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www.Sam·s_Stationery_and_Luncheonette.com: Bringing Ginsberg v. New York into the Internet Age

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I. INTRODUCTION

Sam's Stationery and Luncheonette was, in 1965, a lunch counter and small store in Bellmore, Long Island, New York.[1] Among the items sold were magazines, including what the U.S. Supreme Court would later call "girlie" magazines. The store was operated by Sam Ginsberg and his wife. On each of two occasions in October of that year, Sam sold two such "girlie" magazines to a sixteen-year-old boy whose mother had sent him in to make the purchase in a private sort of sting operation. The mother then reported the purchase to the police.

Ginsberg was charged and convicted under a New York statute barring "knowingly" selling to a person under seventeen material containing representations of "a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors."[2] The statute defined nudity, the feature of the magazines at issue in the case, as showing the genitals, pubic area, or female breast with less than opaque covering. The statute also defined sexual and masochistic abuse. "Harmful to minors" was defined in the statute as follows:

> "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:
>
> (i) predominantly appeals to prurient, shameful or morbid interest of minors, and
>
> (ii) is patently offensive to prevailing standards in the adult

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1. For the facts of the case, see Ginsberg v. New York, 390 U.S. 629, 632–33 (1968).

2. *Id.* at 647 (quoting 1965 N.Y. Laws 1067 (codified at N.Y. PENAL LAW § 484-h(2)(a))).

> community as a whole with respect to what is suitable material for minors, and
>
> (iii) is utterly without redeeming social importance for minors.[3]

While Ginsberg could have served up to one year in prison and could have been fined up to $500, he incurred only a suspended sentence.[4]

When the case reached the Supreme Court as *Ginsberg v. New York*,[5] the Court upheld the conviction, finding no violation of the First Amendment. Although it was accepted that the magazines would not be obscene for an adult audience, the materials were sold to a minor, and the Court recognized that obscenity may vary with the audience.[6] Thus, where distributors pander material to children, the Court would adapt the obscenity standard to children. It was, therefore, permissible for the State to bar the distribution of the materials to children if the ban fit an adaptation of the obscenity standard then in force so as to judge prurient interest, offensiveness, and serious value with regard to minors. Under that standard, the provocatively posed nudes in the magazines could be found obscene to minors.

The Court found the statute justified by two interests. Recognizing a well-established constitutional principle that parents have the authority, within their own households, to direct the raising of their children,[7] the Court said the State could conclude that parents need the support of the law in discharging their responsibilities.[8] Additionally, the Court recognized that the State's independent interest in the well-being of youth justifies the

3. *Id.* at 646 (quoting 1965 N.Y. Laws 1067 (codified at N.Y. PENAL LAW § 484-h(1)(f))).

4. *Id.* at 633 n.2.

5. 390 U.S. 629 (1968).

6. In defining the concept of obscenity, the Court cited William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960). *See Ginsberg*, 390 U.S. at 635–36. The Court had earlier adopted a variable obscenity approach to handle material that was aimed at a sado-masochistic audience. *See* Mishkin v. New York, 383 U.S. 502 (1966).

7. *Ginsberg*, 390 U.S. at 639 ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944))).

8. *Id.* The Court here noted that the statute did not address parents providing this material to their own children.

limitations on the availability of sexual material.[9] While science may not have proven conclusively, then or now, that sexual material harms children, the Court did not require scientific certainty and accepted as rational the belief that the material is harmful.[10]

Ginsberg has proven difficult to bring into the Internet age because of differences between the Internet and traditional media. An analysis of failed Internet regulation efforts and a comparison of these failed statutes to the successful New York statute in *Ginsberg* point to three possible constitutional applications of *Ginsberg* to the Internet context.

This Article proceeds by first discussing various attempts at regulation of the Internet in Part II. Part III follows with an examination of the differences among the invalidated statues and the factors that explain the disparity in treatment between the constitutional regulation of pornography distribution to a minor at a brick-and-mortar establishment in *Ginsberg* and the thus-far unconstitutional regulation of similar online distribution to children. Part IV considers the problems presented by the nature of the Internet in comparison to traditional media. Part V outlines three potential approaches to constitutional regulation, and Part VI concludes that it is not impossible to bring *Ginsberg* into the Internet age.

II. ATTEMPTS AT SIMILAR REGULATION OF THE INTERNET

Before turning to the problems that led the Court to decide that later attempts to regulate the Internet were unconstitutional, it is important to note a case decided eleven years prior to *Ginsberg*. *Butler v. Michigan*[11] addressed an effort by that state to protect children from similar material. But rather than focusing on sales to minors, as New York had, Michigan simply made it a misdemeanor to distribute "'lascivious prints, pictures, figures or descriptions, tending to incire minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth.'"[12] The

9. *See id.* at 640.

10. *See id.* at 641–43. Any laboratory study attempting to show such harm would raise both ethical and legal concerns because it would also be improper on both dimensions for a researcher to provide sexual material to children.

11. 352 U.S. 380 (1957).

12. *Id.* at 381 (quoting MICH. COMP. LAWS § 750.343 (Supp. 1954)).

sale that constituted the basis for the appealed conviction was not to a minor, again unlike the New York case, but to a police officer.[13]

The State argued that it could, in its efforts to protect children, limit the ability of adults to access material that was not obscene.[14] The Court, in language that has been frequently quoted, said, "Surely, this is to burn the house to roast the pig."[15] The statute was seen as not sufficiently restricted to the government's interest in addressing the problem. As the Court expressed, "[t]he incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."[16] That result was unacceptable then and, as the Internet cases show, remains unacceptable today. It is also the major difficulty faced by the later attempts to shield children from material on the Internet that would have been barred by the New York statute.

A. The Communications Decency Act

Almost thirty years after *Ginsberg*, Congress attempted to protect children from indecent Internet material by following the example set by New York and thirty five other states[17] in the context of traditional media. The Communications Decency Act of 1996 (CDA) was enacted as a part of the Telecommunications Act of 1996.[18] The CDA amended sections 223(a) and 223(d) of Title 47 of the United States Code.[19] The amended section 223(a)(1)(B) provided criminal penalties for any person who, through a telecommunications device, knowingly transmits "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age."[20] Section 223(d)(1), as amended, made it a crime to use any "interactive computer service" to send or make available to a person under eighteen "any comment,

13. *Id.* at 383.

14. *Id.*

15. *Id.*

16. *Id.*

17. *See* Ginsberg v. New York, 390 U.S. 629, 647–48 (1968).

18. Pub. L. No. 104-104, § 652, 110 Stat. 56. The Communications Decency Act is Title V of the Telecommunications Act of 1996. It is found at section 502, 110 Stat. at 133–35.

19. *See* Communications Decency Act § 502, 110 Stat. at 133–35.

20. *Id.* § 502, 110 Stat. at 133.

request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication."[21]

The CDA also provided a defense for any person who took "good faith, reasonable, effective, and appropriate actions" to prevent access by children.[22] Such efforts could include requiring the recipient to use a verified credit or debit card or an adult identification or access code.[23]

The ACLU challenged the constitutionality of the CDA; the Supreme Court found it to be unconstitutional in *Reno v. ACLU*.[24] The Government attempted to justify the statute under *Ginsberg*; *FCC v. Pacifica*,[25] which upheld the channeling of indecent material in the broadcast media into hours when children are unlikely to be in the audience; and *City of Renton v. Playtime Theatres, Inc.*,[26] which upheld zoning regulations limiting where adult entertainment businesses, including adult motion picture theaters, could operate. In the Court's view, the CDA went significantly beyond the statutes at issue in those cases.

The Court distinguished *Ginsberg* in several ways. The statute in *Ginsberg* applied only to commercial transactions and did not prohibit parents from providing the same material to their own children, while the CDA did not make an exception for parental communication.[27] The New York statute in *Ginsberg* was also aimed at shielding children under seventeen from obscenity, while the CDA age line was eighteen.[28] Lastly, the statute in *Ginsberg* allowed the sale to minors of material with serious value for minors, while the CDA did not provide the same sort of saving clause.[29]

21. *Id.* § 502, 110 Stat. at 134.

22. *Id.*

23. *See* 47 U.S.C. § 223(e)(5) (2000).

24. 521 U.S. 844 (1997).

25. 438 U.S. 726 (1978).

26. 475 U.S. 41 (1986).

27. *Reno*, 521 U.S. at 865.

28. *Id.* at 865–66.

29. *Id.* at 865. Actually, the statute in *Ginsberg* more broadly allowed material with any redeeming social value. *See supra* note 3 and accompanying text. Material with serious value, the relevant factor under the current obscenity test, *see* Miller v. California, 413 U.S. 15 (1973), would have met the earlier standard.

Pacifica was easily distinguishable in at least one dimension. The FCC rule at issue there only channeled the specific communications addressed into certain time periods, while the CDA eliminated certain material from the Internet, unless defenses were available.[30] The FCC rule in *Pacifica* also applied to a medium traditionally less protected than other media.[31] Lastly, unlike the CDA, the Court considered the *Pacifica* regulations non-punitive.[32] While it is true that there was no penalty issued in the incident that provided the factual basis for *Pacifica*, the findings were associated with the file of the broadcaster and could have played a role in license renewal. They then had the potential to be punitive, at least in a regulatory setting. The real distinction in the nature of the two cases is that the CDA included criminal penalties, rather than just administrative or civil remedies.

As for *Renton*, the Court maintained its position that the zoning ordinance there addressed the secondary effects of adult theaters and was not an attempt to limit expression because of its content.[33] It also did not bar, but only limited the locations of, adult theaters.[34] In *Reno*, the Court would not accept the Government's claim of only having engaged in "cyberzoning." In contrast, the CDA did not apply only to certain neighborhoods, but to the Internet as a whole.[35] Furthermore, the CDA was content based in the sense that it meant to limit the availability of certain conrent rather than addressing the secondary effects of that material.[36]

After distinguishing the three cases the Government had cited, the *Reno* Court then went on to express concern over ambiguities in the CDA. The CDA in one part addressed material that is "indecent," while in another it addressed material depicting or describing sexual or excretory activities or organs in a way that is

30. *Reno*, 521 U.S. at 867.

31. While this was an easy distinction to draw, it had not been previously determined whether the Internet should enjoy the protections of the more traditional media or the lesser protection afforded the broadcast media.

32. *Reno*, 521 U.S. at 867.

33. *Id.*

34. *Id.*

35. *See id.* at 867–68.

36. *See id.* at 868. While an ordinance aimed at theaters showing adult fare also seems content based, the Court's position in *Renton* was that the city was concerned not over the existence of such images in the city but with the crime that results when a number of snch businesses creates an adult entertainment area.

"patently offensive as measured by contemporary community standards."[37] The use of two different language constructions to describe the prohibited material, without a more precise definition of either description, was likely to confuse the meaning and application of the statute for those who would put material on the Internet.[38] Particularly where criminal penalties were available, the Court found this vagueness was likely to result in a chilling effect on what was, after all, protected speech for adults.

Even if the CDA had not been vague, it would have suppressed a great deal of speech adults have the constitutional right to access. That suppression is unconstitutional, even given the interest in shielding youth, if there are less restrictive alternatives.[39] Considering the possibility of alternative ways to shield children and the unavailability or economic infeasibility of the CDA's defenses, the Court found the CDA to lack narrow tailoring.[40]

B. The Child Online Protection Act

Having failed in its first try, Congress made a second attempt to regulate Internet pornography in the Child Online Protection Act (COPA).[41] COPA prohibited posting to the Web for commercial purposes any material that is harmful to minors.[42] "Harmful to minors" was defined as

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently

37. *Compare* 47 U.S.C. § 223(a)(1)(B) (2006), *with* § 223(d)(1).

38. *Reno*, 521 U.S. at 870–74.

39. The restriction on sending such material to a person known to be a minor might seem to raise this problem. However, if any member of a chat room is known to be a minor, the exchanges among the adult members would have to be limited.

40. *Reno*, 521 U.S. at 879.

41. Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681–736 (1998) (codified at 47 U.S.C. § 231 (2000)).

42. *Id.*

> offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or stimulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.[43]

COPA aimed its limitations at protecting those under seventeen and provided a defense for those who restricted access by requiring the use of a credit card or various other indicators of age.[44]

COPA was also declared unconstitutional after consideration by the federal courts a number of times. When it was initially challenged, the United States District Court for the Eastern District of Pennsylvania issued a preliminary injunction, concluding that COPA would burden some protected speech and that the means chosen to protect children were not the least restrictive available.[45] Given the less-restrictive alternatives, particularly filtering or blocking software, the court found the plaintiffs likely to prevail on the merits.[46]

The district court decision was appealed to the United States Court of Appeals for the Third Circuit, which affirmed the grant of preliminary injunction,[47] but on entirely different grounds. The Third Circuit found problematic the reference to "contemporary community standards" in COPA's definition of "harmful to minors."[48] That, in itself, was enough for the Third Circuit to find COPA unconstitutional. However, the Supreme Court reversed the Third Circuit's decision[49] and held that, by itself, the inclusion of community standards in the definition did not render the statute unconstitutional.[50]

The Court remanded the case to the Third Circuit to consider the grounds employed by the district court.[51] On remand, the Third

43. 47 U.S.C. § 231(c)(6).
44. *See* 47 U.S.C. § 231.
45. ACLU v. Reno, 31 F. Supp. 2d 473, 493–99 (E.D. Pa. 1999).
46. *Id.*
47. *Id.*
48. 47 U.S.C. § 231(e)(6).
49. Ashcroft v. ACLU, 535 U.S. 564 (2002).
50. *Id.* at 585.
51. *Id.* at 585–86.

Circuit again affirmed the grant of the preliminary injunction.[52] The court found that COPA was not narrowly tailored to serve the compelling government interest in shielding children. The court further found that COPA was overly broad and was not the least restrictive means available to further the government's interest.[53] The case made its way again to the Supreme Court, which affirmed the grant of the preliminary injunction.[54]

The Supreme Court agreed with the Third Circuit that the trial court had not abused its discretion in granting the injunction. It did not accept all of the Third Circuit's construction of the statute and tied its conclusion more closely to the analysis of the district court.[55] The Court found fault with the statute because of the potential availability of less restrictive, but still effective, alternatives that further the government's interest in shielding children.[56] The Court recognized the possibility that blocking and filtering software could provide an even more effective means of accomplishing the government's interest than the requirements of COPA without limiting adult access by causing consumer unwillingness to identify themselves as recipients or by imposing a chilling effect on those who place material on the Internet.[57] Given the then five-year gap between the original district court decision, in the face of rapidly developing technology and a changing legal landscape,[58] the Court remanded the issue to the district court for a trial on the merits.

The district court re-examined the issues in light of developments in computer technology and issued a permanent injunction.[59] Since the conclusion of the district court is the latest on the issues involved, and has benefited from the opinions of the appellate courts, it is worth examining in some detail.

Because the provisions of COPA are content based, the court applied strict scrutiny.[60] Since the court accepted the interest in

52. ACLU v. Ashcroft, 322 F.3d 240, 271 (3d Cir. 2003).

53. *Id.* at 251, 261, 266–67.

54. Ashcroft v. ACLU, 542 U.S. 656 (2004).

55. *Id.* at 664–70.

56. *Id.* (stating the standard).

57. *Id.* at 666–69.

58. The Court mentioned the later mandate of a child-safe domain on the Internet. *Id.* at 672. For a discussion of that domain, see *infra* notes 100–04 and accompanying text.

59. ACLU v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007).

60. *Id.* at 809.

shielding children as compelling, the court asked whether this suppression of a significant amount of adult speech was narrowly tailored to the compelling interest and was the least restrictive alternative.[61] COPA failed that test.

The court found the statute to be under-inclusive because it had only a domestic effect.[62] Web sites outside the United States were not subject to the sanctions involved, and those sites constitute a significant source of the pornographic material available on the Web.[63] Moreover, filters, the main alternative to restrictions on placing material on the Internet, do not face the same geographic limitations and may be more effective at shielding children.[64]

The court also said that the statute was over-inclusive.[65] While purportedly aimed at commercial providers of pornography, COPA reached more than that target.[66] For example, the statute would reach providers not actually making the profit that would seem the hallmark of a commercial provider. The defenses available would also impose cost on all providers that might well keep some from being profitable.[67] The court also saw the statute as applying to Web sites that earn money from advertising, thus reaching a large number of providers that would not actually seem to be commercial purveyors of pornography.[68] In the sense of the scope of application to sites, COPA may well be over-inclusive, but the court raised a second over-inclusion problem that is more debatable.

The court said, "[T]he fact that COPA applies to speech that is obscene as to all minors from newborns to age sixteen, and not just to speech that is obscene as to older minors, also renders COPA over-inclusive."[69] The court, accepting the guidance of the Third Circuit,[70] said that considering the protected group to include all those under seventeen

61. *Id.*
62. *Id.* at 810.
63. *Id.*
64. *Id.* at 815.
65. *Id.* at 810.
66. *Id.*
67. *See infra* note 87 and accompanying text.
68. *Gonzales*, 478 F. Supp. 2d at 808.
69. *Id.* at 810.
70. *See* ACLU v. Ashcroft, 322 F.3d 240, 253 (3d Cir. 2003).

> creates a serious issue with interpretation of COPA since no one could argue that materials that have "serious literary, artistic, political, or scientific value" for a sixteen-year-old would necessarily have the same value for a three-year old. Likewise, what would be "patently offensive" to an eight-year-old would logically encompass a broader spectrum of what is available on the Web than what would be considered "patently offensive" for a sixteen-year-old. Presumably no material covered by COPA would be "designed to appeal to, or [be] designed to pander to, the prurient interest" of a two or four-year old.[71]

Quoting the Third Circuit, the court said, "Web publishers who seek to determine whether their Web sites will run afoul of COPA cannot tell which of these 'minors' should be considered in deciding the particular content of their Internet posting."[72] This made the statute both vague and overly broad.[73]

There was also a problem, in the court's view, with the "serious value" part of the statutory definition. Again drawing guidance from the Third Circuit, the court said,

> [B]ecause a story that might have "serious literary value" for a sixreen-year-old could be considered to appeal to the "prurient interest" of an eighr-year-old and be "patently offensive" and without "serious value" to that child, Web publishers do not have fair notice regarding what they can place on the Web thar will not be considered harmful to "any person under 17 years of age."[74]

The court seemed to believe that, while serious value may serve as a counrer to an appeal to the prurient interest, the two (three, including offensiveness) factors vary with age and do so in ways that may well confuse a Web site publisher.

The court recognized that *Ginsberg* had upheld a similar—at least in that regard—statute without concern for whether it applies to all minors or only older minors, but the court felt the cases were distinguishable. The court said that a cashier can tell if a potential purchaser is ten, rather than seventeen, and that the only cases that

71. *Gonzales*, 478 F. Supp. 2d at 817 (alteration in original) (citations omitted).

72. *Id.* at 817–18 (quoting *Ashcroft*, 322 F.3d at 254).

73. *Id.* at 818.

74. *Id.* at 819 (citing *Ashcroft*, 322 F.3d at 268).

are of concern are cases in which the customer is close to seventeen.[75]

> As a result, in the pre-Internet age, it was not completely necessary to be more specific in delineating what was obscene as to minors of various age groups. However, on the Internet, everyone is faceless and fairly anonymous and, thus, the context is radically changed. The Internet merchant has no viable method of determining whether an individual is 6, 12, 17, or 51 years old. Consequently, we are presented with this novel problem where a general prohibition on materials obscene as to minors creates a vagueness in the context of Internet transactions that is lacking in other situations.[76]

Furthermore, the court found fault with the fact that COPA did not define the phrase "as a whole."[77] While "as a whole" may have obvious demarcations when talking about a book, magazine, or film, the application in this case was seen as more problematic. Does it apply only to an image on a Web page, the entire Web page, the Web site, the site with all the sites linked to it, or the entire Internet? The content provider, in the court's view, could not know the answer to this question, and the resultant vagueness would chill speech.

This concern, and all those arising from the application of a *Ginsberg*-like definition, would seem questionable. Serious values will vary with age. Material with serious value for a seventeen-year-old may have no value for a five-year-old. Such would seem to be the case with material on avoiding pregnancy or sexual identity. If the basis for the value were serious scientific or artistic value, the same would seem to be true. Appeal to the prurient interest will also vary with age, as the Court's *Ginsberg* analysis indicated. Material will appeal to the prurient interest of a seventeen-year-old that lacks such appeal to an adult.

It is interesting to note that the two factors of value and prurience would seem different in the way they increase or decrease. While it is difficult to tell from the district court's opinion, the court seems to believe that value increases with age and prurience decreases with age. The balance between the prurience required for a violation

75. *Id.* at 818.

76. *Id.*

77. *Id.*

and the value required to invoke the Savings Clause would then vary greatly as one increased and the other decreased. While material that does not appeal to the prurient interest of an adult may appeal to the more easily excited interest of a sixteen-year-old, that does not mean that the appeal is even greater for a ten-year-old or a five-year-old. At some point, the images become just "yucky." Prurience is more likely to arise in rhe teen years, and during this time, both value and prurience will increase together.

More importantly, the difference between the print vendor and the Internet content provider relied on by the court seems unconvincing. Neither was required to do the balancing the court finds so difficulr. In both cases, the statute called for a ban on material that lacked serious value to those under seventeen and that appealed to the prurient interest of the same group. Value and prurience would both seem controlled by the seventeen-year-old, and those younger would be swept up in the ban.

Lastly, and most importantly, drawing guidance from the Third Circuit on the issue of Internet pornography and obscenity may not be the best strategy. The Supreme Court was unconvinced by the Third Circuit's claims that community values issues prevented the application of obscenity law to the Internet.[78] It seems far from certain that the Court would then go along with the idea that it is impossible to apply an "obscenity as to children" definition to that medium. Put perhaps more strongly, if the Court was unwilling to agree that you cannot prevent adult access to obscenity on the Internet, it seems unlikely to decide that children cannot be protected because of some definitional problem.[79]

Moving on, the district court also found fault with COPA's affirmative defenses. First, the Government failed in its attempt to cure the overbreadth of the statute. Since the court concluded that credit cards, debit accounts, adult access codes, and adult personal identification numbers do not actually verify the age of the Internet user transmitting the payment or access code information, they could not satisfy the good faith requirement imposed by the statute to

78. *See supra* note 50 and accompanying text and *supra* notes 72–74.

79. This would also speak to the district court's concern over COPA's "taken as a whole" issue. *See Gonzales*, 478 F. Supp. 2d at 818–19. The Supreme Court, while it did not address that specific issue, seemed unwilling to allow definitional issues to stand in the way of limits on Internet obscenity. This should apply just as strongly to limits on material that is obscene as to minors on the Internet.

restrict access by minors.[80] Furthermore, these attempts all impose an expense on the content provider that may cause a Web publisher to forego putting sexual material on the Web, reducing the availability of such material to adults.[81] Lastly, the requirement might cause potential adult consumers of the material to avoid consuming. While adults have a right to obtain the material, having to identify oneself in some way is chilling and may lead to self-censorship on the part of the consumer.[82]

Before leaving the latest COPA opinion, it is worth pointing to a statement by the district court about improving the availability of filters. In its second COPA opinion, the Supreme Court discussed filters, noting that Congress could act to encourage their use and "could also take steps to promote their development by industry, and their use by parents."[83] Based on that position, the district court said,

> [I]n conjunction with the private use of filters, the government may promote and support their use by, for example, providing further education and training programs to parents and caregivers, giving incentives or mandates to ISP's to provide filters to their subscribers, directing the developers of computer operating systems to provide filters and parental controls as a part of their products . . . .[84]

This statement is important because it supports one of the suggestions presented below as a method still available for shielding children from Internet pornography.[85]

C. The Children's Internet Protection Act

Not all Congressional efforts at shielding children from Internet pornography have been struck down. The Children's Internet Protection Act (CIPA)[86] requires all libraries—receiving federal funding—that provide Internet access to their patrons to employ filtering software to block material that is obscene or that qualifies as

80. *Id.* at 811.
81. *Id.* at 813.
82. *Id.* at 812.
83. Ashcroft v. ACLU, 542 U.S. 656, 669–70 (2004).
84. *Gonzales*, 478 F. Supp. 2d at 814.
85. *See infra* notes 105–29 and accompanying text.
86. Pub. L. 106-554, 114 Stat. 2763A-335 (2000).

child pornography and is hence illegal. CIPA also requires such libraries to prevent minors from accessing harmful material by the use of filtering technology, although such filters could be disabled for adult use. That statute was upheld in *United States v. American Library Ass'n*.[87]

In CIPA, Congress was not regulating generally but was attaching a condition to its spending. Congress may attach conditions to its grants, but the issue raised in the courts was whether the libraries acceding to the conditions would themselves be violating their patrons' First Amendment rights.[88] The Supreme Court held that the use of the mandated filters would not be a violation of the First Amendment.

United States v. American Library Ass'n may appear less relevant to this analysis since Congress was acting under its Spending Power rather than regulating conduct it has not funded. It is interesting to note, however, that the chilling effect of asking a librarian to unblock a computer would seem similar to that associated with providing a credit card for Web access, as the COPA district court discussed. While the credit card includes a name, and a request to the librarian by a person of sufficient age may not require identification, the presence of the librarian in the patron's locale might be more chilling.[89]

III. DIFFERENCE AMONG THE STATUTES

The earlier success at limiting the exposure of children to indecent material in the brick-and-mortar context, coupled with the later Internet failures, raises the question of why Sam's Stationery and Luncheonette can be restricted while its online analog, www.Sam's_Stationery_and_Luncheonette.com, has thus far proven to be beyond sanction. To see whether there is any hope of Internet indecency regulation, the factors that led to approval of the New York statute and the rejection of CDA and COPA must be examined.

87. 539 U.S. 194 (2003).

88. *Id.* at 203.

A. Age

One difference between the statute in *Ginsberg* and the CDA is that the relevant age for the New York statute was seventeen, while the relevant age for the CDA was eighteen. That would seem to be an important difference, as explained by Judge Posner in *American Amusement Machines Ass'n v. Kendrick*, one of the cases addressing restrictions on violent video games.[90] Posner, writing for the Seventh Circuit, argued that children must be ready to cast informed votes when they turn eighteen and must, therefore, have fuller access to expression before that birthday.[91] While one may be skeptical regarding the efficacy of pornographic material in the development of informed voters, the same argument could be made for the video games at issue in the case before Posner. Changing the age in the CDA would not, however, have been sufficient to save the CDA, since COPA, which was struck down, employed a seventeen-year age limit.

It might be argued that the difference between seventeen and eighteen should be less significant when material is not banned from the Internet but only limited in how it is placed on the Internet—that is, if a filter or type of access is at issue, marerial is still available, and the child's parents determine how he or she accesses the Internet. But Posner said that since the right ro vote includes a vote independent of the parents, the right to access material must also have independence.[92] Thus, the use of seventeen, rather than eighteen, would seem important here, too.

B. Application to Parents

A second difference between the New York stratute and the CDA that concerned the Court was that the CDA restricted the transmission by a parent to a child of material that the community would find sufficiently indecent, while the New York statute was limited to commercial sales and did not reach parent-child communication. This, too, is an important distinction, given the protection the Court has historically afforded parental decisions in the upbringing of their children. Here, too, however, application of

90. Am. Amusement Machs. Ass'n. v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

91. *See id.* at 577.

92. *See id.*

the New York limitations to the CDA would prove inadequate to save the CDA. COPA was limited to commercial sales and was struck down.

Nonetheless, as emphasized in *Ginsberg*, it is important that parents be able to control what kinds of materials their children can access. Even where the content provider is commercial, if parents are placed in the role of deciding what materials, or what sort of materials, their children can access, that is more consonant with *Ginsberg*. While simply exempting parents from liability for communications to their own children would place a statute on the right side of the line between *Ginsberg* on one side and the CDA and COPA cases on the other, providing a greater role for the parent in determining the material that their children may access seems the better route.

C. Vagueness

Another problem with the CDA was a perceived vagueness in the definition of the material the act restricted. There were two different definitions presented in the two sections, and neither was seen as having the specificity present under the New York statute. While critics of the obscenity exception might dispute the clarity of the New York definition, that statute did mirror the test for obscenity under the then effective *Memoirs* test[93] adapted by judging the relevant factors in that test with regard to minors. Whatever one thinks of the clarity of the Court's standard for obscenity, the New York statute seems superior to the CDA.

Once again, however, COPA seemed to cure that defect by basing its definition on the now current *Miller* test for obscenity,[94] with the factors again modified to reflect the concern over minors, and still failed. Nonetheless, COPA was an improvement, and any future attempts must be at least as specific in their definitions. Many will never be satisfied with obscenity or obscenity-as-to-children definitions, but obscenity laws and restrictions on material that is obscene as to children may be constitutional despite some inherent vagueness, as illustrated by *Ginsberg*.

What may be most important here is to recognize the major problem that may result from vagueness. Where a statute is vague, it

93. *See* Memoirs v. Massachusetts, 383 U.S. 413 (1966).

94. *See* Miller v. California, 413 U.S. 15 (1973).

may have a chilling effect on expression. If a speaker cannot know with accuracy what is proscribed by a statute, the speaker may—out of an abundance of caution—choose not to offer what would in fact be protected expression. It is important in that regard to look at just what is chilled. In earlier attempts at restricting Internet content for minors, the chill was on the expression that would be generally available on the Internet. Speech to other adults would be suppressed. If a program allows expression from adult to adult and has a limiting effect only on material that is made available to children, the chill is more limited. The only chilling effect is a decision not to provide the material to children, rather than not to offer the expression at all. The chill then does not have the effect that has concerned the Court—the imposition of greater-than-necessary restrictions on adult-to-adult expression.

IV. THE REAL DIFFICULTY: THE NATURE OF THE MEDIA INVOLVED

The shortcomings of the CDA already discussed do not explain why children who would be protected from the distribution of indecent materials at Sam's Stationery and Luncheonette have been left unprotected against similar distribution through the analogous Internet content provider www.Sam's_Stationery_and_Luncheonette .com. It was not simply the difference in age, the inadequate definitions in the CDA, nor the fact that the CDA could be applied to parents and not just commercial distribution that made the difference. Even with the correction of these problems in COPA, the Inrernet still remained a viable medium for the distribution to children of material that the Court in *Ginsberg* said could be denied them.

The lack of success in regulating the Internet is due to the nature of the medium itself. In his luncheonette, Sam Ginsberg had the opportunity to assess the age of his potential customer and choose whether or not to sell the magazines at issue. He was also a member of the community that would determine the acceptability of the material for minors. In contrast, the Internet content provider does not enjoy either advantage. Material posted to the Internet, particularly to the World Wide Web, is available for all to access, with the provider not able to make a decision whether or not to provide the material to the particular potential consumer. Further, rhe Web also does not have the clearly defined geographical limitations of the

community envisioned in the *Memoirs* or *Miller* tests. There is the concern that, if there is liability for the distribution of indecent or obscene material over the Internet, the least tolerant community will control what is on the Web.[95]

This second concern was, between *Reno* and *Ashcroft*, resolved in a way that seems to remove the problem. *Reno*, as noted previously,[96] was actually the second time that COPA reached the Supreme Court. The statute had earlier reached the Court in a case also titled *Reno v. ACLU*.[97] In that case, the only issue before the Court was whether the lack of a geographical community in itself rendered COPA unconstitutional. The Court refused to find such a fatal flaw in attempts to regulate the Internet, but there were two separate rationales for the conclusion. One group of Justices said that if one does not wish to be judged by the standards of a particular community, one should not publish in a way that the material reaches that community,[98] a position that would place rather strong limits on the Internet. The other approach that reached the same conclusion suggested the adoption of a standard based on the Internet community.[99] Under either approach, the lack of a geographical community should not stand in the way of shielding children.

The more serious problem is the first of the two discussed: the inability to selectively limit access. Under both the CDA and COPA, providers were likely to refrain from placing material on the Internet that adults have a right to access. Access to a sire might be limited, but the expenses of credit card verification or processing of other age verification procedures might have led content providers to limit their use of material protected for adult consumption. This chilling effect can work in both directions, affecting the consumer as well as the provider. Any process in which the consumer has to identify himself may chill his reception. When there is this effect on adult access—even in the face of a state's power to shield children—the methods used must be the least restrictive available, and it is under that test that the Court has been unwilling to uphold the statutes.

95. *See generally* John Fee, *Obscenity and the World Wide Web*, 2007 BYU L. REV. 1691.

96. *See supra* notes 49–50 and accompanying text.

97. 535 U.S. 564 (2002).

98. *See id.* at 583 (plurality opinion).

99. *See id.* at 587–89 (O'Connor, J., concurring); *id.* at 589–91 (Breyer, J., concurring).

What is required to put the Internet provider in the same position as the brick-and-mortar provider is a method under which the provider, at little or no cost, can prevent access by children but still be free to sell to adults materials they have a right to purchase. That does not make Internet regulation of access by minors hopeless, and there are, indeed, constitutional ways to accomplish, at least partially, that goal.

V. POTENTIAL APPROACHES TO REGULATION

A. Protected Domains

One approach that seems to meet the above test is already enacted as the Dot Kids Implementation and Efficiency Act of 2002.[100] The act called for a second-level Internet domain name within the "us" country code domain.[101] The domain ".kids.us" is limited to material suitable for children under thirteen years of age.[102] Content providers may be a part of the domain only if their material is suitable and does not contain links to sites outside the ".kids" domain.[103]

It would seem that adult speech would not be affected under this approach. It simply has to take place in another domain. No one is prohibited from publishing indecent material. Again, it must simply be published in a different domain. There is no additional expense to publish adult, indecent material. Indeed, any additional expense would seem to be in the establishment of a new ".kids" Web site to publish material for children. This is also voluntary, since children's material can also be published on Web sites in the other domains such as ".com" and ".net." There is also no requirement that adult users, or anyone else, identify themselves in order to obtain any particular material. What results is a method by which parents may be able to limit their children's access to the Internet with no effect on the use of the Internet by others.

The shortcoming of the ".kids" approach is that the domain is likely to be the province of content providers such as Disney or the

100. Pub. L. 107-317, 116 Stat. 2766.

101. *Id.* § 4.

102. *Id.* § 2(a)(10).

103. NeuStar, Inc., Kids.us Content Policy: Guidelines and Restrictions, at 10 (2003), http://www.kids.us/content_policy/content_policy.pdf.

Children's Television Workshop.[104] The sites in the domain will be safe and may well be valuable, but if parents have to rely solely on this approach, filtering anything not in the domain, there will be sites outside of the ".kids.us" domain that are both inaccessible and valuable. Parents of a fifteen-year-old may want their child to have access to sites outside the ".kids" domain without also having access to sites with adult sexual content. While the approach provided for by the statute is valuable, something more seems to be necessary.

B. Mandated Filter Activating Signals

A second approach is one that was suggested after the CDA was struck down and before COPA was adopted.[105] The approach puts www.Sam's_Stationery_and_Luncheonette.com to the same decision faced by Sam's Stationery and Luncheonette: Do I provide this content to a child? Under this approach, all software used to post any kind of material to the Internet has the capacity to let content providers decide if their content will be available to children. The software would provide a toggle for the content provider's use and could apply to posting to the Web, to a list-serv or a bulletin board, and to sending e-mail.[106] The default position would indicate that the material about to be placed on the Internet is not suitable for minors, using a definition similar to that used in COPA. Leaving the toggle alone would lead to the attachment of a signal that would activate a filter available to parents.[107]

If the content provider believed the material to be suitable, he or she could toggle off the filter activating signal.[108] The material would then be available to children, even those whose parents had activated their filters. If a content provider decided to make material as defined in COPA available to children by toggling off the filter, and a child

104. For a directory of a rather limited number of sites in the domain, see generally http://www.kids.us/. From a review of the website, however, it appears that not even the likely users noted in the text have established a presence.

105. *See* Kevin W. Saunders, *Electronic Indecency: Protecting Children in the Wake of the Cable and Internet Cases*, 46 DRAKE L. REV. 1, 43 (1997).

106. *Id.* at 43–44. This toggle solves the problem of content providers being limited in what they can post to a bulletin board or list-serv due to possible minor-aged recipients. If the signal remains attached, those with filters will not receive the content, but adults and others without filters will. *Id.*

107. *Id.*

108. *Id.*

accessed the material, the provider would face criminal liability.[109] A provider who posted indecent material without toggling off the filter activating signal would not face liability for any child accessing the material, perhaps because the child's parents did not employ a filter.

Under this approach, no adult-to-adult communication is affected since adults could use unfiltered computers. There is no chilling effect on posting adult material to the Web; the only requirement is that the filter signal not be toggled off. The only chilling effect on content providers is the possibility that they would leave the signal attached to material that is in fact suitable for children. Even then, however, the only effect is on children, and that effect does not reach children whose parents believe them capable of handling adult material.

There is also no expense for the content provider. There are no credit cards to verify or subscriptions to adult identification services to purchase. Children are protected as long as the content provider does nothing—that is, leaves the toggle in the default setting. It is true that there would be some minor expense in adding a few lines of code to the programs used to place material on the Internet, but the costs attach not to speech but to manufacturing, and they would seem likely to be less than that of requiring that televisions contain the V-chip.

There is also some case law support for this approach. In addition to the suggestion of the district court in the most recent COPA case,[110] there is a Supreme Court case and a relatively recent Tenth Circuit case involving similar filtering requirements for mailings and telephone calls. The first of them, *Rowan v. United*

109. *Id.* The fact that many Web sites originate outside the United States was addressed by suggesting that the filters available to parents be capable of filtering out sites with extensions indicating non-US origin. Children would also be protected from material on links, since the links would also either be subject to the requirements or would be non-US sites. This non-US application seemed to be of concern to the COPA district court. It is less clear that it should be of concern here. The issue there was whether there were less-restrictive alternatives, and the court examined the effectiveness of filters, which would not affect adult reception, and prohibitions, which certainly would. If bans had no extraterritorial effect, while filters would be equally effective against sites wherever they originate, filters would seem the less-restrictive, yet at least equally effective, alternative. Here, the call is for a filtering program. The provision regarding non-US sites makes it effective for those sites, and again, there is not the effect on adult access that requires as strong a consideration of the under-inclusiveness that was a problem for COPA.

110. *See supra* note 84 and accompanying text.

States Post Office Department,[111] centered on a provision of a federal statute limiting pandering ads that a mail recipient found erotic or sexually provocative.[112] A recipient of such mail could register with the Post Office, and the Postmaster General would then be required to issue an order to the sender "directing the sender and his agents or assigns to refrain from further mailings to the named addressee" and "to delete the name of the designated addressee from all mailing lists owned or controlled by the sender."[113]

When publishers and mailers challenged the statute, the Court found no constitutional violation. The following excerpt is long, but it is quite informative about the balance between the mailer's and addressee's rights.

> [T]he right of every person "to be let alone" must be placed in the scales with the right of others to communicate.
>
> . . . .
>
> . . . Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee.
>
> . . . .
>
> To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.
>
> . . . .

111. 397 U.S. 728 (1970).

112. 39 U.S.C. § 4009(a) (Supp. IV 1965), *cited in Rowan*, 397 U.S. at 729–30.

113. *Rowan*, 397 U.S. at 730.

> We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.[114]

The second case is *Mainstream Marketing Services, Inc. v. Federal Trade Commission*.[115] That case involved the national "do not call" registry implemented by the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC).[116] The registry is a list of phone numbers of telephone subscribers who have registered their wish not to receive commercial solicitations over the phone.[117] While the subscribers might well wish not to receive solicitations from charities and political fundraisers[118] or from companies with which they have a business relationship,[119] those potential callers were exempted from the regulations. Commercial entities subject to the restrictions are also required annually to pay a fee to access the phone numbers in the registry.[120]

Telemarketers challenged the regulations on First Amendment grounds.[121] The government argued that its "do not call" program was justified, again at least in part, by an interest in protecting the privacy of people in their own homes.[122] The court noted Supreme Court cases recognizing that interest, including the *Rowan* Court's statement that the sentiment that "'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality . . . ."[123] The court also cited a case involving limits on picketing in residential neighborhoods, in which the Court said "the

114. *Id.* at 736–38 (citations omitted).

115. 358 F.3d 1228 (10th Cir. 2004), *cert. denied*, 543 U.S. 812 (2004).

116. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B) (FTC rule); 47 C.F.R. § 64.1200(c)(2) (FCC rule).

117. *See Mainstream*, 358 F.3d at 1234.

118. *See* 16 C.F.R. §§ 310.4(b)(1)(iii)(B), 310.6(a).

119. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B)(i-ii); 47 C.F.R. § 64.1200(f)(12)(ii).

120. *Mainstream*, 358 F.3d at 1246–47.

121. *Id.* at 1232.

122. *Id.* at 1237.

123. Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 737 (1970).

State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."[124] The court added a quote from a broadcast case that said, "In the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[125] This interest in the privacy of the home justified the registry requirements.[126]

There are clear differences between the two cases discussed and the filtering signal suggested here. The mailings and telephone calls addressed there were pure commercial speech, which has traditionally been afforded less protection under the First Amendment than the sort of speech at issue here. The government's interest need not be as strong when commercial speech is involved, and the fit need not be as tight as the narrow tailoring required for more protected speech.[127] However, the potential recipient's interests are at least the same, and indeed the government's interest in shielding children has been seen as compelling, and hence greater than the level of interest required to limit commercial speech. While the sender's interests may be stronger in the noncommercial case, the balance between the stronger interests on both sides may remain the same. Furthermore, the *Mainstream* court quoted *Frisby v. Schultz*,[128] again a case involving not commercial speech but essentially political speech—anti-abortion picketing—in a residential neighborhood.

> One important aspect of residential privacy is protection of the unwilling listener. . . . [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech

124. Frisby v. Schultz, 487 U.S. 474, 484 (1988) (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)).

125. *Mainstream*, 358 F.3d at 1238 (quoting FCC v. Pacifica Found., 438 U.S. 726, 748 (1978)).

126. The court also cited *Hill v. Colorado*, 530 U.S. 703 (2000), which upheld limitations on unwanted "counseling" of patients outside medical facilities. *Mainstream*, 358 F.3d at 1238. In *Hill*, the Court recognized, even outside the home, an interest in avoiding unwanted communication, seeing it as part of the right Justice Brandeis recognized in being let alone and called "the right most valued by civilized men." 530 U.S. at 716–17 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

127. *See, e.g.*, United States v. Edge Broad. Co., 509 U.S. 418, 427–28 (1993).

128. 487 U.S. 474 (1988).

> into their own homes and that the government may protect this freedom.[129]

Thus, the concerns of the unwilling recipient have application outside the commercial arena.

The more serious objection to any reliance on the mail and telephone cases would be in the ability of providers to know what material is restricted. Where the restriction is based on the identity of the recipient, either in the case of a postal customer who objects to mail from a particular sender or a telephone subscriber who objects to all commercial phone solicitations, the provider simply needs notification that the potential recipient is on a restricted list. In the filtering proposal, the provider does have to assess the material to be posted to determine whether it is of the nature that would require the filtering signal to remain attached. That requirement, and in a criminal setting, may lead to a chill on expression, but again the chill is only on expression to children. The content provider can still put the material on the Internet and it will remain available to adults and to children whose parents do not employ a filter.

C. The Community Ports Approach

The mandatory filtering signal approach and the Dot Kids provisions certainly suggest that attempts to limit the access of children to indecent material on the Internet are not hopeless despite whatever lack of complete protection they may afford. If the lessons of *Ginsberg* and the Internet cases are treated seriously, there can be additional successful regulation. One such suggestion would seem to be the Community Ports approach.[130]

As explained by the CP80 Internet Channel Initiative,[131] the Community Ports approach works with the cooperation of the recipient's Internet Service Provider (ISP), the service that connects the home computer to the Internet. The ISP can connect the customer through a variety of ports. Some of those ports may have open access to everything available on the Internet while others may be designated by the FCC as "Community Ports." Content providers would then be put to the choice of whether or not their

129. *Mainstream*, 358 F.3d at 1237–38 (quoting *Frisby*, 487 U.S. at 484–85).

130. The CP80 program is discussed in far greater detail in Cheryl B. Preston, *Zoning the Internet: A New Approach to Protecting Children Online*, 2007 BYU L. REV. 1417.

131. *See* CP80 Foundation, http://www.cp80.org (last visited Nov. 5, 2007).

material will be available on Community Ports. The proposed legislation would provide for civil and criminal liability for those placing material on a Community Port that is inappropriate for children, defined in a way similar to the statute in *Ginsberg* or that suggested for the mandatory filtering signal approach.

The legal analysis for this approach would seem similar to that for the mandatory filtering signal approach, and both should be constitutional. Nothing would be banned from the Internet under this approach. Providers are free to publish indecent material, but they must not make it available through a Community Port. The choice with both Community Ports and the decision about whether or not to leave the filtering signal attached is with the content provider, but both choices are made with some risk of criminal sanction. That, once again, will have some chilling effect, but the chill is only on whether or not to make the material available to children, not on the decision about whether to make the material available at all. Even then, here too, parents who choose not to access the Internet through a Community Port may leave their children access to material others would find inappropriate.

Adults who wish to have access to pornographic material may have that access. They also are not required to signal that desire to anyone. Just as adults may choose not to activate the filter proposed above, an adult may contract with his or her ISP to access the Internet through a port that has not been designated as a Community Port. There should be no inference that the customer is one who wishes to access pornography. The customer may simply wish wide-open or unfiltered access out of concern for some form of over-blocking. With the filter approach, there is no communication to anyone of the customer's decision. With the Community Ports approach, the communication is only to the ISP, and again there should not be any inference drawn. Both approaches avoid the concern of a chill on consumption that would come from being required to provide a credit card or some form of identification to a content provider of Internet pornography.

There is an advantage to the Community Ports approach compared to the mandatory filtering signal approach or the Dot Kids approach. For the latter two, the computer-savvy child presents a problem. Children are often more competent computer users than

their parents.[132] A parent who activates the filter intended to block material that providers have not designated as appropriate for children, or who sets a computer to access only those sites with a "kids.us" extension, probably should not be too confident that his or her child will not be able to defeat the filter. With the Community Ports approach, the "filtering" is accomplished at the facilities of the ISP. The objectionable material never arrives at the computer, so protection does not rely on something in the home computer that can be worked around by the child.[133]

The Community Ports approach may, however, also face some of the same problems faced by the Dot Kids approach, and indeed the mandatory filter signal may also face this problem. There are very few Internet content providers who have decided to place their sites in the ".kids.us" domain.[134] With so little material available there, parents may be unlikely to limit their computers' access to that domain. Unless content providers opt into the Community Ports system in greater numbers than they did for kids.us, few may ask their ISP for a connection through a Community Port. Of course, content providers may also choose not to toggle on the switch that takes off the filtering signal as well. But the decision regarding the filter seems easier to implement than choosing how to make a site available. It also seems more amenable to efforts to limit e-mail or list-serv access to indecent material. While Web publishers may make the decisions regarding Dot Kids or Community Ports, every time e-mail or a list-serv contribution is sent or made, the filtering signal decision is made on a message-by-message basis.

V. CONCLUSION

There are certainly differences between brick-and-mortar distributors of sexual magazines and other tangible media, on the one hand, and virtual distributors of sexually indecent material on the other. But that does not mean that one is subject to legal limitations while the other completely escapes legislative control.

132. M. Resnick, *It's Not Just Information*, 39 IBM SYSTEMS J. 816, 816 (2000), *available at* http://www.research.ibm.com/journal/sj/393/part2/resnick.pdf.

133. That is, of course, not to say that a child could never defeat the Community Ports' protection. A child may manage to get the ISP to change the access or otherwise change the connection between home and ISP. It would, however, seem to be more difficult to make that sort of change than to turn off a filter in the home computer.

134. *See supra* note 104.

Ginsberg can be brought into the Internet age, and www.Sam's_Sationery_and_Luncheonette.com can be subjected to limits at least similar to those that once faced Sam's Stationery and Luncheonette.

That does not mean that the extension will be easy. Indeed, the CDA and COPA cases demonstrate the difficulty. But those cases also provide guidance by demonstrating the pitfalls to avoid. The major pitfall, as was clear even before the Internet cases, is an effect on adult consumption of material that adults have the right to access. While it is accepted that limits can be placed on access by children, the distribution of the material to adults must not be any more restricted than is necessary. Those who would provide indecent content must not fear liability in supplying adults and must not face undue financial burdens in taking care that they do not face liability by having supplied minors. Those who would consume must not be deterred by having to identify themselves.

The three approaches discussed in the last section should all prove to be constitutional methods of imposing at least some restrictions on the distribution of pornography to children. They all leave adults with access to the sexual material they may wish to obtain. They place no limits on what a content provider may wish to place on the Internet but simply require that such providers not affirmatively decide to make material that is obscene as to children available to children. The only chilling effect would be to leave unavailable to children material that might be appropriate for that audience out of concern that a prosecutor would consider it inappropriate. But even then, the material still is available to adults, and it is, in fact, available to children whose parents choose not to employ the relevant filter or port. While that non-use might simply be a lack of parental concern or control, it may be hoped that it would be based on a decision by parents, those who should know best, regarding the maturity of their own children.

The above-mentioned solutions may not go as far as some would like in terms of being totally effective restrictions, but they may well be as far as government can constitutionally go. While each may have some weakness, it is important to know that they are not exclusive. The fact that the Dor Kids approach is already implemented does not mean that the mandatory filtering signal or Community Ports approaches cannot stand alongside to provide additional protection. Parents who limit their children to Dot Kids sites may also wish to

have a filter that responds to the mandatory filtering signal. If their children manage to access the rest of the Web, the filter would limit what they find available there. Indeed, there are likely to be advances in other approaches that can add layers to the protection.