



COMPETITIVE ENTERPRISE INSTITUTE

Tech Briefing 2001

*A Free-Market Guide to Navigating Tech Issues
in the 107th Congress*

COPA and Internet Content Regulation

by
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The Child Online Protection Act of 1998 (COPA) was designed to protect children from accessing harmful content, primarily pornography, on the Internet. Though several federal courts have issued injunctions against it as infringing on the First Amendment, there is still support for the idea of censoring the Internet to make it “safe for children.” However, such legislation would only serve to make valuable non-pornographic content more difficult to access, raising the cost to both websites and consumers, while ultimately failing to truly protect children from unsavory Internet content.

The technology. If COPA takes effect, it will require websites posting material “harmful to minors” to verify that visitors to the site are adults before allowing them to access the content. This would be done primarily through some form of credit-card verification. Since most companies do not have the financial resources to do this verification in-house, they turn to Age Verification Systems (AVS), which charge consumers an annual \$10 to \$20 fee for membership. Consumers submit their credit-card number to an AVS, which verifies its authenticity and then issues a PIN that allows the card holder to access all sites which use that AVS.¹

Software filters installed on individual PCs are an alternative technology. Such filters—Surf Watch, Net Nanny, X-Stop, and Cybersitter, to name a few—use a number of different techniques to prevent users from accessing adult sites. Many run scans on the web page being accessed by the browser to determine if it contains prohibited words. Several software-filter companies employ hundreds of human monitors who surf the Web daily to “blacklist” sites.² In many ways, these filters are analogous to anti-virus programs, except that they block adult content rather than viruses.

The background. President Clinton signed COPA on October 21, 1998. Congress passed it in response to the Supreme Court’s ruling in *ACLU v. Reno* (1997), which struck down the Communications Decency Act (CDA), a similar piece of legislation designed to regulate “indecent” Internet content. Carefully crafted to avoid the

constitutional pitfalls of CDA, using the term “harmful to minors” instead of the more vague “indecent,” COPA set penalties of up to six months in jail and \$50,000 fines for sites that permitted minors to access harmful content. The ACLU and 16 other plaintiffs nonetheless challenged COPA the day after it was signed. On June 22, 2000, a panel of the US Court of Appeals for the Third Circuit unanimously upheld a preliminary injunction against enforcement of COPA, noting that it “imposes an impermissible burden on constitutionally protected” speech.³ Most recently, the COPA Commission, a non-partisan board created by COPA to examine the best approach to protect minors from harmful on-line content, unanimously recommended a shift away from the COPA approach: it said resources should be shifted to enforcing existing obscenity laws, promoting the use of filtering software at home, and looking to the industry for self-regulation.⁴

COPA would apply to legitimate websites, depriving consumers of valuable on-line content. Despite being written to avoid the vagueness that killed its predecessor, COPA can’t overcome the problem of defining exactly what is “harmful to minors.” The uncertainty about the scope of the prohibition leaves websites open to arbitrary and discriminatory enforcement. In issuing his injunction, US District Judge Lowell Reed found that there was a strong likelihood that COPA will be used to prosecute non-pornographic sites.⁵

Popular and useful sites, such as pop-culture magazine Salon.com, medical sites such as OBGYN.net, and art stores such as ArtNet.com could be forced to close or censor their sites if COPA goes into effect. It is impossible to write a law that isolates pornography from sites that provide information on sex, medicine, and art.

The international nature of the Internet makes COPA unenforceable. The Internet is a global and decentralized medium—more than 40 percent of Internet content comes from abroad.⁶ The international nature of the Internet makes it virtually impossible for COPA, or any US regulation, to affect content providers outside the United States. In fact, many foreign countries, such as Singapore, which have already banned Internet pornography, admit that enforcement is nearly impossible. And Australia, which recently prohibited Internet porn, is facing similar problems; domestic porn sites have moved their content to offshore servers, and there is no reliable way for the country to block access.⁷ For COPA to be truly binding, we must be able to prosecute foreigners who violate US laws.

Understandably, such disrespect for the sovereignty of other nations will not be received well in the international community.⁸ Because foreign pornography will still exist regardless of COPA, COPA fails to truly achieve its goal of protecting minors from exposure to such material.

Credit-card verification is a flawed mechanism for checking age.

COPA would force most sites that have doubts about their material to turn to credit-card Age Verification Systems to verify that their visitors are adults. But Laith Paul Alsarraf, President and CEO of a company that runs AdultCheck TM, a leading AVS, admits there are loopholes in credit-card verification systems that minors can easily exploit.⁹ First, an AVS checks credit cards only once, at registration, and every AVS issues a PIN after registration. This PIN can then be posted on the Internet and passed on and shared with others. Second, simple possession of a credit card is no guarantee that a person is an adult. Many minors have access to a parent's credit cards, and theft of credit-card numbers is not rare.¹⁰

Finally, credit-card verification places a burden on Internet users, who must pay for access. More significantly, they risk being exploited by a faceless company of unknown credibility that has their credit-card number. In his congressional testimony, Lawrence Lessig notes that one on-line adult site offers entrance for just \$1, but then charges the user \$20 per month if membership is not canceled within 72 hours.¹¹

Policy recommendation. COPA, and similar legislative measures, will ultimately be unsuccessful at protecting children from harmful content on the Internet for both practical and constitutional reasons. The real solution lies in closer parental supervision of children's Internet activity. Filtering software, which is increasingly becoming standard issue with home PCs, has the added benefit of preventing children from accessing adult content on international sites. Congress should follow the recommendations of the COPA commission by taking a hands-off approach to the issue, thus empowering parents to make decisions about the Internet content their children access.

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¹ Laith Paul Alsarraf, Transcript of Testimony Before the House Subcommittee on Telecommunications, Trade and Consumer Protection, 11 September 1998, p. 2.

² Nigel Hawkes, "Internet Filter Puts Block on Porn Sites," *The London Times*, 29 December 1999.

³ *ACLU v. Reno*, No. 99-1324 (2000); available at laws.lp.findlaw.com/3rd/991324.html.

⁴ Leslie Miller, "Panel Agrees: Rethink Net Porn Laws," *USA Today*, 17 October 2000.

⁵ *ACLU v. Reno*, No. 1998-5591 (1999); available at www.paed.uscourts.gov/opinions/99D0078P.HTM.

⁶ Jerry Berman, Transcript of Testimony Before the House Subcommittee on Telecommunications, Trade and Consumer Protection, 11 September 1998, pp. 3-4.

⁷ Stewart Taggart, "Nasty Business on the Net," *Asiaweek*, 2 July 1999, p. 40.

⁸ Robert L. Hoegle and Christopher P. Boam, "Nations Uneasily Carve Out Internet Jurisdiction," *IP Worldwide* (July/August 1999).

⁹ Alsarraf, Transcript of Testimony, p. 2.

¹⁰ *Ibid.*

¹¹ Lawrence Lessig, Transcript of Testimony Before the House Subcommittee on Telecommunications, Trade and Consumer Protection, 11 September 1998, p. 2.