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DELETING ONLINE PREDATORS ACT: “I THOUGHT IT WAS MY-SPACE” — HOW PROPOSED FEDERAL REGULATION OF COMMERCIAL SOCIAL NETWORKING SITES CHILLS CONSTITUTIONALLY PROTECTED SPEECH OF MINORS

“Social networking sites such as MySpace and chat rooms have allowed sexual predators to sneak into homes and solicit kids.”¹

– Texas Representative Ted Poe

I. INTRODUCTION

As many of us feared, the Internet provides a new way for strangers to meet our children. A mere decade ago, parents worried that their children would be approached by strangers on the street or in the front yard. Now, children do not play in front yards—they play on the Internet. Thus, the question becomes: who is responsible for protecting our children in this new forum? Lawmakers have repeatedly attempted to put this responsibility on everyone except parents; instead, they have focused their attention on schools, libraries and even on the Internet Service Providers themselves. Congress’ latest attempt, the Deleting Online Predators Act (“DOPA”, the “Act”),² prevents minors from accessing commercial social networking websites like MySpace at public schools and libraries.³

1. Declan McCullagh, *Chat Rooms Could Face Expulsion*, CNET NEWS.COM, July 28, 2006, http://news.com.com/2102-1028_3-6099414.html [hereinafter *Chat Rooms Could Face Expulsion*].

2. During the editing phase of this Note, the U.S. Senate failed to vote on DOPA before the end of the Congressional term. H.R. REP. NO. 109-5319 (2006); Anne Broache, *Congress Off to a Slow Start with Tech*, CNET NEWS.COM, Jan. 9, 2007, http://news.com.com/Congress+off+to+slow+start+with+tech/2100-1028_3-6148312.html. On January 4, 2007, Senator Stevens introduced bill S. 49 to the Senate, titled “Protecting Children in the 21st Century Act” and colloquially referred to as DOPA Jr. Protecting Children in the 21st Century Act, S. 49, 110th Cong. (as introduced to Senate, Jan. 4, 2007). S. 49 includes all the language of DOPA, with additional warning label requirements for websites depicting sexually explicit material. Deleting Online Predators Act, H.R. 5319, 109th Cong. (as passed by H.R., July 26, 2006).

3. H.R. 5319.

MySpace and other commercial social networking websites targeted by DOPA combine several different Internet services into one convenient website.⁴ MySpace offers an interactive network of personal profiles, friends, blogs, groups, pictures, music, and videos as well as an internal messaging system.⁵ This hugely popular website “has accumulated 67 million members since its launch in 2004, and is currently growing by an average of 250,000 new members daily.”⁶ Critics of MySpace fear that it allows sexual predators to meet children online, arrange a time and place to meet in person, and then sexually assault the children.⁷ Further, the critics argue that child predators can too easily misrepresent their age, thereby making such a meeting more likely.⁸ Due to this potential for child abuse, MySpace and other social networking websites have generated significant legal and media attention.

Currently, a fourteen-year-old girl and her mother are suing MySpace and its parent corporation, News Corporation, in a Texas District Court.⁹ The plaintiffs allege that the girl was assaulted by a nineteen-year-old boy (who claimed he was fourteen) whom she met on MySpace.¹⁰ The complaint asserts causes of action for “negligence, gross negligence, fraud, fraud by nondisclosure, and negligent misrepresentation.”¹¹ Plaintiff seeks thirty million dollars in damages.¹² Emphasizing the perceived dangers of MySpace, the complaint lists thirteen incidents within the past year in which adult MySpace users have sexually assaulted underage MySpace users.¹³

MySpace has also received significant media attention as a result of its perceived danger for potential child abuse. Dateline’s television series, *To Catch a Predator*,¹⁴ explored the threat of online predators, possibly creating an overblown sense of paranoia among suburban lawmakers and

4. See, e.g., Myspace, <http://www.myspace.com/Modules/Common/Pages/AboutUs.aspx> (last visited Apr. 26, 2007).

5. *Id.*

6. Dawn Kawamoto & Greg Sandoval, *MySpace Growth Continues Amid Criticism*, CNET NEWS.COM, Mar. 31, 2006, http://news.com.com/MySpace+growth+continues+amid+criticism/2100-1025_3-6056580.html?tag=nl.

7. 152 CONG. REC. H5883, 5886 (daily ed. July 26, 2006) (statement of Rep. Fitzpatrick).

8. See generally *id.*

9. Plaintiff Original Petition at 1, *Doe v. MySpace, Inc.*, No. D-1-GH-06-002209 (D. Tex. filed June 19, 2006).

10. *Id.* at 12–13.

11. *Id.* at 1.

12. *Id.* at 22.

13. *Id.* at 6–9.

14. MSNBC, *To Catch a Predator*, <http://www.msnbc.msn.com/id/11152602/> (last visited April 26, 2007).

parents.¹⁵ On the show, unsuspecting men from all walks of life were filmed as they arrive at the home of someone whom they believe is a teenage girl they met on websites such as MySpace.¹⁶ Instead, the men were greeted by cameramen, Dateline's host, and police officers who arrest the men for attempted sexual abuse of a minor.¹⁷ This successful television series, which has aired numerous installments, exaggerates the proliferation of online sexual predators by luring men through a series of graphic sexual conversations online.¹⁸

In response to the perceived dangers of MySpace and other commercial social networking websites as fora for online sexual predators to meet minors, Republican members of the House of Representatives proposed DOPA in 2006, which the House of Representatives quickly passed.¹⁹ "DOPA is part of a new, poll-driven effort by Republicans to address topics that they view as important to suburban voters."²⁰

This Note will address whether DOPA and the significantly similar subsequent legislation should be held constitutional. Part II will discuss the language of the Act. Part III will compare and contrast the Act to previous bills, and based on such comparisons, will explain why DOPA will likely be declared an unconstitutional abridgement of the First Amendment free speech rights of minors. Part IV will provide policy arguments on solutions other than the proposed federal regulation of the Internet. Part V will conclude that MySpace and other commercial social networking websites are just like any other playground and ultimately children must still refrain from talking to strangers.

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See* Deleting Online Predators Act, H.R. 5319, 109th Cong. (as passed by H.R., July 26, 2006); Declan McCullagh, *Lawmakers Take Aim at Social-Networking Sites*, CNET NEWS.COM, Dec. 19, 2006, http://news.com.com/2102-1028_3-6071040.html [hereinafter *Lawmakers Take Aim*].

20. *Lawmakers Take Aim*, *supra* note 19.

II. DELETING ONLINE PREDATORS ACT

A. Language of the Act

DOPA amends the Communications Act of 1934 to require schools and libraries that receive universal service support²¹ to enforce a policy of “prohibit[ing] access to commercial social networking websites.”²² It states that minors can easily “access or be presented with obscene or indecent material . . . be subject to unlawful sexual advances, unlawful requests for sexual favors, or repeated offensive comments of a sexual nature from adults [or] access other material that is harmful to minors.”²³ The Act allows an authorized person to disable the protective measures when an adult—or minor with adult supervision—accesses such websites for educational purposes.²⁴

Initially, the Act defined “commercial social networking websites” as a “commercially operated Internet website that: (i) allows users to create web pages or profiles that provide information about themselves and are available to other users; and (ii) offers a mechanism for communication with other users, such as a forum, chat room, email or instant messenger.”²⁵ However, since opponents in the House of Representatives argued this definition was too vague, the drafters amended the Act to leave the definitions of “commercial social networking websites” and “chat rooms” to be determined by the Federal Communications Commission (“FCC”) “[w]ithin 120 days after the date of enactment of the Deleting Online Predators Act of 2006.”²⁶ To determine these definitions, the Act directs the FCC to consider the extent to which a website:

21. H.R. 5319; *see* FCC, The FCC’s Universal Service Program for Schools and Libraries, http://www.fcc.gov/cgb/consumerfacts/usp_Schools.html (stating that “Congress mandated in 1996 that the Federal Communications Commission (FCC) use the federal Universal Service Fund to provide support to companies that give discounts to eligible schools and libraries Eligible schools and libraries receive discounts on telephone service, Internet access, and internal connections (for example, network wiring). The discounts range from 20 to 90 percent, depending on the household income level of students in the community, and whether the school or library is located in an urban or rural area In general, all telecommunications companies that provide interstate telecommunications service contribute to the federal Universal Service Fund. These companies include wireline phone companies, wireless phone companies, paging service companies, and certain Voice over Internet Protocol (VoIP) providers.”).

22. H.R. REP. NO. 109-5319 (2006).

23. *Id.*

24. H.R. 5319.

25. *Id.*

26. 152 CONG. REC. H5883, 5883 (daily ed. July 26, 2006).

(1) is offered by a commercial entity; (2) permits registered users to create an on-line profile that includes detailed personal information; (3) permits registered users to create an on-line journal with other users; (4) elicits highly-personalized information from users; and (5) enables communication among users.²⁷

Furthermore, the Act directs the FCC to establish an advisory board that will “annually publish a list of commercial social networking websites and chat rooms that have been shown to allow sexual predators easy access to personal information of, and contact with, children.”²⁸ The Act also directs the Federal Trade Commission (“FTC”) to:

(1) issue a consumer alert regarding the potential dangers to children of Internet child predators, including the potential danger of commercial social networking websites and chat rooms . . . and (2) establish a website to serve as a resource for information for parents, teachers and school administrators, and others regarding the potential dangers posed by the use of the Internet by children.²⁹

The House of Representatives approved the Act by a 410 to 15 vote on July 26, 2006.³⁰ On July 27, 2006, DOPA was referred to the Senate Committee on Commerce, Science and Transportation, but has not yet been put to a vote.³¹

B. Arguments For and Against DOPA

DOPA’s proponents argue that restrictions on access to social networking websites are necessary to protect children from online predators.³² The Congressional findings accompanying the Act indicate that:

(1) sexual predators approach minors on the Internet using chat rooms and social networking websites, and, according to the United States Attorney General, one in five children has been

27. *Id.*

28. H.R. 5319.

29. *Id.*

30. H.R. REP. NO. 109-5319 (2006). Since DOPA was not voted on by the Senate before the expiration of the Congressional term, it was reintroduced as S. 49, titled “Protecting Children in the 21st Century Act” to the Senate by Senator Stevens on January 4, 2007. *Id.*; Broache, *supra* note 2; Protecting Children in the 21st Century Act, S. 49, 110th Cong. (as introduced to Senate, Jan. 4, 2007).

31. H.R. REP. NO. 109-5319.

32. 152 CONG. REC. H5883, 5884 (daily ed. July 26, 2006) (statement of Rep. Upton).

approached sexually on the Internet; (2) sexual predators can use these chat rooms and websites to locate, learn about, befriend, and eventually prey on children by engaging them in sexually explicit conversations, asking for photographs, and attempting to lure children into a face to face meeting [sic]; and (3) with the explosive growth of trendy chat rooms and social networking websites, it is becoming more and more difficult to monitor and protect minors from those with devious intentions, particularly when children are away from parental supervision.³³

The bill's opponents include the American Library Association ("ALA") and the National School Boards Association ("NSBA").³⁴ Beth Yoke, the Executive Director of the Young Adult Library Services Association ("YALSA"), an affiliated group, testified before the Subcommittee on Telecommunications and the Internet under the Committee on Energy and Commerce.³⁵ Yoke described the unified stance of the ALA and YALSA by stating:

Youth librarians believe, and more importantly know from experience, that education about safe Internet practices—for both youth *and* parents—is the best way to protect young people. We believe that the overly broad technological controls that would be required under DOPA are often ineffective given the fast-moving nature of modern technology. Further, such technological controls often inadvertently obstruct access to beneficial sites. In essence, we believe that this legislation will lead to the blocking of essential and beneficial Interactive Web applications and will further widen the digital divide.³⁶

The ALA further argues the issue should be determined locally by community members, library trustees, and school boards, not federal lawmakers.³⁷ They assert that the proposed federal regulation erodes the authority of those responsible for the safe use of libraries,³⁸ pointing out that up to eighty percent of the funding for the library or school is locally

33. *Id.* at 5883.

34. *Id.* at 5855.

35. *Testimony Before the Subcomm. on Telecomm. and the Internet of the Comm. on Energy and Commerce*, 109th Cong. (2006) (statement of Beth Yoke, Executive Director of the Young Adult Library Services Association), at 7, available at http://www.ala.org/ala/washoff/WOissues/techinttele/DOPA_testimony.pdf [hereinafter *Testimony of Beth Yoke*].

36. *Id.* at 2.

37. *Id.* at 7.

38. *Id.*

derived.³⁹

The NSBA opposes the bill because it fears “that the bill would not substantially improve safety of students, and would place an added and unnecessary burden on schools.”⁴⁰ Furthermore, the NSBA believes that the Act “does not address the real issue of educating children about the dangers of the Internet and how to use it responsibly.”⁴¹

III. ANALYSIS

DOPA is a prophylactic response to an incorrectly perceived threat. It proves that lawmakers are out of touch with how quickly the Internet has revolutionized the way people interact. Commercial social websites like MySpace have become extremely popular in the past few years.⁴² Students today race home after school to their computers to chat with their friends over MySpace and customize their MySpace pages. They also have the ability to post messages directly onto their friends’ MySpace pages.⁴³ They can post their own daily blogs⁴⁴—expressing their thoughts and ideas about the trivial and the philosophical alike.⁴⁵

Lawmakers also overlook the power of these websites to serve as avenues for the free exchange of ideas. “Web-based chat rooms and discussion groups are vitally important features that contribute to the popularity of many commercial Web sites”⁴⁶ such as MySpace. They represent “some of the ‘vast democratic fora of the Internet,’ providing Web users with equal access and an equal voice.”⁴⁷ In this sense, MySpace is a leveler of sorts—any child has the ability to create a personalized website and communicate his or her own ideas to a nearly limitless audience.

How can Congress shut its eyes to the fact that MySpace is perhaps one of the most powerful ways a child can express herself? By preventing access to MySpace and other commercial social networking sites at public schools and libraries, Congress has essentially interfered with the rights of children to send and receive constitutionally protected information. If the

39. *Id.*

40. 152 CONG. REC. H5883, 5885.

41. *Id.*

42. *Chat Rooms Could Face Expulsion*, *supra* note 1.

43. Myspace, *supra* note 4.

44. *Blog*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Blog> (last visited Jan. 17, 2007).

45. *See generally* Myspace, *supra* note 4.

46. *Brief for Respondents in Ashcroft v. ACLU*, 14 ALB. L.J. SCI. & TECH. 699, 716 (2004).

47. *Id.* (citing *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

Supreme Court were to accept this case, it would likely determine that this interference is an unconstitutional abridgment of the right to free speech under the First Amendment.

A. First Amendment Analysis

The First Amendment of the Constitution states that, “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.”⁴⁸ Implicit in the First Amendment is the “right to disseminate information and ideas,” as well as “the right to receive them.”⁴⁹ To a large extent, children are afforded the same basic First Amendment protections as adults.⁵⁰ Children do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁵¹ Moreover, students cannot be punished for expressing their personal views on the school premises, whether “in the cafeteria, or on the playing field, or on the campus during the authorized hours” as long as they do so “without . . . substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school” or impinging upon the rights of other students.⁵²

In order “to keep the First Amendment current with technology, the Supreme Court established a medium-by-medium approach to determine the [appropriate] level of First Amendment protection.”⁵³ This approach balances the significant factors of each type of media against the competing government interests.⁵⁴ Historically, courts have granted speech within the print medium the highest level of First Amendment protection, while radio broadcasts receive the lowest.⁵⁵

48. U.S. CONST. amend. I.

49. See Rebecca L. Covell, *Problems with Government Regulation of the Internet: Adjusting the Court's Level of First Amendment Scrutiny*, 42 ARIZ. L. REV. 777, 795 (2000).

50. See *id.*

51. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

52. *Id.* at 512–13.

53. Debra M. Keiser, *Regulating the Internet: A Critique of Reno v. ACLU*, 62 ALB. L. REV. 769, 776 (1998).

54. *Id.*

55. *Id.* at 776–77.

1. Forum Designation

For cases where the speech occurs on government property, the United States Supreme Court held that the first step in its First Amendment analysis is to identify the type of forum on which the speech was made.⁵⁶ The Court recognizes “three types of fora: the traditional public forum, the designated public forum, and the nonpublic forum.”⁵⁷ If the Court determines that the forum is either a traditional or a designated public forum, then it will apply the strict scrutiny test.⁵⁸ If it finds that the forum is a nonpublic forum, then it will apply the less stringent reasonableness test.⁵⁹

a. Traditional Public Forum

In *United States v. American Library Association*, the United States Supreme Court classified Internet use in a public library as speech in a nonpublic forum;⁶⁰ therefore, it was not subject to strict scrutiny.⁶¹

In 2002, upon discovering that library patrons, including minors, are exposed to pornography through the Internet, Congress enacted the Children’s Internet Protection Act (“CIPA”).⁶² CIPA forbids public libraries from receiving federal assistance for Internet access unless they install software to block pornographic images and prevent minors from accessing harmful material.⁶³ A group of libraries, patrons, and website publishers sued the government, “challenging the constitutionality of CIPA’s filtering provisions.”⁶⁴

56. Pearson Liddell, Jr., et al., *This Little Piggy Stayed Home: Accessibility Of Governmentally Controlled Internet Marketplaces*, 15 ALB. L.J. SCI. & TECH. 31, 35 (2004) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)).

57. *Id.* (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

58. *Id.* (citing *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992); *Widmar v. Vincent*, 454 U.S. 263, 270 (1981)).

59. *Id.* (citing *Int’l Soc’y for Krishna Consciousness, Inc.*, 505 U.S. at 679 (1992)).

60. *See United States v. Am. Library Ass’n*, 539 U.S. 194, 205 (2003) (“Internet access in public libraries is neither a ‘traditional’ nor a ‘designated’ public forum.”).

61. *Id.* at 208.

62. *Id.* at 200–01.

63. *Id.* at 201.

64. *Id.* at 201–02.

The United States District Court for the Eastern District of Pennsylvania ruled that CIPA is facially unconstitutional.⁶⁵ Finding that Internet access at public libraries was a designated public forum⁶⁶ and that the filtering software is a content-based restriction,⁶⁷ the district court applied the strict scrutiny test.⁶⁸ The Court concluded that the filters were not narrowly tailored to advance the government's legitimate interest in preventing dissemination of material that is harmful to minors.⁶⁹

The district court found that the public library is a "mighty resource in the free marketplace of ideas. . . ."⁷⁰ Acknowledging that Internet use in public libraries "does not enjoy the historical pedigree of streets, sidewalks, and parks as a vehicle of free expression," the district court nonetheless found that "it shares many of the characteristics of these traditional public fora."⁷¹ The court found that "[r]egulation of speech in streets, sidewalks, and parks is subject to the highest scrutiny not simply by virtue of history and tradition, but also because the speech-facilitating character . . . makes them distinctly deserving of First Amendment protection."⁷² Thus, Internet use in public libraries and schools is highly analogous to speech in streets, sidewalks, and parks, and should be afforded maximum First Amendment protection.

In reversing the district court's opinion, the United States Supreme Court first examined the role of libraries in our society.⁷³ Chief Justice Rehnquist, writing for the plurality, described the traditional mission of a library as one of "facilitating learning and cultural enrichment,"⁷⁴ but noted that the goal "has never been to provide 'universal coverage.'"⁷⁵ Instead, the plurality found that public libraries "collect only those materials deemed to have 'requisite and appropriate quality.'"⁷⁶

65. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 490 (E.D. Pa. 2002).

66. *Id.* at 457.

67. *Id.* at 454.

68. *Id.* at 470.

69. *See id.* at 489–90.

70. *Id.* at 466 (citing *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976)).

71. *Am. Library Ass'n*, 201 F. Supp. 2d at 466.

72. *Id.*

73. *Am. Library Ass'n*, 539 U.S. at 203–04.

74. *Id.* at 203.

75. *Id.* at 204.

76. *Id.*

The plurality then analogized public libraries to both a public television station's editorial judgments and to an art-funding program.⁷⁷ In the public television and art-funding program contexts, the "government has broad discretion to make content-based judgments in deciding what private speech to make available to the public."⁷⁸ Accordingly, the plurality concluded that forum analysis and heightened judicial scrutiny are incompatible with the discretion that public libraries must be afforded in fulfilling their traditional missions.⁷⁹ By so holding, the plurality overturned the district court's finding that Internet use at public libraries was a public forum subject to strict scrutiny.⁸⁰ Instead, the plurality concluded that because libraries typically make content-based judgments in selecting materials, a library's decision to use filtering software must be viewed as a collection decision,⁸¹ as opposed to a restraint on private speech.

In finding that Internet use in the library was no more than a "technological extension of the book stack,"⁸² available purely for research purposes, the plurality belied the myriad of uses of the Internet. Simply because the Internet is used in a library does not necessarily mean that it is being used for research purposes. In addition to research, library patrons send and receive email, post on blogs, and engage in numerous other expressive activities on the Internet.⁸³ By focusing entirely on where the Internet was being used, the plurality overlooked the fact that the Internet cannot be bound to the particular physical location of the user. Instead, the Supreme Court should focus on how the Internet operates and find that the Internet is the most recent example of a traditional public forum despite its rather recent origin.

77. *See id.* at 204–05.

78. *Id.*

79. *Am. Library Ass'n*, 539 U.S. at 205.

80. *See id.* at 214.

81. *Id.* at 208.

82. *Id.* at 207.

83. *See Reno v. ACLU*, 521 U.S. 844, 851 (1997); *Am. Library Ass'n*, 201 F. Supp. 2d at 405.

The plurality's oversimplification of Internet use carries significant social implications because it exacerbates the problem of the "digital divide."⁸⁴ The plurality ignored that some children are only capable of accessing the Internet at public libraries. "Of the 143 million Americans who use the Internet regularly, ten percent rely solely on access at a public library."⁸⁵ Children in economically depressed areas whose parents cannot afford Internet services at home will be unable to access websites that have become an imperative mode of expression for today's youth.⁸⁶ A statistical study found that for households with a median income below \$40,000, "whites were proportionally twice as likely as African Americans to own a home computer"⁸⁷ Further, among high school and college students, seventy-three percent of white students owned a home computer while only thirty-two percent of African American students owned one.⁸⁸

The plurality further erred in its forum analysis by focusing on the Internet's recent creation and finding that "[t]he doctrines surrounding traditional public forums may not be extended to situations where such history is lacking."⁸⁹ By so holding, the Court overlooked its own precedent from *Reno v. ACLU (Reno I)*.⁹⁰

Reno I was the first Supreme Court case to determine the appropriate level of First Amendment protection that should be afforded to the Internet.⁹¹

The Court in *Reno I* began its analysis by comparing the Internet to broadcast media,⁹² which has historically been afforded the least protection under the First Amendment.⁹³ The Court provided three factors that distinguished broadcast media from other forms of speech: (1) "the history of extensive Government [sic] regulation of the broadcast medium"; (2) "the scarcity of available frequencies at its inception"; and (3) the

84. *Digital Divide*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Digital_divide_in_the_context_of_e-democracy](http://en.wikipedia.org/wiki/Digital_divide#Digital_divide_in_the_context_of_e-democracy) (last visited Apr. 30, 2007) (stating that "[t]he digital divide is the gap between those with regular, effective access to digital technologies and those without which results from the socio-economic differences between communities").

85. Barbara A. Sanchez, *United States v. American Library Association: The Choice Between Cash and Constitutional Rights*, 38 AKRON L. REV. 463, 463 (2005).

86. See generally Donna L. Hoffman & Thomas P. Novak, *Information Access: Bridging the Racial Divide on the Internet*, SCIENCE, Apr. 17, 1998, available at <http://www.sciencemag.org/cgi/content/full/280/5362/390>.

87. *Id.*

88. *Id.*

89. *Am. Library Ass'n*, 539 U.S. at 206.

90. See generally *Reno v. ACLU*, 521 U.S. 844 (1997).

91. See *id.* at 870.

92. See *id.* at 868-70.

93. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

invasiveness of the broadcast medium.⁹⁴ Applying these factors to the Internet, the Court concluded that the factors “are not present in cyberspace.”⁹⁵ The Internet does not have a history of extensive government regulation, nor does it have a scarcity of frequencies.⁹⁶ The Court found that it was not as invasive as broadcast media because it does not “invade” the home in the same way—Internet “[u]sers seldom encounter content ‘by accident.’”⁹⁷ Thus, the Court concluded that the Internet was distinguishable from broadcast media and should be afforded full First Amendment protection.⁹⁸

Justice Stevens, author of the majority opinion in *Reno I*, acknowledged the significant expressive power of the Internet and provided a thoughtful analysis of how the Internet differs from broadcast media.⁹⁹ Most notably, the first factor—the history of extensive government regulation—is simply not present with the Internet.¹⁰⁰ The immense scope and lack of geographical boundaries make Internet regulation by any one organization virtually impossible.¹⁰¹ Although the Court in *Reno I* did not go so far as to classify the Internet as a traditional public forum, it implied that full First Amendment protection was warranted by distinguishing it from broadcast media.¹⁰²

Building upon the logic from the district court in *American Library Association v. United States*, the Court should find that the Internet is more analogous to public parks and streets than any other media form. Streets and parks “have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹⁰³ In these quintessential, traditional public fora, “the government may not prohibit all communicative activity.”¹⁰⁴ In one of its earliest opinions on traditional public fora, the Supreme Court found that an ordinance forbidding the distribution of printed matter on public streets was unconstitutional, holding that “[s]uch use of streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of

94. *Reno*, 521 U.S. at 868 (1997).

95. *Id.* at 868–69.

96. *Id.* at 868–70.

97. *Id.* at 869.

98. *Id.* at 870.

99. *See id.* at 849–53, 868–70.

100. *See Reno*, 521 U.S. at 868–69.

101. *Id.* at 853.

102. *See id.* at 868–70.

103. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

104. *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 45 (1983).

citizens.”¹⁰⁵ The Court continued:

The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience . . . but it must not, in the guise of regulation, be abridged or denied.¹⁰⁶

Judging whether something is a “traditional” public forum cannot and should not be based on longevity alone. The Internet is now used for exactly what the quintessential fora are used for: communication between citizens and discussion of public questions.¹⁰⁷ The Internet is a “virtual” city plaza—a veritable soapbox for free assembly and the dissemination of ideas. During the past several years, “the Internet has expanded dramatically, connecting more than twenty-nine million computers in more than 250 countries. Internet communication has emerged as the primary mode of communication for the new millennium.”¹⁰⁸

The Internet is a unique medium, unlike anything before it, allowing people to easily and inexpensively share their ideas, particularly through blogs,¹⁰⁹ where users act as their own commentators. Blogs allow anyone on the Internet to read another person’s commentary on a range of issues—from food to politics to music.¹¹⁰ Most blogs also feature a “comment” section, which allows readers to post their own ideas or debate with the initial comment poster.¹¹¹ Since the early days of blogging, circa 1994, blogs have grown exponentially in popularity and credibility as a medium of news dissemination.¹¹² Furthermore, “[i]n 2004, the role of blogs became increasingly mainstream, as political consultants, news services, and candidates began using them as tools for outreach and opinion forming.”¹¹³ Although various legal issues attach to blogs, including liability caused by their content,¹¹⁴ it is undeniable that blogs allow average Internet users to act as their own publishers—expressing their ideas to a

105. *Hague*, 307 U.S. at 515.

106. *Id.* at 515–16.

107. *See, e.g., Blog*, *supra* note 44.

108. *See Covell*, *supra* note 49, at 790.

109. *Blog*, *supra* note 44 (stating that “[a] blog is a user-generated website where entries are made in journal style” and “often provide commentary or news on a particular subject, such as food, politics or local news”).

110. *See id.*

111. *See id.*

112. *See id.*

113. *Id.*

114. *See id.*

vast audience in a manner that would have been incomprehensible even twenty years ago.

The pervasiveness and power of the Internet to affect how people express themselves in modern society makes it necessary for the Supreme Court to clarify its position on the Internet's forum designation. The Supreme Court should build upon Justice Stevens' analysis, as well as the district court's public forum analysis in *American Library Association v. United States*,¹¹⁵ and find that Internet use at a public library is a traditional public forum.

b. Designated Public Forum

The plurality in *United States v. American Library Association* found that the Internet was not a designated public forum because the government never intentionally opened a non-traditional public forum for public discourse.¹¹⁶ Instead, it found that Internet use in the library was not created for the purpose of expressive activity.¹¹⁷ In so holding, it reversed the district court's finding that "when the government provides Internet access in a public library, it has created a designated public forum."¹¹⁸ The district court found that "[u]nlike nonpublic fora such as airport terminals . . . and public transit vehicles . . . the purpose of a public library"—specifically, its provision of Internet access—is "for use by the public . . . for expressive activity."¹¹⁹ Again, the plurality overlooked the power of the Internet to allow expressive activity, as well as the fact that ten percent of the 143 million people using the Internet access the Internet at public libraries.¹²⁰

Further, the plurality's decision only addresses public libraries, not public schools.¹²¹ If the Supreme Court were to determine the proper forum for Internet access at public schools, the decision would likely come out differently. Even though the Internet is a relatively recent phenomenon, the Supreme Court has recognized that clubs at public schools are designated public fora.¹²² One could argue that the use of social commercial networking websites is the modern-day equivalent of an

115. See *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 457 (E.D. Pa. 2002).

116. See *United States v. Am. Library Ass'n*, 539 U.S. 194, 206 (2003).

117. *Id.*

118. *Am. Library Ass'n*, 201 F. Supp. 2d at 457.

119. *Id.*

120. *Id.* at 422.

121. See generally *Am. Library Ass'n*, 539 U.S. at 194.

122. See *Lidell, Jr.*, *supra* note 56, at 38 (citing *Widmar v. Vincent*, 454 U.S. 263, 267–70 (1981)).

after-school club.

In *Widmar v. Vincent*, the Supreme Court held that “a state university created a designated public forum for the use of student groups where the state university had an express policy of allowing registered student groups to use its facilities.”¹²³ In *Widmar*, the University of Missouri sought “to disallow any meetings on campus of any groups . . . for the purposes of religious worship or teaching.”¹²⁴ Noting that the University had a stated policy of encouraging the activities of student organizations, the Court held that the University created a designated public forum subject to the strict scrutiny test once it opened a non-traditional public forum for public speech.¹²⁵

Even though the government entity in *Widmar* was a state university, the same rule can also be applied to a public elementary, junior high, or high school. Public high schools have numerous student clubs that meet on campus to exchange ideas. Even though students who use MySpace are not physically meeting in person on campus, they are sharing their ideas in much the same way.

Lawmakers supporting DOPA may argue that Internet use at public schools should be limited to educational purposes.¹²⁶ They assert that MySpace and other commercial social networking websites have no educational value and hence, public schools are not required to provide access to such sites. However, MySpace undeniably provides youth with an educational benefit—it teaches them how to modify their user pages and express themselves through their writings and artwork.¹²⁷ It also makes them more technologically savvy.¹²⁸

If the United States Supreme Court is again asked to determine the appropriate forum designation for Internet use at public schools and libraries, it will likely re-classify such use. Two of the justices who comprised the plurality in *United States v. American Library Ass’n*, Chief Justice Rehnquist and Justice O’Connor, are no longer members of the bench.¹²⁹ The younger justices who have replaced them, Chief Justice

123. *Id.* (citing *Widmar*, 454 U.S. at 267).

124. *Id.* (citing *Widmar*, 454 U.S. at 270).

125. *Id.* (citing *Widmar*, 454 U.S. at 267–70).

126. See Nancy Willard, *Legal and Ethical Issues Related to the Use of the Internet in K-12 Schools*, 2000 BYU EDUC. & L.J. 225, 225 (2000).

127. See generally MySpace, *supra* note 4.

128. *Id.*

129. See Members of the Supreme Court of the United States, <http://www.supremecourt.us.gov/about/members.pdf>.

Roberts and Justice Alito,¹³⁰ are arguably more knowledgeable about the expressive powers of the Internet, and therefore likelier to engage in a more thorough analysis of public forum doctrine. Upon doing so, the Court is likely to hold that Internet use in public schools and libraries is either a traditional or designated public forum. Alternatively, the Court may decide to forego these traditional concepts of fora altogether and create a new forum to manage the unique nature of the Internet.

2. Strict Scrutiny Test

If the Internet is classified as either a traditional or designated public forum, “any content-based restriction on speech [would be] subject to strict scrutiny.”¹³¹ “To survive strict scrutiny, the government must demonstrate that the law serves a compelling governmental interest and is narrowly tailored to meet the objectives of this interest.”¹³² Although the government has a compelling state interest in protecting minors from Internet predators, DOPA is neither narrowly tailored nor the least restrictive means available. DOPA over-blocks access to all commercial social networking websites as well as chat rooms. Therefore, DOPA would fail the strict scrutiny test.

a. Compelling Government Interest

Generally, children “gain access to the Internet in three places: in the home, at school, or in a library.”¹³³ Since parents cannot control their children’s Internet access at school, they must rely on school administrators to do so.¹³⁴ “The Supreme Court acknowledges that parents have a legitimate expectation that schools will protect their children from exposure to sexually explicit material,” and that the government has a compelling interest in protecting children from obscene material.¹³⁵

Probing further, it is debatable whether the *federal* government has a compelling interest in protecting children from online predators in public schools and libraries. As argued by the American Library Association, controlling Internet use in schools and libraries is already a local

130. *Id.*

131. Sanchez, *supra* note 85, at 487.

132. Steven E. Merlis, *Preserving Internet Expression While Protecting Our Children: Solutions Following Ashcroft v. ACLU*, 4 NW. J. TECH. & INTELL. PROP. 117, 120 (2005) (citing *Reno v. ACLU*, 521 U.S. 844, 871 (1997)).

133. Covell, *supra* note 49, at 779.

134. *Id.*

135. *Id.*

government concern.¹³⁶ Rather than imposing the conservative views of suburban Republican congressmen on the entire nation, local regulation would allow each community or state to independently determine whether MySpace and other social networking websites are truly dangerous, and the appropriate regulation, if any.

b. Least Restrictive Alternative

The second part of the strict scrutiny test requires the government to demonstrate that the law is “narrowly tailored to meet the objectives” of the compelling government interest.¹³⁷

i. Comparison to the Child Online Protection Act

The Child Online Protection Act (“COPA”), codified at 47 U.S.C. § 231 and passed in 1998, was “Congress’ second attempt to regulate pornography on the Internet.”¹³⁸ COPA imposes civil and criminal penalties for an individual or entity that “knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any *material that is harmful to minors*.”¹³⁹

Unlike its predecessor, the Communications Decency Act (“CDA”), COPA expressly defines most of its key terms and, as a result, does not target all methods of communication, such as e-mail and newsgroups.¹⁴⁰ Under COPA, “only ‘commercial’ publishers of content on the World Wide Web can be found liable . . . [so that] individuals who place such material on the World Wide Web *solely* as a hobby, or for fun . . . are not in danger of either criminal or civil liability.”¹⁴¹ Further, whether material is “harmful to minors” is governed by a three-part test, each prong of which must be satisfied in order to impose liability: (1) “the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to . . . pander to [] the prurient interest”; (2) “depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact”; and (3) “taken as a whole, lacks serious literary, artistic,

136. *Testimony of Beth Yoke, supra* note 35.

137. *See* Merlis, *supra* note 132, at 120.

138. *ACLU v. Ashcroft*, 322 F.3d 240, 244 (3d Cir. 2003).

139. 47 U.S.C. § 231(a)(1) (2000) (emphasis added).

140. *Ashcroft*, 322 F.3d at 245.

141. *Id.*

political, or scientific value for minors.”¹⁴²

The day after COPA was signed into law, the American Civil Liberties Union, together with various Internet publishers, filed an action to challenge the constitutionality of the Act.¹⁴³ The District Court granted a preliminary injunction barring enforcement of the Act on the grounds that COPA was likely to violate the First Amendment.¹⁴⁴ The Court held that “although COPA addressed a compelling governmental interest in protecting minors from harmful material online, it was not narrowly tailored to serve that interest, nor did it provide the least restrictive means of advancing that interest.”¹⁴⁵ Thus, the District Court concluded that COPA failed the strict scrutiny test.¹⁴⁶

The Third Circuit Court of Appeals “affirmed the District Court’s holding, but on different grounds.”¹⁴⁷ It “held that the reference to ‘community standards’ in the definition of ‘material that is harmful to minors’ resulted in an overbroad statute.”¹⁴⁸ It reasoned that “[b]ecause the Internet cannot, through modern technology, be restricted geographically . . . the ‘community standards’ language subjected Internet providers in even the most tolerant communities to the decency standards of the most puritanical.”¹⁴⁹

In May 2002, the United States Supreme Court issued an opinion holding that the Third Circuit’s earlier decision was insufficient to establish that COPA was unconstitutional.¹⁵⁰ The plurality opinion, written by Justice Thomas, focused on the narrower issue of whether COPA’s “use of ‘community standards’ to identify ‘material that is harmful to minors’ violates the First Amendment.”¹⁵¹ The opinion stated: “[i]f a publisher chooses to send its material into a particular community, this Court’s jurisprudence teaches that it is the publisher’s responsibility to abide by that community’s standards. The publisher’s burden does not change simply because it decides to distribute its material to every community in the Nation.”¹⁵² The Court merely held that “COPA’s reliance on

142. 47 U.S.C. § 231(e)(6) (using a formulation similar to the one that the Supreme Court articulated in *Miller v. California*, 413 U.S. 15, 24 (1973)).

143. *Ashcroft*, 322 F.3d at 246–47.

144. *Id.* at 247.

145. *Id.*

146. *Id.*

147. *Id.* at 248.

148. *Id.*

149. *ACLU v. Ashcroft*, 322 F.3d 240, 248 (3d Cir. 2003).

150. *See Ashcroft v. ACLU*, 535 U.S. 564, 564–65 (2002).

151. *Id.* at 566.

152. *Id.* at 583.

community standards to identify ‘material that is harmful to minors’ does not *by itself* render the statute substantially overbroad for purposes of the First Amendment.”¹⁵³ The opinion refrained from expressing any view on whether the statute was “unconstitutionally vague” or if the lower court was correct in concluding the statute would not survive the strict scrutiny test.¹⁵⁴ The Supreme Court remanded the case to the Third Circuit Court of Appeals for further proceedings in light of its finding that the community standards language was not sufficient grounds for finding COPA unconstitutional.¹⁵⁵

The Third Circuit Court of Appeals again struck down COPA as unconstitutional, holding that the Act was “substantially overbroad in that it places significant burdens on Web publishers’ communication of speech that is constitutionally protected as to adults and adults’ ability to access such speech.”¹⁵⁶ The Court found that COPA “encroaches upon a significant amount of protected speech beyond that which the Government may target constitutionally in preventing children’s exposure to material that is obscene for minors.”¹⁵⁷

On certiorari, the Supreme Court affirmed and remanded.¹⁵⁸ In an opinion by Justice Kennedy,¹⁵⁹ the Supreme Court held that the Court of Appeals was correct in concluding that “[t]he District Court did not abuse its discretion when it entered the preliminary injunction.”¹⁶⁰ The Court found that there were “a number of plausible, less restrictive alternatives” to COPA, including blocking and filtering software.¹⁶¹ The Court further found that the “potential harms from reversing the injunction outweigh those of leaving the injunction in place”¹⁶² as there was “a potential for extraordinary harm and a serious chill upon protected speech.”¹⁶³

153. *Id.* at 585.

154. *Id.* at 585–86.

155. *Id.*

156. *ACLU v. Ashcroft*, 322 F.3d 240, 266 (3d Cir. 2003).

157. *Id.* at 266–67.

158. *Ashcroft v. ACLU*, 542 U.S. 656, 673 (2004).

159. *Id.* at 659.

160. *Id.* at 656.

161. *Id.* at 666–67.

162. *Id.* at 670.

163. *Id.* at 671.

The Court most strongly advocated was filtering software, whereby individuals could control what they may access on the Internet while allowing publishers to communicate whatever they wished.¹⁶⁴ Justice Kennedy offered filters as a less restrictive alternative, praising websites that imposed “restrictions on the receiving end,” rather than “universal restrictions at the source.”¹⁶⁵ However, commercial social networking websites are quite different from the websites the Supreme Court referred to in *Ashcroft v. ACLU*.¹⁶⁶ With DOPA, Congress has created its own filter by blocking access to all commercial social networking websites and chat rooms, “unless used for an educational purpose.”¹⁶⁷ However, by restricting minors’ access to commercial social websites, DOPA restricts access both at the receiving end and at the source. Minors essentially become publishers when they create their own websites. By blocking access to these sites, DOPA unconstitutionally restricts a publisher’s ability to express his or her ideas.

In deciding whether DOPA is the least restrictive alternative, the Supreme Court will likely rely on Justice Kennedy’s opinion in *Ashcroft v. ACLU*, whereby the Court declared that COPA was not the least restrictive alternative.¹⁶⁸ The Court will likely hold that DOPA is still not narrowly tailored, despite Congress’ attempts to implement the Court’s accepted definition of the phrase “harmful to minors” and to advance a means of filtering. Blocking minors’ access to commercial social networking sites at public libraries and schools overly restricts speech because it prevents minors from publishing content, as well as receiving it. Furthermore, DOPA over-blocks by prohibiting some individuals from using social commercial networking websites altogether because a significant number of people obtain Internet access only at public schools and libraries.¹⁶⁹

164. See *Ashcroft v. ACLU*, 542 U.S. 656, 666–69 (2004); see also Merlis, *supra* note 132, at 124.

165. See Merlis, *supra* note 132, at 124 (citing *Ashcroft*, 542 U.S. at 702).

166. See generally *Ashcroft*, 542 U.S. 656.

167. See Deleting Online Predator’s Act, H.R. 5319, 109th Cong. (as passed by H.R., July 26, 2006).

168. See *Ashcroft*, 542 U.S. at 673.

169. See Sanchez, *supra* note 85.

ii. Comparison to the Children's Internet Protection Act

The Children's Internet Protection Act ("CIPA") was approved by Congress in December 2000.¹⁷⁰ Two provisions of this act forbade public libraries from receiving universal service support for Internet access unless the libraries installed software to block or filter obscene or pornographic computer images and sought to prevent minors from accessing material that was deemed harmful to them.¹⁷¹ A group of libraries, library associations, library patrons, and website publishers sued the United States challenging the constitutionality of CIPA's filtering provisions.¹⁷² "The District Court held these provisions facially invalid . . . [as] they induce[d] public libraries to violate patrons' First Amendment rights."¹⁷³ The "court held that the filtering software contemplated by CIPA was a content-based restriction on access to a public forum, and was therefore subject to strict scrutiny."¹⁷⁴ Applying this test, the Court held that "although the Government has a compelling interest 'in preventing the dissemination of obscenity, child pornography, or . . . material harmful to minors,' . . . the use of software filters is not narrowly tailored to further those interests."¹⁷⁵

In a six to three vote in June 2003, the United States Supreme Court reversed the lower court's holding.¹⁷⁶ The plurality held that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum"¹⁷⁷ and rejected the District Court's finding that the software "over-blocked" constitutionally protected speech because patrons could easily ask a librarian to unblock a site.¹⁷⁸

Additionally, the plurality found that CIPA did not impose an unconstitutional condition on the receipt of federal assistance because Congress can insist that "public funds be spent for the purposes for which they were authorized."¹⁷⁹ Since "public libraries have traditionally excluded pornographic material . . . Congress could reasonably impose a

170. See Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763, 2764 (2000).

171. *United States v. Am. Library Ass'n.*, 539 U.S. 194, 198-99 (2003); 20 U.S.C. § 9134(f) (2000); 47 U.S.C. § 254(h)(1)(B) (2000).

172. *Am. Library Ass'n.*, 539 U.S. at 201-02.

173. *Id.* at 199.

174. *Id.* at 202-03.

175. *Id.* at 203.

176. *Id.* at 194.

177. *Id.* at 205.

178. *United States v. Am. Library Ass'n.*, 539 U.S. 194, 208-09 (2003).

179. *Id.* at 210-12.

parallel limitation on its Internet assistance programs.”¹⁸⁰

Proponents of DOPA point out that it is similar to CIPA in how it conditions federal assistance on the blocking of online visual depictions.¹⁸¹ At first blush, the two acts seem similar in their targeting of public schools and libraries that receive universal service support funding, and indeed, this federal funding itself is the hook that Congress latched onto in order to initially regulate this area.¹⁸² However, the two acts differ immensely. CIPA prevents access to obscene or pornographic online material.¹⁸³ DOPA prevents this as well, but goes further by largely preventing access to social commercial networking websites.¹⁸⁴ The first part of DOPA is redundant—CIPA already allows public schools and libraries to block obscene or pornographic material on the Internet through use of filtering software.¹⁸⁵ The second part of DOPA, which restricts access to a commercial social networking website,¹⁸⁶ is likely to be found unconstitutional because it is not the least restrictive alternative. By preventing access to sites like MySpace entirely, DOPA overtakes CIPA by blocking all speech by certain providers.

iii. Comparison to the Communications Decency Act

Congress passed the Communications Decency Act (“CDA”) in 1996 in order to “ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”¹⁸⁷ CDA prohibited any person from posting material on the Internet that would be considered either indecent or obscene and could readily be available to a person under eighteen years of age.¹⁸⁸ It provided two affirmative defenses to prosecution: (1) the use of a credit card or other age verification system, and (2) a good faith effort to restrict access to minors.¹⁸⁹ CDA further stated that:

180. *Id.* at 212.

181. *See* 152 CONG. REC. H5883, 5885 (daily ed. July 26, 2006) (statement of Rep. Stupak).

182. *See* Children’s Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763, 2763A–336 (2000); *see also* Deleting Online Predator’s Act, H.R. 5319, 109th Cong. (as passed by H.R., July 26, 2006).

183. *See* 114 Stat. at 2763A–336.

184. *See* H.R. 5319.

185. *See* 114 Stat. at 2763A–336.

186. *See* H.R. 5319.

187. 47 U.S.C. § 230(b)(5) (2000).

188. *See* *Reno v. ACLU*, 521 U.S. 844, 859 (1997).

189. *Id.* at 860–61.

[n]o provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described [above].¹⁹⁰

CDA listed the obligations of interactive computer services as follows:

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.¹⁹¹

The United States Supreme Court analyzed the CDA in *Reno I*.¹⁹² In a seven to two decision, the Court found that the Act violated the free speech facets of the First Amendment.¹⁹³ Writing for the majority, Justice Stevens found the use of the undefined term “indecent” in describing prohibited content to be too vague to withstand constitutional scrutiny and that the open-ended provisions broadly embraced all non-profit entities and individuals.¹⁹⁴ The Court further noted that “the ‘community standards’ criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.”¹⁹⁵ As a result, the Court determined that the CDA was not narrowly tailored to the government’s purported interest and “lack[ed] the precision that the First Amendment requires when a state regulates the content of speech. In order to deny

190. 47 U.S.C. § 230(c)(2)(A)–(B).

191. *Id.* § 230(d).

192. *Reno*, 521 U.S. 844.

193. *Id.* at 864.

194. *See id.* at 877.

195. *Id.* at 877–78.

minors access to potentially harmful speech, the CDA effectively suppresses [sic] a large amount of speech that adults have a constitutional right to receive and to address to one another.”¹⁹⁶ The Court further asserted that such “vagueness [sic] and sweeping breadth would impermissibly chill protected speech”¹⁹⁷ and “threaten[] to torch a large segment of the Internet community.”¹⁹⁸ With its decision, “the Court emphasized the uniqueness of the Internet as a distinct medium and signaled how future restrictions of similar content based on-line communications would be held to the highest level of review.”¹⁹⁹

Ultimately, even though DOPA targets public schools and libraries and does not provide for criminal penalties, it is analogous to the CDA. Like CDA, DOPA lacks precision. At present, the drafters of DOPA have defined neither “commercial social networking websites” nor “chat rooms”—two of the most vital phrases in the Act.²⁰⁰ Rather, DOPA requires the FCC to define the two phrases within 120 days after the enactment of the Act.²⁰¹ Failure to define these terms ensures that the same concerns expressed by the Supreme Court as to CDA will likely be expressed as to DOPA. Uncertainty about which sites are prohibited, as well as what qualifies as “harmful to minors,” will lead to the suppression of a large amount of constitutionally protected speech. Essentially, DOPA will impermissibly chill protected speech which minors have a constitutional right to exchange.

IV. POLICY—OPTIONS OTHER THAN FEDERAL REGULATION

A. Internet Self-Regulation

“With regard to adult users, industry self-regulation has been cited as the ‘least intrusive and most efficient means to ensure fair information practices, given the rapidly evolving nature of the Internet and computer technology.’”²⁰² This same tenet should be applicable to child users as

196. Jay Krasovec, *Cyberspace: The Final Frontier, for Regulation?*, 31 AKRON L. REV. 101, 122 (1997) (citing *Reno*, 521 U.S. at 882).

197. *Id.*

198. *Reno*, 521 U.S. at 882.

199. Krasovec, *supra* note 196, at 123.

200. *See* Deleting Online Predator’s Act, H.R. 5319, 109th Cong. (as passed by H.R., July 26, 2006).

201. *See id.*

202. Dorothy A. Hertzler, *Don’t Talk to Strangers: An Analysis of Government and Industry Efforts to Protect a Child’s Privacy Online*, 52 FED. COMM. L.J. 429, 447 (2000).

well.

The Court of Appeals of New York has analyzed whether Internet Service Providers have an affirmative duty to protect their users.²⁰³ In *Lunney v. Prodigy Services Co.*, an unknown imposter opened a number of accounts with Prodigy Services Company (“Prodigy”), an Internet Service Provider, by assuming the name of Alexander Lunney, a teenage Boy Scout.²⁰⁴ Using Lunney’s name, the imposter posted two obscene messages on a Prodigy bulletin board and sent a threatening email to a third person.²⁰⁵ Lunney, via his father, sued Prodigy asserting that Prodigy was negligent in allowing accounts to be open in his name and was responsible for his stigmatization as a result of “being falsely cast as the author of the messages.”²⁰⁶ The lower court denied Prodigy’s three motions for summary judgment and Prodigy appealed.²⁰⁷

The principle issues before the New York Court of Appeals were whether Prodigy could be held liable for defamation or negligence.²⁰⁸ In its discussion of negligence, the court held that there is “no justification” to impose a duty on Internet Service Providers to “employ a ‘process for verification of bona fides’ of all applicants and any credit cards they offer so as to protect from defamatory acts.”²⁰⁹ Such a “limitless field of liability” would open up an Internet Service Provider to “liability for wrongful acts of countless potential tortfeasors committed against countless potential victims.”²¹⁰

Although the United States Supreme Court has not yet dealt with the precise issue of whether Internet Service Providers have a duty to protect their users, it is likely that such a duty would be impossible to implement and enforce. However, a possible alternative to complete restriction of commercial social networking websites like MySpace may be internet self-regulation.

MySpace has taken significant steps within the last several months to alleviate the concerns of parents and politicians.²¹¹ “It has assigned about 100 employees, about one-third of its workforce, to deal with security and customer care, and hired . . . a former Justice Department prosecutor as [its]

203. *Lunney v. Prodigy Servs. Co.*, 723 N.E.2d 539, 539–40 (1999).

204. *Id.* at 539.

205. *Id.* at 539–40.

206. *Id.* at 539–40.

207. *Id.* at 540.

208. *Id.*

209. *Lunney*, 723 N.E.2d at 543.

210. *Id.*

211. *Lawmakers Take Aim*, *supra* note 19.

chief security officer[.]”²¹² MySpace also removes “offensive content, from nudity to racist material.”²¹³ It requires its members to be age fourteen or older and removes user profiles that fail to adhere to this policy.²¹⁴ Further, MySpace is now planning to offer free parental notification software that would allow parents to learn what name, age and location their children are using on MySpace.²¹⁵ Lastly, MySpace has announced that it is launching an advertising campaign, in conjunction with the Advertising Council and the National Center for Missing and Exploited Children, to educate parents and young people about Internet safety.²¹⁶

B. Regulation at the Local Level

As argued by the American Library Association, regulation of commercial social networking websites should be executed at the local level.²¹⁷ This would allow each community or state to first determine the veracity of the perceived dangers of MySpace, and to devise the appropriate solution. The Supreme Court has recognized that “[t]he determination of what manner of speech in the classroom or school assembly is inappropriate properly rests with the school board . . . rather than the federal courts.”²¹⁸

Local regulation would also combat the problem the United States Court of Appeals had with the Child Online Protection Act (“COPA”)—determining which community standards should apply to material that is available anywhere on the planet via the Internet. In the Supreme Court’s first analysis of COPA, Justice Thomas stated that it is “the publisher’s responsibility to abide by the community standards [and this responsibility] does not change simply because [the publisher] decides to distribute its material to every community in the Nation.”²¹⁹ However, critics of his

212. *Id.*

213. Kawamoto & Sandoval, *supra* note 6.

214. *Id.* (stating that “since its debut in 2004, MySpace has removed 250,000 profiles of underage users”).

215. Julia Angwin, *MySpace Moves to Give Parents More Information*, WALL ST. J., Jan. 17, 2007, at B1.

216. See Stefanie Olson, *MySpace Reaching Out to Parents*, CNET NEWS.COM, Apr. 12, 2006, <http://news.com.com/MySpace+reaching+out+to+parents/2009-1041-3-6059679.html>.

217. See Am. Library Ass’n, *Online Soc. Networks, Why DOPA is Bad for Libraries*, <http://www.ala.org/ala/oif/ifissues/onlinesocialnetworks.htm> (last visited Jan. 23, 2007).

218. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267–68 (1988) (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986)).

219. *Ashcroft v. ACLU*, 535 U.S. 564, 583 (2001); Declan McCullagh, *Appeals Court Strikes Down Net Porn Law*, CNET NEWS.COM, March 6, 2003, http://news.com.com/Appeals+court+strikes+down+Net+porn+law/2102-1028_3-91477.html?tag=nl [hereinafter *Appeals Court*

opinion argue that the community standards of the least tolerant, most conservative state would win out, thereby imposing a nearly insurmountable restriction on speech.²²⁰ If local communities regulated the Internet on their own behalf, it would then allow each community to create its own specific standards.

C. Student Awareness Education

The difficulty in regulating the Internet results from its vastness. Even if DOPA passes constitutional muster, children can still access the Internet at home without their parents' knowledge. Children cannot be policed twenty-four hours a day. Instead, they must be reminded not to talk to strangers, regardless of whether they meet someone on a street corner or on the Internet. Children should be permitted to utilize MySpace to create their own website and use it to communicate with their friends, but should also be made aware of the dangers of sexual predators on the Internet.

Instead of restricting children's access to a beneficial social site, parents should educate their children. Rather than seeing children as helpless victims who are in need of exaggerated protection, Congress and parents should instead see them as technologically savvy young adults. Parents have been teaching their children for decades not to talk to strangers; now they only need to warn their children not to talk to strangers on the Internet as well.

V. CONCLUSION

MySpace is not the only Internet website that could be affected by the Deleting Online Predators Act. "Even though politicians apparently meant to restrict access to MySpace, the definition of [commercial social networking sites] is so broad [that it] would probably sweep in thousands of commercial Web sites that allow people to post profiles, include personal information and allow 'communication among users.'"²²¹ Other sites that could be affected include: Friendster, Facebook, Slashdot, Amazon, and blogs such as RedState.com, and LinkedIn.com.²²²

Strikes Down Net Porn Law].

220. See generally *Ashcroft*, 535 U.S. at 603 (Stevens, J., dissenting); *Appeals Court Strikes Down Net Porn Law*, *supra* note 219.

221. *Chat Rooms Could Face Expulsion*, *supra* note 1.

222. See *id.*

How much can the government continue to blame Internet Service Providers while completely overlooking parental responsibility to protect their own children? Would a parent, whose child meets a stranger at a mall and is then sexually assaulted, sue the mall for negligence? Most would say no, but some would argue that a stranger at a mall cannot misrepresent his age as easily as he could over the Internet. Obviously, a forty-year-old man in a mall cannot pass for fourteen, but can the same be said for an eighteen-year-old boy, the age of the perpetrator in *Doe v. MySpace*?

At some point, parents must take more responsibility for their children's activities on the Internet. Parents must be educated about how to protect their children against Internet predators. Parents should examine their child's MySpace page, familiarize themselves with such websites, and talk to their children about their Internet activity. And parents, just as they have for decades, should remind their children not to talk to strangers—of any sort.

*By Lindsay M. Gehman**

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