"APPENDIX A"

http://www.cdt.org/http://www.cdt.org/

Amicus brief filed by Sen. Coats, Rep. Bliley Rep.Oxley, and Rep. Greenwood (1/14/99)

Janurary 15, 1999

In the United States District Court
for the Eastern District of Pennsylvania

AMERICAN CIVIL LIBERTIES UNION, et al.,) Civil No. 98-CV-5591 (LAR)
)
PLAINTIFFS,)
V.)
)
JANET RENO, in her official capacity as)
ATTORNEY GENERAL OF THE UNITED STATES,)
)
DEFENDANT.)

BRIEF OF MEMBERS OF CONGRESS AS AMICI CURIAE,

Senator Dan Coats (ret.), Representative Thomas J. Bliley, Representative Michael G. Oxley, Representative James C. Greenwood,

IN OPPOSITION TO THE MOTION FOR PRELIMINARY INJUNCTION,

BRUCE A. TAYLOR,
Counsel of Record for Amici Curiae
J. ROBERT FLORES,
Co-Counsel for Amici Curiae
Chadwicke L. Groover,
NLC Legal Fellow, on the brief
NATIONAL LAW CENTER
FOR CHILDREN AND FAMILIES
4103 Chain Bridge Road, #410
Fairfax, VA 22030-4105
(703) 691-4626, Fax: 703-691-4669

“APPENDIX A”

JAMES J. WEST
PA. BAR NO. 331
Local Counsel for Amici Curiae

LAW AND ARGUMENT

I. THE CHILD ONLINE PROTECTION ACT, 47 U.S.C. þ 231, IS A VALID,
NARROWLY TAILORD RESPONSE TO A MOST SERIOUS PROBLEM
AND SHOULD BE SO CONSTRUED AND UPHELD

These amici curiae, Members of Congress who sponsored the Act being
challenged, maintain that the Child Online Protection Act of 1998 ("COPA")
is a constitutionally valid federal adoption of the traditional protections
for minors that have existed for over thirty years in state Harmful To
Minors (HTM) laws. This law, 47 U.S.C. þ 231, will protect the great
majority of minor children in America from the instant and unrestricted
access to the free pornographic "teaser" pictures now openly available at
commercial porn sites on the World Wide Web. In light of the present
situation existing since the Communications Decency Act's indecency
provisions were invalidated in 1997, Congress found that this law would be
an effective federal proscription to deal with this tragic feature of the
Web, stating that "the Committee concludes that H.R. 3783 is currently the
most effective, yet least restrictive approach that should be taken given
the current state of technology." REPORT to accompany H.R. 3783, House

"APPENDIX A"

Committee on Commerce, 105th Cong. 2d Sess. (Rep. No. 105-775), COMMITTEE
REPORT at 16. There are presently an increasing number of thousands of
sites that openly allow children, as well as adult porn customers, to see
hard-core and soft-core porn pictures by simply clicking on any link to a
pornography company's web page, even when searching for innocent material
such as "teen", "boy", "girl", "toy", "pet", etc. COMMITTEE REPORT at 10,
citing Testimony of National Law Center for Children and Families (copy in
Appendix C hereto). The law was designed to require such commercial porn
sellers to take a credit card or adult PIN or access number in order to
protect a visiting child or teenager from seeing the graphic sex pictures on
the front pages of the commercial porn WWW sites.
As chronicled in the House Commerce Committee's Report, COPA is carefully
limited in scope to deal only with this problem as it exists on the Web and
only for commercial sellers of pornography that is "obscene as to minors" or
"harmful to minors" as that test is known. The technical capability of
commercial pornographers on WWW sites to use credit cards and PIN/codes was
recognized by the Supreme Court in last year's decision in Reno v. ACLU, 117
S. Ct. 2329, 2349 (1997). The Act relied on the Court's pronouncement to
deal with this narrow part of the problem of online pornography. This Act
applies only to the World Wide Web and excludes other Internet, Usenet,
email, BBS, chat, and online services. The Act applies only to commercial
sellers of harmful pornography and excludes all non-commercial, non-profit,
educational, governmental, and private communications. Finally, this Act
employs the existing and constitutionally valid definition of "harmful to

minors" to limit its reach to pornography that is not protected speech for
juveniles to receive and unprotected when provided or displayed to juveniles
by adults. Therefore, COPA is an intentionally narrow focus on a "least
restrictive means" to control the unrestricted display to minors of
blatantly harmful pornographic images on the front pages of porn Web sites.
COPA is limited solely to regulating the manner of displaying for sale the
adult pornography that is harmful to minors without taking a credit card or
adult PIN or code to exclude minors. The Act would not prevent adult
customers from purchasing or browsing "adult" pornography on the commercial
Web sites. It would only require the commercial sites that are regularly in
the businesses of trying to make money from the sale of material that is
Harmful To Minors to require visitors wishing to sample the pornography to
use a credit card, PIN, etc. The site is also protected by the defense in
Section 231 (c) if it attempts to restrict access "by any other reasonable
measures that are feasible under available technology" before allowing
customers to browse the pornography that is for sale at the site. This is
no different than the universally valid HTM display provisions existing
under the laws of the States which require vendors of "adult" pornography to
keep such legally "harmful to minors" materials away from the reach or
viewing of minors in commercial and public places. Over the past four
decades in every state, magazine retailers, video outlets, theaters, and
even "adult" bookstores, have complied with existing state HTM laws, yet
continued to sell such materials to adults while restricting access and
display from minors.

"APPENDIX A"

The standard in COPA separately incorporates both the adult "Miller" test
for what is "obscene," as well as the traditional definition of "harmful to
minors", thus making the Act applicable both to hard-core pornography that
is obscene and soft-core pornography that is "Harmful To Minors" even if not
obscene for adults. The HTM definition was first approved thirty years ago
by the Supreme Court in the landmark case of Ginsberg v. New York, 390 U.S.
629 (1968), and is known as the "Millerized-Ginsberg Test." The obscenity
test derives from Miller v. California, 413 U.S. 15, at 24-25 (1973), as
explained in Smith v. United States, 431 U.S. 291, at 300-02, 309 (1977), to
clarify that the "average person, applying contemporary community standards"
would "judge" patent offensiveness in prong two, and in Pope v. Illinois,
481 U.S. 497, at 500-01 (1987), to hold that "a reasonable person" would
"judge" serious value in prong three.

The Act's standard for what must be restricted from minor children is,
therefore, a constitutionally valid test for "harmful to minors" as approved
by the Supreme Court in Ginsberg in 1968 and universally followed and upheld
by state and federal courts ever since.

Though HTM laws have heretofore been State statutes and city ordinances, the
"harmful to minors" standard is familiar to the federal courts, which have
routinely upheld such laws. See, for example: Crawford v. Lungren, 96 F.3d
380 (9th Cir. 1996), cert. denied, 117 S.Ct. 1249 (1997), upholding
California's HTM statute regulating "adult" sidewalk vending machines;
American Booksellers v. Webb, 919 F.2d 1493 (11th Cir. 1990), upholding
Georgia HTM statute; American Booksellers Ass'n v. Com. of Virginia, 882
F.2d 125 (4th Cir. 1989), on remand from the Supreme Court, 488 U.S. 905

(1988), upholding Virginia's HTM display law as construed by the Supreme
Court of Virginia in Commonwealth v. American Booksellers Ass'n, 372 S.E.2d
618 (Va. 1988), which interpreted the law and materials on certified
questions from the U.S. Supreme Court, 484 U.S. 383 (1988); Upper Midwest
Booksellers v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985), upholding
city HTM ordinance; M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983),
upholding city HTM ordinance. See COMMITTEE REPORT at 13.

A. THE STANDARD OF HARMFUL OR OBSCENE TO MINORS IS HISTORICALLY AND JUDICIALLY LIMITED TO PORNOGRAPHIC DEPICTIONS AND DESCRIPTIONS OF SEXUALLY EXPLICIT MATTER.

The statutory definition for what is Harmful To Minors adopted in COPA
includes that which is "obscene" even as to adults, as well as that which is
"obscene as to minors" under the variable obscenity test for what is
unprotected as to minors. 47 U.S.C. þ 231 (e)(6). Many of the arguments of
the ACLU Plaintiffs and their supporting amici curiae in the Brief of The
Association of American Publishers, et al., would apply equally to their
objections to the definitions and understanding of the elements of the
Miller-Smith-Pope test for obscenity, as they do to those terms and
understanding of the Millerized-Ginsberg test for what is Harmful To Minors.
Nevertheless, the Plaintiffs and others must comply with COPA's technical
and good faith restriction requirements for actual or simulated hard-core
pornography that meets the obscenity tests under federal statutes and the
various obscenity statutes and ordinances in almost every state. The
obscenity provisions were specifically excluded from the scope of this
Court's Temporary Restraining Order on November 19, 1998.
Though there are scarce few actual cases enforcing state harmful to minors

"APPENDIX A"

laws, due to the commonly found compliance with such sale and display laws by retail businesses across the nation, the obscenity prosecution cases and cases challenging harmful to minors laws provide guidance and authoritative construction precedent for understanding the scope of HTM laws. It is worth noting that issues of some "men's" magazines have been found "obscene" as a matter of law, even for adults, by federal and state courts: Penthouse v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) (Penthouse, Oui); Penthouse v. Webb, 594 F. Supp. 1186 (N.D. Ga. 1984) (Penthouse); City of Urbana v. Downing, 539 N.E.2d 140, 149-50 (Ohio, 1989) (Velvet, Nugget, Oui, Big Boobs); State v. Flynt, 264 S.E.2d 669, 679 (Ga. App. 1980), cert. denied, 449 U.S. 888 (1980) (Hustler); City of Belleville v. Morgan, 376 N.E.2d 704 (Ill. App. 1978) (Gallery, Genesis, Playgirl, et al.); City of Cleveland v. Hustler Magazine, Inc., No. 76-959230, Rec. vol. 330, pp. 545-55 (Ohio Common Pleas, 1976) (enjoining Sept. 1976 Hustler). Such "men's sophisticate" magazines are recognized, and universally treated in the magazine and print medium, as obviously "harmful to minors." Consequently, this type of pornography is not displayed to minors in print form and is also the type of pornography that should be restricted from open commercial distribution or display to minors on the Web under COPA. This is no more or less than State laws now require of retail stores, news stands, and mail order houses under present State law. No one can reasonably claim that these long-existing Harmful To Minors display laws are misunderstood or unreasonable in the print medium and film industry. This system works in all other media and commercial settings in this Country and the Child Online

“APPENDIX A”

Protection Act would and should be no different for porn sellers on the Web.
A major advantage in adopting the established test for Harmful To Minors, at
least for those who wish to comply with the law and for the courts in
reviewing or applying the law, is that its parameters have been interpreted
and construed to narrow its reach to materials that are intentionally
pornographic and inappropriate for minor children of the intended and
probable age groups to which it is exhibited. As stated in the COMMITTEE
REPORT at 28:
The Committee also notes that the "harmful to minors" standard has been
tested and refined for thirty years to limit its reach to materials that are
clearly pornographic and inappropriate for minor children of the age groups
to which it is directed. Cases such as Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975), and Board of Education v. Pico, 457 U.S. 853 (1982),
prevent the traditional "harmful to minors" test from being extended to
entertainment, library, or news materials that merely contain nudity or
sexual information, regardless of how controversial they may be for their
political or sexual viewpoints. [Emphasis added.]

As taught by such decisions as Erznoznik and Pico, viewpoint discrimination
and suppression of ideas are not permitted under the Harmful To Minors test
and minors are entitled to sexual information that has serious value for
them, even if "someone" might find them offensive or prurient. These cases
are not only binding on all courts with respect to the scope and
applicability of state and federal Harmful to Minors law, but they should
give comfort and guidance to members of the public in rejecting unfounded,
hypothetical scare tactics of those who would have them believe that such

protected speech may be in jeopardy. In Erznoznik, 422 U.S. at 213, the
Court explains why that ordinance was overbroad in forbidding display of all
nudity, "irrespective of context or pervasiveness" including babies, war
victims, and indigenous cultures, reminding that "all nudity cannot be
deemed obscene even as to minors" and referring back to Ginsberg and Miller
and (because "such expression must be, in some significant way, erotic") to
Cohen v. California, 403 U.S. 15, 20 (1971). Such statements were repeated
in later cases such as Carey v. Population Services Int'l, 431 U.S. 678, 701
(1977) ("[W]here obscenity is not involved, we have consistently held that
the fact that protected speech may be offensive to some does not justify its
suppression.") and FCC v. Pacifica Foundation, 438 U.S. at 745 (1978) ("that
society may find speech offensive is not a sufficient reason for suppressing
it"). The Court in Erznoznik, 422 U.S. at 213, clarified that the law was
overbroad because it was "not directed against sexually explicit nudity, nor
is it otherwise limited....Speech that is neither obscene as to youths nor
subject to some other legitimate proscription cannot be suppressed solely to
protect the young from ideas or images that a legislative body thinks
unsuitable for them." The similarity between these pronouncements of law
and like statements by the Court in Reno v. ACLU, 117 S.Ct., at 2346, formed
an admitted basis for COPA and counsel it's constitutionally valid reach.
These decisions were recognized in the Committee Report, at 28, on the House
side and by the original sponsor of the bill to enact COPA when it was first
introduced in the Senate. See the extensive discussion by Senator Coats
that COPA is knowingly and intentionally limited by Supreme Court guiding

precedents in such cases and for that type of sexually explicit pornography
that is clearly obscene as to minors and not otherwise merely offensively
controversial. Cong. Rec.- Senate, S.12146-54 (Daily ed., Nov. 8, 1997).
It cannot be found by this Court that Congress intended the exact opposite
or intended to contradict such pronouncements when it specifically
recognized and relied on them. Such decisions do not aid the ACLU
challengers in asking this Court to strike COPA from the Code, but rather
mandate the authoritative construction of the new federal law in such a
constitutional manner.

B. THIS FEDERAL COURT SHOULD CONSTRUE AND UPHOLD COPA WITHIN REQUIRED CONSTITUTIONAL PARAMETERS.

Though federal courts cannot authoritatively construe a state statute and
must declare them wholly or partially valid, invalid, or severable, as in
Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503-05 (1985), the rule is
appositive for federal statutes, which federal courts are bound to interpret
in a constitutional fashion so as to protect legitimate rights, if the law
is reasonably susceptible to such valid construction. As the rule was
stated in New York v. Ferber, 458 U.S. 747, 769, n. 24 (1982):
When a federal court is dealing with a federal statute challenged as
overbroad, it should, of course, construe the statute to avoid
constitutional problems, if the statute is subject to such a limiting
construction.

Just as it was recognized in Ferber, supra, that First Amendment challenges
may be heard to a law that is facially overbroad as to all by one to whom
the statute could have been validly applied, the opposite is also true-that
the courts should not strike a statute on its face as to those to whom it

has a legitimate reach when the court can protect the rights of those before
it by limiting its reach as applied to those to whom it should not be
applied by narrowly construing the law to exclude or guide those protected
speakers. The Court in Ferber, at 766-74, discussed the "substantial
overbreadth" doctrine and reiterated that facial invalidity is a drastic and
narrow exception that must be "carefully tied to the circumstances in which
facial invalidation of a statute is truly warranted" and is "strong
medicine" employed "only as a last resort." This Court recognized this
burden in the preliminary statements from the Bench before issuing the
Temporary Restraining Order on November 19, 1998, and these amici
respectfully ask that the difficult process of carrying out that duty now
commence by requiring the parties to offer proof of the real and substantial
overbreadth claimed for this Act and then avoid such improper overbreadth by
narrowly construing the Act so as to prevent and forbid any such
unconstitutional applications. As further stated in Ferber, at 773-74:

While the reach of the statute is directed at the hard core of child
pornography, the Court of Appeals was understandably concerned that some
protected expression, ranging from medical textbooks to pictorials in the
National Geographic, would fall prey to the statute. ...Yet we seriously
doubt, and it has not been suggested, that these arguably impermissible
applications of the statute amount to more than a tiny fraction of the
materials within the statute's reach. Nor will we assume that the New York
courts will widen the possibly invalid reach of the statute by giving an
expansive construction to the proscription on "lewd exhibition[s] of the
genitals." Under these circumstances, þ 263.15 is "not substantially

overbroad and ... whatever overbreadth may exist should be cured through
case-by-case analysis of the fact situations to which its sanctions,
assertedly, may not be applied."

In the instant case, this statute is admittedly and explicitly directed at
the pornographic core of what is obscene or harmful to minors, not at
literary, artistic, political, or scientific treatments of sex and not at
materials that are not intentionally pandered to prurient interests, even if
the treatments could be found patently offensive for minors. In this case,
the Plaintiffs do suggest that the Harmful To Minors test is feared to be
expanded to reach much of the speech traditionally protected from
prosecution under state harmful to minors laws for the past three decades,
without any factual basis or experience in that regard to substantiate such
fears. This Court, like the Supreme Court in Ferber, should not assume the
federal District Courts will "widen the possibly invalid reach of the
statute by giving an expansive construction" to COPA and ignore the clearly
binding precedents discussed herein and in the Committee Report.
That other courts recognize the need to follow these principles in applying
these or similar laws is also seen in school cases such as: Bicknell v.
Vergennes Union High School Board of Directors, 638 F.2d 438 (2d Cir. 1980)
(finding book inappropriate for teenage students because of its vulgar and
indecent language, not its ideas); Presidents Council v. Community School
Board, 457 F.2d 289 (2d Cir. 1972), cert. denied, 409 U.S. 998 (1980)
(upheld decision to restrict sexually explicit book from minors unless
parental consent obtained).
The application of state laws is likewise required to be viewpoint neutral

and courts must apply the test in the specific context of that work, that
audience of minors, and that circumstance of exhibition. See, for example,
Grosser v. Woollett, 45 Ohio Misc. 15, 74 Ohio Ops.2d 233, 341 N.E.2d 356
(Ohio C.P. 1974), aff'd, 74 Ohio Ops.2d 243 (Ohio App. 1975), appeal
dismissed for want of a substantial constitutional question, No. 75-719
(Ohio, 1975), a civil nuisance action by students and their parents seeking
to protect the minors from having certain adult nature books assigned to
them, wherein two books with graphic sexual descriptions were found Harmful
to Juveniles and enjoined from use unless parental consent was obtained. In
Grosser, the trial court found two books, Manchild in the Promised Land and
One Flew Over the Cuckoo's Nest, to meet Ohio's Harmful to Juveniles test
for that audience under those circumstances. The court construed the law as
a Millerized-Ginsberg test and applied it to the pervasively graphic
descriptions of sexual conduct contained in the two works. The court did
not find the works obscene for minors as a whole on the basis of the
messages or otherwise protected ideas expressed in the books, but because of
the pornographic nature of the continual sexual descriptions which were
notably absent from the film version of Cuckoo's Nest, for example) and the
court quoted several such examples at length in its opinion to illustrate
this issue. (See the official published versions, since West Publishing Co.
deleted those explicit passages from its published version, as explained in
341 N.E.2d at 359, n. 2.) This is a case the courts would not be expected
to see twenty years later under today's standards, but it shows the rule of
law as binding the process and narrowing its remedies, in that case to a

civil order since Ohio's school defense would have applied to a criminal prosecution. The combination of judicial interpretation and narrow applicability protects the balance of competing interests with respect to minors and requires that any contest among parties must be resolved in court and not on the basis of what one or the other personally believes to be suitable or unsuitable for the children they themselves deal with.

In the Virginia Supreme Court's decision on the questions certified by the United States Supreme Court, the State Court held that each of the 16 works alleged to be threatened by the Virginia HTM law were not legally "harmful to minors" under Virginia law and First Amendment principles. As the Virginia Supreme Court held, Com. v. Am. Booksellers, supra, 372 S.E.2d at 6221:

The 16 books in question run the gamut, as the Supreme Court aptly put it, from classic literature to pot-boiler novels. Having examined them all, we conclude that although they vary widely in merit, none of them lacks "serious literary, artistic, political or scientific value" for a legitimate minority of older, normal adolescents. It would serve no purpose to review the books in detail. Because none of them meets the third prong of the tripartite test, we hold that none of the books is "harmful to juveniles" within the meaning of [Virginia] Code þþ 18.2-390 and 391.

This recognition that the Harmful To Minors test must consider the appropriate value to the age group to which it is directed was a major holding of the Supreme Court of Virginia in finding, on one of the certified questions, that none of the considered literary and political works were

“APPENDIX A”

"harmful to minors" under the challenged Virginia law, even though the federal courts had surmised that the books were in jeopardy of the law as interpreted in an overly broad fashon. See Commonwealth v. American Booksellers Ass'n, 372 S.E.2d 618, 622 (Va. 1988), followed on remand, 488 U.S. 905, American Booksellers Ass'n v. Commonwealth of Virginia, 882 F.2d 125 (4th Cir. 1989). See also American Booksellers v. Webb, supra, 919 F.2d at 1504-06.

In the Supreme Court's Erznoznik and Pico cases, and in the Harmful To Minors cases decided by the other federal and state courts cited above, the courts have already held that minors may receive sexual materials that are not "harmful" or "obscene as to minors" in the legal sense. Sexual information and sexually explicit materials that are not factually and legally Harmful To Minors under the Millerized-Ginsberg test may not be proscribed to minors simply because "someone" disapproves of the message, viewpoint, or orientation of the materials. Like obscenity generally, the terms "harmful to minors" or "obscene as to minors" are legal terms of art, subject to the constitutional procedures of the courts, and protected against unconstitutionally overbroad applications or vague interpretations.

As the Court said in Hamling v. United States, 418 U.S. 87, 118 (1974):

The definition of obscenity, however, is not a question of fact, but one of law; the word "obscene," as used in ...[federal law], is not merely a generic or descriptive term, but a legal term of art. ... The legal definition of obscenity does not change with each indictment; it is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him.

“APPENDIX A”

So it is with the term "harmful to minors" as adopted into federal law by
this Act and so it is that the federal courts are bound to apply this Act in
accordance with First Amendment principles and thus protect even those who
suffer the unfounded fear instilled by zealous advocacy or fear of the
unknown. The courts cannot indulge such hypothetical possibilities, because
the law, properly applied according to case law and the Constitution, cannot
be so impermissibly applied or interpreted. The body of law and the
diligence of the courts are expected to protect and apply these required
legal principles, despite the lack of knowledge or confidence that some
individuals may have in the law enforcement or judicial community.
Properly construed and applied, HTM laws apply to pornographic adult
materials, not serious or merely offensive or controversial treatments of
sex. Serious sex education, AIDS/STD information, disease prevention, news
accounts of sexual offenses or legal questions, and political or social
treatments of sexual issues cannot be obscene or Harmful To Minors because
the courts must find that they have serious literary, artistic, political,
or scientific value for minors. The established test for Harmful To Minors
only affects a minor's unrestricted access to that which lacks serious
literary, artistic, political, or scientific value for the intended and
probable age group of the minors to which it is made available.
Therefore, works such as the presently controversial "Starr Report" of the
Office of the Independent Counsel that was submitted pursuant to federal law
to the House of Representatives and released as a public document of
political significance to the press and the Internet and World Wide Web

would not be affected by COPA (or existing state HTM laws), since the "Starr Report" is not obscene or obscene as to minors and thus is not "harmful to minors" under this new federal law. That document and its attendant documentary and grand jury exhibits are not "directed to" or "pandered to" a prurient interest and do not depict or describe sexual conduct in a "patently offensive" way. The language used in a federal grand jury may well be clinical and graphic, but not salaciously lascivious or pruriently pornographic when judged by the "average person" of the law, as could be the case for intentionally pornographic materials sold as "men's" or "adult" materials in commercial establishments and porn Web sites. Furthermore, such a governmental or news or public information document does have serious political value, as a matter of law, inherently and for everyone, everywhere, at every time, both for minors as well as adults. This is true in law, no matter how offensive "some" persons may find it (and regardless of whether parents may choose to try to avoid exposing young children to it). The inherent political value of the "Starr Report" is its legal character and it cannot be said to appeal to the prurient interest when it is released and then re-released or re-sold solely to provide legal and political information for serious decision making by Government officials.

The report was not "pandered" by the House of Representatives in releasing it to the public and it is not "pandered" by the New York Times or Amazon.com when reprinted or sold for public access.

Furthermore, because of the restrictions on the statutory element, secondary transmissions would not, standing alone, violate the statute, even if commercial. COPA requires that an offender be the one who knows the

“APPENDIX A”

character of the matter and then knowingly "makes any communication for
commercial purposes...that includes any material that is harmful to minors"
under Section 231 (a). The law then adds further limitations in the
definition of such maker of the harmful communication as being one who is
"engaged in the business" of trying to profit from "such" harmful
communications "as a regular course of such person's trade or business"
under Section 231 (e)(2). COPA, therefore, only applies to commercial WWW
sites that can be proven by the Government to regularly and knowingly sell
or attempt to profit from pornographic materials that are obscene or
"harmful to minors" and does not apply to private, governmental, news
organizations, non-profit, or other sites that cannot be shown to regularly
market such harmful pornography. The "Starr Report" is not legally Harmful
To Minors under the Ginsberg-Miller test in existing state laws and would
not and could not be "harmful to minors" under the new federal law. COPA is
a valid proscription against a definitive type of pornography, but it would
not, as a matter of law, affect the release nor the commercial or public
re-distribution of the "Starr Report" or any other such serious work.

C. COPA IS A NECESSARY AND LEAST RESTRICTIVE MEANS OF PROTECTING MINORS FROM
ADULT PORNOGRAPHY THAT IS OBSCENE AND HARMFUL FOR THEM AND NOT PROTECTED FOR
SALE OR DISPLAY TO THEM.

As the legislative record and the Commerce Committee Report and Committee
Hearing should make clear, these amici Members of Congress fully support the
constitutional validity and the law enforcement effectiveness of COPA.
Since existing obscenity laws and the level of federal obscenity
prosecutions are not deterring pornographic "teasers" now, this new law

would add a much-needed level of protection for children. The law would
empower the efforts of parents, police, and child advocates to require the
porn industry to take responsibility for selling "adult" materials to adults
by asking for adult-world identifications, like credit card numbers or PIN
codes before showing pornography pictures on their sales sites. As
recognized in the COMMITTEE REPORT at 14, COPA's allowed access restriction
methods will protect "most juveniles" even though it cannot protect all
juveniles. This is an adoption of the finding by the Supreme Court in Sable
Communications of Cal. v. FCC, 429 U.S. 115, 130 (1989), that the credit
card/access number regulations of the FCC for dial-porn "would be extremely
effective, and only a few of the most enterprising and disobedient young
people would manage to secure access to such messages." Sable at 130
(emphasis added). In light of the Reno v. ACLU decision, Congress did not
find that it could attempt to be as "extremely effective" as the FCC
regulations approved in Sable, but that many reasonable restrictions should
be enacted and, thus, "the Committee believes that H.R. 3783 is currently
the most effective, yet least restrictive, way to reduce a minor's access to
harmful material." COMMITTEE REPORT at 6. See also the discussion of
protection issues and compliance alternatives in the COMMITTEE REPORT at
13-20. COPA's defenses are thus similar but not identical to prior FCC or
even CDA defenses. The COPA requirement allows a defense if the Web site
tries to restrict access by minors "by requiring use of a credit card, etc."
by the visitor, whether or not the visitor is a minor and whether or not the
visiting minor stole a real card or PIN or not. COPA protects a site that

in good faith puts the burden on the visitor to use a credit card, even if
the site is lied to or defrauded by an "enterprising and disobedient"
juvenile. Presumably, this class of juveniles with such extraordinary
computer and mathematical skills and the desire to use it dishonestly to
satisfy some prurient interest in seeing pornography is a small part of the
class of all minors and even a small portion of the class of older juveniles
expected to be of that level and character. The COPA would, therefore,
protect all children from open access to the porn teaser pictures and would
"reduce" even the most sophisticated juvenile's access to such inappropriate
material. This would be a great benefit to confer on children and families
and Congress sought to do so with COPA.
This new law would protect children from commercial pornography that is
"harmful" to them, because it is legally "obscene as to" them, not merely
hurtful or objectionable. This is a "compelling governmental purpose" of
"surpassing importance" that the Supreme Court and the other federal and
state courts have said legislatures can provide for our most vulnerable
citizens. It was the least Congress could do to accept that protection and
extend it to America's children and grandchildren.   This is no more than
State display laws do when requiring merchants of "adult" magazines and
videos that are "harmful to minors" to sell them on display racks that are
out of reach or sight of minors, while still available for purchase by
adults. Such an adult sales method is what this Act intends to and would
extend to the commercial Web, as it fairly should.

D. THE SCOPE OF COPA'S HARMFUL TO MINORS TEST IS CONSTITUTIONALLY VALID AND CAPABLE OF FAIR APPLICATION.

"APPENDIX A"

COPA adopted a non-geographic, adult age community standard for judging the prurience and offensiveness prongs of the Harmful To Minors test. As stated in the COMMITTEE REPORT at 28:
The Committee recognizes that the applicability of community standards in the context of the Web is controversial, but understands it as an "adult" standard, rather than a "geographic" standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors.

This is a reflection of the power of legislatures to do so, as recognized by the Court in upholding non-specific "community standard" instructions in state and federal courts. See Jenkins v. Georgia, 418 U.S. 87, 157 (1974), Hamling v. United States, 418 U.S. 87, 101-07 (1974), even though trials could occur in various federal districts, as they could under various state laws. It was in Jenkins, at 157, that the Court held that courts and juries need not attempt to use hypothetical statewide standards any more than any other hypothetical geographic standard:
We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply "community standards" without specifying what "community." ... A state may choose to define an obscenity offense in terms of "contemporary community standards" as defined in Miller without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in Miller.

In this case, Congress chose the non-geographic "adult" standard to accommodate the nature of the World Wide Web as accessed within the United

“APPENDIX A”

States. Though Plaintiffs may not understand the legal tests for obscenity
or Harmful To Minors, they are protected by the understanding of these legal
terms of art in the courts.
Guidance is also provided by the Court's treatment of the film "Carnal
Knowledge," found not capable of being obscene in Jenkins, 418 U.S. at 161:
"While the subject matter of the picture is, in a broader sense, sex, and
there are scenes in which sexual conduct ... is to be understood to be
taking place, the camera does not focus on the bodies of the actors at such
times. There is no exhibition whatever of the actors genitals, lewd or
otherwise, during these scenes. There are occasional scenes of nudity, but
nudity alone is not enough to make material legally obscene under the Miller
standards." Even today, such forms of sexual treatment in mainstream films
(like today's "R" films), featuring brief nudity and suggested sex, would
not be "obscene" for adults under the second prong of the Miller test if
they do not depict patently offensive depictions of ultimate sexual acts,
normal or perverted, actual or simulated, or lewd exhibitions of the
genitals. However, such explicitly simulated sexual conduct is universally
treated as for "adults" and is handled and displayed in all other streams of
commerce as "harmful to minors." Such depictions are less sexually explicit
than today's versions of "men's" magazines, some of which, even where the
penetration was not clearly visible, have been found legally obscene as a
matter of law after independent appellate review. See, for example:
Penthouse v. McAuliffe, 610 F.2d 1353, 1370-73 (5th Cir. 1980) (finding
issues of "Penthouse" and "Oui" magazines obscene, but not "Playboy" -taken

as a whole- because it had some serious value); City of Urbana v. Downing, 539 N.E.2d 140, 149-50 (Oh. 1989) (declaratory judgment and appellate review by Court of Appeals and Ohio Supreme Court finding five "male sophisticate" magazines obscene- "Juggs," "Nugget," "Velvet," "Oui," and "Big Boobs"); State v. Flynt, 264 S.E.2d 669, 679 (Ga. App. 1980), cert. denied, 449 U.S. 888 (1980) (jury conviction affirmed after appellate review finding "Hustler" obscene); City of Belleville v. Morgan, 376 N.E.2d 704 (Ill. App. 1978) (trial and appellate courts found several news stand pornography magazines obscene, including "Gallery," "Genesis," "Playgirl," "Dapper," "Loving Couples," etc., but conviction based on "Playboy" reversed on appeal). See also, Penthouse v. Webb, 594 F. Supp. 1186 (N.D. Ga. 1984) (declaring a "Penthouse" issue within the scope of Georgia's obscenity statute and the "Miller Test").

The Supreme Court in the landmark case of Ginsberg v. New York, 390 U.S. at 631-33, 634, 639 (1968), affirmed a conviction for the sale of "'girlie' magazines" to a 16 year old boy. The Court also referred to the materials as "sex material" and upheld the trial court's finding that the magazines were "harmful to minors" and unlawful to disseminate to juveniles. The Court emphasized in Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975), that "all nudity cannot be deemed obscene even as to minors" (such as a baby's buttocks, nude body of war victim, indigenous cultural nudity, or "fleeting and innocent glimpses of nudity") and found invalid an ordinance banning all nudity from drive-ins. The result could have been different, however, had the city passed or construed its ordinance to adopt

a "harmful to minors" standard, noting, at 213, that it was "not directed against sexually explicit nudity," and, at 216, n. 15, not limited to "movies that are obscene as to minors."

It is submitted that appellate decisions on what has or may be found to be "harmful to minors" are rare precisely because few prosecutions are brought due to general compliance with existing state display and sales regulations. However, authoritative and precedential guidance emanates from the cases where harmful to minors laws have been upheld, facially or as applied, by many state and federal courts since Ginsberg was decided in 1968. COMMITTEE REPORT at 13. As a result, American businesses and public speakers have for three decades complied with them in stores, theaters, and other public places and commercial establishments, including "adult businesses" and, at least in California after Crawford v. Lungren, 96 F.3d 380 (9th Cir. 1996), cert. denied, 117 S. Ct. 1249 (1997), with supervised or coin-operated newsracks on public thoroughfares. These laws as they have existed from coast to coast have coexisted with newspapers, magazines, films, books, and computer communications, with the obvious avoidance of public displays of the sexually explicit materials on the covers, advertisements, billboards, video cases, and even many Web pages. A groundless and judicially avoidable fear of the over-expansion of a federal harmful to minors law is an impermissible basis to assume or allow unconstitutional applications of such an historically constitutional standard and reasonably non-burdensome restrictions on adult access to adult materials that are harmful and obscene as to minor children.

Most reported decisions are federal reviews of state harmful to minors

display or sales laws and do not involve factual findings as to the harmful
to minors nature vel non of any particular materials. Several decisions,
however, have involved findings as to submitted trial exhibits as to what
could be within the reach of the laws and general language is used to
provide some guidance as to the scope of such laws. See: American
Booksellers v. Webb, 919 F.2d 1493, 1503-05 (11th Cir. 1990) (upholding
Georgia's harmful to minors display law and "Millerized-Ginsberg Test" and
finding that a defendant's exhibit would be subject to the law, stating in
footnote 22: "This is not to say that the statute covers only material
already subject to Georgia's general obscenity statute.... For example,
Defendant's Exhibit 1, Human Digest (June 1984), found in a convenience
store with no restrictions on in-store access by minors, would be 'harmful
to minors' and thus subject to section 16-12-103's bans on sales to minors
and display. The cover refers to several articles within that are written
from the juvenile perspective: "'Why My Mom Loves Oral Sex!'"; "'I Made
X-Rated Videos for Dad!'"; "'Sex Slave Sis!'"; and "'My Anal Aunt!'".");
Upper Midwest Booksellers v. City of Minneapolis, 602 F. Supp. 1361, 1369
(D. Minn. 1985) (upholding harmful to minors display law and declaring that
it was lawfully applicable to "sexually explicit materials" that are
"harmful to minors" and stating: "A child who walks into a store which
openly displays material with sexually explicit covers may be harmed simply
by viewing those covers."), aff'd, 780 F.2d 1389, 1395 (8th Cir. 1985)
(upholding display provision as valid time, place, and manner protection for
minors while allowing adults to obtain "adult" materials, even though adult

"APPENDIX A"

must comply with "incidental effect of the permissible
regulation" by
purchase, request of a copy from a clerk, or perusal in "adults
only
bookstores or in segregated sections of ordinary retail
establishments").
One of the most important cases in the history of harmful to
minors laws
since Ginsberg is Commonwealth of Virginia v. American
Booksellers Ass'n,
372 S.E.2d 618, 622-24 (Va. 1988), which clarified and limited
the scope of
such laws at the request of the U.S. Supreme Court. Following a
declaration
that the state's display law was invalid in American Booksellers
Ass'n v.
Strobel, 617 F. Supp. 699 (E.D. Va. 1985), aff'd, sub nom
American
Booksellers v. Com. of Va., 792 F.2d 1261 (4th Cir. 1986),
amended opinion,
802 F.2d 691 (4th Cir. 1986), jurisdiction was noted on the
appeal and two
certified questions were proffered by the Supreme Court of the
United
States, Virginia v. American Booksellers Ass'n, 484 U.S. 383
(1988), to the
Supreme Court of Virginia:
1.   Does the phrase "harmful to juveniles" as used in
Virginia Code þþ
18.2-390 and 18.2-391 (1982 and Supp. 1987), properly construed,
encompass
any of the books introduced as plaintiff's exhibits below, and
what general
standard should be used to determine the statute's reach in light
of
juveniles' differing ages and levels of maturity?
2.   What meaning is to be given to the provision of
Virginia Code þ
18.2-391(a) (Supp. 1987) making it unlawful "to knowingly display
for
commercial purpose in a manner whereby juveniles may examine or
peruse"
certain materials? Specifically, is the provision complied with
by a
plaintiff bookseller who has a policy of not permitting juveniles
to examine
and peruse materials covered by the statute and who prohibits
such conduct

when observed, but otherwise takes no action regarding the display of
restricted materials? If not, would the statute be complied with if the
store's policy were announced or otherwise manifested to the public?
As concluded by the Virginia Supreme Court, 372 S.E.2d at 625: "The first
certified question is answered in the negative. The second certified
question is answered in the affirmative."
The Virginia Supreme Court interpreted Virginia's "harmful to juveniles"
display law in light of Miller, Ginsberg, Pope, etc., as applicable only to
"explicit sexual content," "pornographic," or "borderline obscenity" and
found that sixteen exhibits would not be "harmful to juveniles" because they
contained serious literary, artistic, political, or scientific value "for a
legitimate minority of older, normal adolescents," including "Where Do
Babies Come From?," "Ulysses," "The New Our Bodies, Ourselves," "Witches of
Eastwick," etc.). As so construed, Virginia's law was then upheld on
remand, sub nom American Booksellers Ass'n v. Com. of Va., 882 F.2d 125 (4th
Cir. 1989).
It is clear, these amici submit, that the concerns of the U.S. Supreme Court
were in whether the reach of such harmful to minors laws as upheld in
Ginsberg were still limited to pornographic "adult" materials, rather than
to serious or redeeming, if frank, sexual information or treatments; whether
the "variable obscenity standard" was variable, not only for minors as a
class, but variable as to age groups of minors within that class; and
whether possible restrictions on marketing or display of such "harmful"
pornography that is "obscene as to minors" are reasonably related to
safeguarding children from exposure to such unprotected materials as to them

by various methods available to businesses in modern commerce. Just as the highest federal Court asked the highest state Court for its authoritative interpretation and construction of the law under consideration, your Congressional amici similarly request that this federal District Court, with a corresponding power and duty to interpret and construe this federal law, fairly and authoritatively read the Child Online Protection Act so as to protect the legitimate rights of those to whom it is applied and to uphold it as to all others to whom it is facially applicable and who are not challenging the act or who may face the Act only on a fact specific case-by-case basis in the future. In any event, the guidance of the historical precedent and the limitations recognized in the Congressional Record, the Committee Hearing, and in the House Committee's Report, should be adopted by this Court and thus avoid any real or substantial overbreadth or vagueness claimed by the Plaintiffs or their amici in this matter. This Court thus protects the rights of those before it and all those who are not before it, since both groups will benefit from the limiting focus and clarifying gloss put on the law by an authoritative declaratory judgment by this District Court.

II. THE CHILD ONLINE PROTECTION ACT IS CONSTITUTIONAL AS SPEAKERS COVERED BY ITS REGULATIONS CAN READILY COMPLY WITH THE ACT'S REQUIREMENTS CONTRARY TO PLAINTIFFS' ALLEGATIONS

Amici bring to the attention of this Court information which they believe may not be provided by the parties or, if provided, will not be sufficiently developed so as to assist the Court in making a searching inquiry of the

soundness of Plaintiffs' allegations. This information pertains to the
question of whether Plaintiffs can comply, as a practical matter, with the
Act while balancing the right of the Government to protect children and the
right of adults to have access to material which is constitutionally
protected as to them. Statement of Senator Dan Coats, Hearing before the
Subcommittee on Telecommunication, Trade, and Consumer Protection of the
House Committee on Commerce, Serial Number 105-119 (Sept. 11, 1998) (HOUSE
HEARING at 3-4).

As Amici have demonstrated above, the Child Online Protection Act is
designed to apply to a limited category of speech, pertain only to that
portion of the Internet known as the World Wide Web, and place a least
restrictive burden on those involved in pornographic commercial speech
activities. As made plain by the Act's sponsors, the statute is directed at
material which when taken as a whole appeals to the prurient interest, which
describes sexual conduct in a patently offensive manner, and which, as a
whole, lacks serious value for minors. Coats Statement, HOUSE HEARING at 3.
In a word, it is directed at pornography. Thus, at the outset, Amici urge
this Court to examine what the industry, whose behavior is the focus of this
Act, has said about restricting access.

As the industry's trade association, it is the position of the Free Speech
Coalition that the mechanism required [credit card verification] under the
former Communications Decency Act to screen for minors is effective and
appropriate. Prior to the viewer seeing sexually explicit images, the Web
site should require that a credit card be provided. No charge need be put
on the account. By requiring the credit card, the only mechanism by which

minors could gain access to sexually explicit imagery is through the consent or negligence of the parents. That is the case now with the other media for sexually explicit materials. [Emphasis added.]

Prepared Statement of Jeffrey J. Douglas, Executive Director, Free Speech Coalition, HOUSE HEARING at 48. Though Congress can disagree with their other conclusions, we note that even pornographers understand the efficacy of such a restriction. Simply put, children's access to material which is harmful to them will be curtailed by requiring that knowing purveyors of such material obtain a credit card number that can be verified as such.

Plaintiffs' base their claim that they cannot constitutionally comply with the Act's requirement on the allegation that they cannot verify credit card numbers. Plaintiffs' Memorandum of Law In Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction at 33. What do they offer as support for this claim? They offer their parties' declarations that state that they: (a) have insufficient funds to use the verification method used to process sale transactions; (b) verification, if used, would disrupt their business or speech; (c) requiring that individuals provide any identification would frighten away customers and future users. Amici contend that an inquiry by the Court, before acceding to Plaintiffs' draconian request to preliminarily enjoin the statute, will reveal that these reasons fail either because current technology exists which does not result in the problems identified by Plaintiffs or because any minimal restrictions are outweighed by the Government's compelling need to protect children.

Before directly addressing Plaintiffs' claims regarding their ability to

"APPENDIX A"

comply with the statute, it is instructive to briefly discuss several of Plaintiffs' declarations. This discussion will give the Court a frank picture of the Plaintiffs' use of hyperbole, misinterpretation of the Act's reach, and incorrect statements regarding the requirements necessary for satisfying the Act. For example, in the Declaration of Mark Segal on behalf of Philadelphia Gay News (News), submitted by Plaintiffs, Mr. Segal makes the statement, "[c]redit card and age verification pose insurmountable technological, economic and other burdens to PGN Online." Declaration of Mark Segal at 15. His basis for these beliefs is information he gathered from his PGN Online technical staff. Id. at 16. He does not explain or detail their areas of expertise and indeed undermines any information they may provide by admitting that his technical staff does not deal with verification at all since PGN Online "does not have any system of credit card verification in place at this time because it does not charge for its online resources ... ." Id.

Looking further at Mr. Segal's Declaration, one also discovers that he has interpreted the Act's affirmative defense to require that PGN Online verify the age of prospective Web site users. Id. at 15 and 16. A plain reading of the affirmative defense reveals clearly that such is not the case and that verifying the age of the prospective Web site user is simply one way to satisfy the statute. The Act states:

(c) AFFIRMATIVE DEFENSES.

(1) DEFENSE. It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors

"APPENDIX A"

(A) by requiring use of a credit card, debit account, adult access code, or
adult personal identification number;
(B) by accepting a digital certificate that verifies age, or
(C) by any other reasonable measures that are feasible under available
technology."
(2) PROTECTION FOR USE OF DEFENSES. No cause of action may be brought in
any court or administrative agency against any person on account of any
activity that is not in violation of any law punishable by criminal or civil
penalty, and that the person has taken in good faith to implement a defense
authorized under this subsection or otherwise to restrict or prevent the
transmission of, or access to, a communication specified in this section.

Child Online Protection Act, 47 U.S.C. Section 231(c)(1). "[A]s the
legislation provides, the commercial provider and operator enjoys a defense
from prosecution simply by having the access restriction measures in place."
Coats Statement, HOUSE HEARING at 4. Thus, if the Web site operator adapts
his Web site, so that before making available those materials he knows are
harmful to minors, persons requesting such access must provide credit card
numbers which can be verified as such, the Act is satisfied, even if the
card number is stolen, belongs to another, has been generated by some
fraudulent means, or has insufficient credit remaining to allow even the
smallest purchase.

Similarly, just as Mr. Segal's Declaration is revealed as nothing more than
speculation and unsubstantiated lay opinions disguised as "expert" opinions
that "[c]redit card and age verification pose insurmountable technological,
economic and other burdens to PGN Online," Segal Decl. at 15. An analysis

of the Declaration of Nadine Strossen reveals that it would do more to distress the public and the other Plaintiffs, than offer an objective viewpoint on legal issues, and she colors the Act's requirements in a way that could chill the speech of even the most "staunch advocate[s] of free speech." Strossen Decl. at 6. Additionally, Ms. Strossen interprets the statute so as to imply that it will reach her conduct even though she does not identify any of her writing as harmful to minors. Instead, as one would expect from an attorney, she identifies the conduct of another, removing any risk of incriminating herself should the Court uphold the statute. With respect to whether the Act could in any way reach her conduct, basing it for argument sake on her Declaration, amici note that there is nothing to suggest, and certainly nothing which would support, a finding that she is engaged in the business of making commercial communications which are legally "harmful to minors." Thus, even if she were responsible for posting her communications on the Word Wide Web, she would not qualify as being, "engaged in the business," because she does not, "as a regular course of [her] trade or business," make commercial communications by means of the World Wide Web which includes matter that is harmful to minors. (Emphasis added.) 47 U.S.C. Section 231(e)(2). Finally, amici note that although at one point in her Declaration she claims that she cannot "take advantage of any of the affirmative defenses," because she "do[es] not have control over how IC [the e-magazine she writes for] chooses to publish its Web site, she claims she is afraid that she "could be criminally prosecuted or face severe civil penalties for the material that other people post on the "bulletin

board" which follows her column. Strossen Decl. at 4. Amici urge this
Court to recognize the unrealistic nature of this claim, that although she
has no control of the Web site she is afraid that entirely independent
actions taken by others can be imputed to her and that her column for the
ACLU's viewpoint will be prosecuted by a U.S. Attorney or the Department of
Justice if COPA goes into effect. It could be suggested that such an
argument to this Court is pure sophistry.

As one can see from even a brief review of two representative declarations
submitted by Plaintiffs, their arguments are based on endlessly repeating
the mantra of fear, resorting to a tortured reading of the statute, and
merely claiming that they cannot or don't want to comply with the Act.
Thus, at the end of a review of Plaintiffs' case, one is left solely with
the question of compliance- can it be done? Amici contend that compliance
is possible, however, because amici have not been privy to evidence
developed by the Government or provided by the Plaintiffs, since they allege
that such information is proprietary, we urge this Court to require that the
parties provide information on the following techniques, including
information pertaining to what would be required for implementation of one
or more of these methods and why the use of one or more of the following
methods imposes an undue burden on their speech given the benefit to
children which the Act affords: (1) merchant accounts, (2) authorization
only accounts, and (3) Luhn Check Algorithm software.

A. CREDIT CARD NUMBER VERIFICATION

As discussed above, COPA provides for several ways in which a commercial Web
site operator who knowingly makes available material which is harmful to

“APPENDIX A”

minor may comply with the statute. A plain reading of the Act makes clear that while a commercial Web site operator may opt to verify the age of the individual seeking access to such material, he can choose other methods of restricting access which fall short of actually verifying the age of the individual. This portion of the brief discusses the three methods by which access may be restricted through the use of credit card numbers, though Amici do not mean to imply that these are the only ways currently available.

The three methods for use of a credit card number on the Internet which these amici bring to the Court's attention are: (1) merchant accounts, which entail a pre-authorization and settlement process, (2) authorization only accounts, which also utilize merchant accounts, but only proceed to the pre-authorization process never reaching settlement of the transaction, and (3) the use of Luhn check algorithm software, which verifies credit card numbers by testing them with an algorithm that checks the digits of the numbers to see if they match the format used by the various credit card associations. Each method is described below in detail.

A. 1 Merchant Accounts[2]

The most prevalent method for use of a credit card number over the Internet is the merchant account. For this method, the commercial Web site obtains an account with a merchant bank, such as Bank of America,[3] Wells Fargo, or First of Omaha. The bank then establishes accounts for the merchant with the major credit card networks, most often the Visa and MasterCard Networks.

The credit card networks authorize transactions on behalf of the credit card association, which represents the member bank that issues the credit card.

Once a merchant account has been established, the bank will contract with a

transaction processing clearinghouse to process transactions. Some banks
have an in-house merchant processing service.4 Those banks which do not use
in-house merchant processing contract with companies such as Automated
Transaction Services, Inc.,5 Payment Net,6 and Payment Tech. These clearing
houses function as an intermediary between the merchant and the credit card
network.
In order to make a connection between the merchant and the clearinghouse, a
gateway is needed.7 In traditional commerce, as opposed to e-commerce, a
cash register is typically accompanied by a cardswipe machine (the little
gray box attached to the register). In the world of e-commerce, however,
because the merchant never has physical possession of the credit card, it is
impossible for her to utilize this physical gateway. Therefore, the
Internet merchant must use some other means to connect with the
clearinghouse. There are two such mechanisms. The first is desktop
software which transmits the account numbers given the merchant over a one
or two day period. Some examples of these are ICVerify, PCAuthorize, and
MacAuthorize. The second is a real time Web site gateway, such as
CyberCash, VerifonevPOS, or Anacom Merchant Services SecurePay. The Web
site gateways utilize a modem channel separate from the channel used to run
the Web site to communicate with the clearinghouse in real time. Thus, the
desktop software and the Web site gateway are functionally the same as the
little gray box found next to the cash register in almost every commercial
business.8
Transactions typically take the following form:9 First the purchaser gives
the merchant a credit card number and the expiration date of the credit

card. The merchant then by means of a Web site gateway, such as CyberCash,
or a desktop software package, such as ICVerify, transmits the card number
to the clearinghouse (also known as an acquirer in the credit card industry)
for processing the transaction. The credit card number which is transmitted
is often checked at this stage to screen what could be a actual account
number from one which is obviously false. The method used is called the
Luhn check algorithm and it is extremely accurate in screening out
incorrectly formatted numbers. After determining the validity of the number
transmitted, the acquirer relays the number to the credit card network for
authorization. Once the network determines that the number represents a
valid account with sufficient funds, the network notifies the processor who
in turn informs the merchant that the transaction has been authorized or in
the alternative declined. Upon receiving authorization the merchant can
sell the item to the purchaser and settle with the credit card network for
the amount of the sale. For Web site gateways this process takes place in a
matter of seconds, thus it is commonly known as a real time authorization.
For desktop software the authorization is received from the network in a
relatively short time period, however, the software accumulates the credit
card numbers given to the merchant over a one or two day period before
transmitting them to the clearinghouse.
The majority of Web sites involved in e-commerce, use merchant accounts and
Web site gateways for the purposes of credit card verification,
pre-authorization, and settlement. In fact, many if not all of the
plaintiffs, engaging in e-commerce, utilize this system for credit
transactions. Although this system occurs in real time and is virtually one

hundred percent secure, it can be costly. This fact has been much ballyhooed by the plaintiffs at the T.R.O. hearing and in their briefs and declarations in spite of the fact that many of them already have this system in place for the purchase of products from their Web site. (For example, A Different Light Bookstore and Condomania may or do use this system for the sale of their merchandise.)

The costs to the merchant for this means of pre-authorizing and settling credit card transactions can vary greatly depending upon the merchant and the bank with which the merchant has a merchant account. The costs are generated by the merchant bank,[10] the clearinghouse,[11] and the credit card network.[12] The merchant bank charges an application fee, a per transaction fee, a minimum monthly processing fee, and a discount rate. The application fee is a one time fee charged by many, but not all, banks and it ranges from nothing to $500. The per transaction fee is charged by the bank and/or the gateway and it ranges between fifteen and thirty cents. This fee is determined by the annual sales volume of the Web site and the average transaction amount. The greater the volume and average transactions amount, the lower the per transaction fee. Because of this fact, the fee can be quite nominal or it can be quite extravagant. In the event that the Web site fails to generate a certain volume of business, some banks will charge a minimum monthly processing fee of fifteen to thirty dollars. The greatest cost to the merchant who settles transactions (as opposed to those who use the system for authorization only, which is discussed later in the brief) is the discount rate. The bank charges a rate of 1.5% to 5% of the purchase

price of the item charged. The rate is also determined based upon the
annual sales volume and the average transaction amount.
There are several other nominal charges associated with this method for
taking credit card transactions. The gateway software ranges from $350 to
$994 depending upon whether you choose a desktop software gateway or a real
time Web site gateway. Most gateways also charge a monthly fee ranging from
nothing to fifty dollars. The credit card networks also charge a per
authorization fee of one half of one percent of the transaction amount
charged. There are several other costs associated with the set up and
upkeep of the gateway, but these costs are negligible to most if not all
commercial Web sites.
Amici submit that while this method is not warranted for the vast majority
of most commercial web sites which do not sell pornography, it may very well
be appropriate and desired by those companies which wish to protect children
from harmful material and can segregate their limited amount of such
material to different web pages. For example, if the Web site operator for
OBGYN.net chose to allow the posting of sexually explicit portions of sex
education tapes which a doctor or medical organization made available for
sale, they could easily segregate such depictions on a separate web page
which utilized the full use of a merchant account to check, not only to
verify the number, but make sure that the viewer had sufficient means
available to purchase the materials. Such utilization would, amici submit,
make sense since it would provide a high level of protection for minors
while not prohibiting individuals who were genuinely interested in such
material.13

"APPENDIX A"

A. 2 Authorization Only Accounts14

These accounts are identical to the above merchant accounts with the
exception that these accounts are designed for the pre-authorization process
only, thus they never do reach settlement or the charges associated with
settlement. This type of account is used most often by the telemarketing
industry and the pay per minute telephone services (i.e. psychic hotlines,
dial-a-porn, sports score services, etc.).
The typical scenario for this method of credit card number use is that a
telemarketing company will use its authorization only merchant account to
obtain authorization from the quickest of the credit card networks (usually
MasterCard) and then settle the transaction on a separate merchant account
with a cheaper credit card network (usually Visa).15 In this way, the
merchant can get the quickest authorization while paying the lowest discount
rate. While this method may, like the use of a merchant account, not be
appropriate in every instance, Web site operators who have little in the way
of material which is harmful to minors and seek to provide a high level of
protection to minors may prefer to use this method.

A. 3 Luhn Check Algorithm

In the Plaintiffs' testimony at the T.R.O. hearing and in both their
depositions and affidavits, they rely heavily on their inability or
unwillingness to comply with COPA, due to their perception that the Act
requires verification of a credit card by each visitor to the site. Section
231 (c)(1)(A), however, actually allows a full defense "by requiring use of
a credit card" by the visitor. That subsection does not actually mandate
verification or authorization by the site. As discussed earlier in this

"APPENDIX A"

Brief, this position is not consistent with the language of the Act, which
lists other affirmative defenses available to the Plaintiffs, as well.
However, amici recognizes that the merchant account and possibly even the
authorization only merchant account methods may be too costly for the
smallest of commercial Web sites, but at the same time, call to the
attention of the Court the existence of another viable mechanism available
to commercial Web sites for verifying credit card numbers.
This mechanism
is Luhn Check Algorithm software (also known as Mod-10 algorithm checks).
To date this method has not been suggested to the court by either the
Plaintiffs or the Defendant. We believe that this mechanism could offer the
Court an opportunity to find COPA constitutional.
The Luhn Check Algorithm was first formulated by a group of mathematicians
in the late 1960's.16 It was shortly thereafter adopted by the credit card
industry as a method for generating the checksum digit of credit card
numbers. This algorithm is in the public domain and has been used for a
number of years as a method for verifying credit card numbers.
Any
commercial Web site, including the Plaintiffs', could purchase such software
utilizing the Luhn algorithm to verify credit cards numbers. In fact, as
will be discussed below, there are several programs available from software
companies that implement the Luhn Algorithm Check. The majority of these
programs are marketed specifically for small businesses that want to accept
credit card numbers, but cannot afford a merchant account.
This software subjects the credit card number to a test to determine if the
number is consistent with the format of the standard Visa or MasterCard
number. The format for a credit card number is as follows: (1) the first

digit identifies the credit card type (for example: Visa or MasterCard), (2)
the middle digits are the Bank and Customer identifiers, and (3) the last
digit is the checksum digit which is calculated by the Luhn Algorithm. The
verifying software determines if the first digit matches one of the major
credit card associations, if the middle digits are of the same quantity and
type as those used to identify banks and customers, and if the last digit
matches the checksum calculated by the algorithm. Software utilizing this
algorithm is virtually full proof in verifying that a number matches the
formula used by the credit card companies.17 Not only do small businesses
use this software, but, as stated previously, many clearing houses which
process credit card transactions also use this algorithm to weed out bad
numbers before processing a credit card number for authorization.18
This software is typically found as shareware or freeware from software
dealers on the World Wide Web. Induction Software, Inc., offers a version
called the "Credit Card Verifier 1.0" on its Web site, inductionsoftware.com
(copy in Appendix D). This is a freeware program that is available for use
in both Java and Visual Basic Web site development. Induction claims the
following in its advertisement, "[p]erfect for small businesses that want to
take credit cards over the Internet but don't want to pay for expensive real
time verification. The chance of someone actually guessing a real credit
number, without knowing the algorithm, is fairly slim."19 This program is
also advertised by DaveCentral.com (copy in Appendix D). The software
company, Softseek, offers a shareware program authored by Mr. Hassan Fehik
of Donia Software called the "CardCheck ActiveX Control." (Copy in Appendix

"APPENDIX A"

D.) This program costs $20 and is available for Visual Basic development.
A search on any search engine uncovers several other offers for software
programs that use the Luhn Check Algorithm for verifying credit cards.
The parties have been silent as to this method for compliance with the Act.
This silence is disturbing, since the Luhn Check Algorithm gives the
Plaintiffs a free to nominal cost method for verifying credit cards numbers,
without incurring the expense of a merchant account or authorization only
account. It is critical to note here that the only cost associated with
this software is the initial purchase price of less than twenty dollars.
There is never a per transaction fee for use the algorithm to verify a
credit card number. As demonstrated above, even if Plaintiffs choose to
proceed with a merchant account for their sales, they may also verify credit
card numbers given them by prospective viewers by testing the numbers with
the Luhn Check Algorithm which is extremely accurate in identifying invalid
credit card numbers, widely used, and exceedingly inexpensive.
In contrast to Plaintiffs' efforts to rely on allegations and opinion, these
amici submit that the algorithm method could satisfy the Act because it
could allow Web site operators to have "restricted access by minors" ("most
juveniles" except "the most enterprising and disobedient") as a good faith
defense under Section 231 (c) (1) (A) or (C). Use of a math algorithm, if
shown to the satisfaction of the Court to screen out almost all fake credit
card numbers that a minor could make up, would, as much as the real number
stolen from a parent that lets a minor into a site, exclude and make access
to teaser pornography all but impossible for almost all children and impose
an incidental burden on adults with real card numbers.

“APPENDIX A”

Such an algorithm may provide a high degree of expectation that persons seeking access to their Web site are providing credit card numbers which are verifiable as such. Such a good faith effort to screen out unrestricted visits by minors to those pages of a Web site containing the pornographic images is all the Act requires.20 Because it is possible for all or virtually all commercial Web sites to comply with the Act in such a manner, which is reasonable, minimally burdensome, and essentially deminimus in cost. If so found by the Court, either on its own examination of the witnesses or by requiring submission of evidence and arguments to address this issue, this Court has the ability to interpret the Act as satisfied, if this technology or something similar were used. Amici urge this Court to examine and consider approving by construction such an available and feasible measure to protect children from material which is harmful and obscene as to them.

Amici submit that Plaintiffs have asked this Court for an extraordinary remedy without factual support that they cannot comply with COPA's requirements. Plaintiff's have not shown that they have attempted to comply but failed, rather that they believe that such efforts will be futile.

Lastly, as demonstrated by amici, there exists a technology which we submit meets the test and which they have not attempted to use, research, or inform this Court. While their failure to inform this Court may have resulted from their lack of knowledge about verification, authorization, or number checking technologies or their determination that doing any of it will interfere with their choices on how to do business, amici submit that their

lack of knowledge is insufficient to show a fault in the statute and
speculation over whether using verification or number checking algorithms
will interfere with their business are likewise no factual basis to strike
the new law. Plaintiffs should be required to do more before this Court is
asked to issue a preliminary injunction against the Act. Therefore, these
amici respectfully urge this Honorable Court to deny Plaintiffs' motion.
The safety of children is simply too important for this Court to base its
decision on such an incomplete and speculative record.

CONCLUSION

Your Congressional amici submit that these principles should guide this
District Court in reviewing COPA and that the constructions and
interpretations of the United States Supreme Court, the Virginia Supreme
Court, and the U.S. Courts of Appeals decisions referenced in the Committee
Report and discussed below, are equally applicable to the scope and
compliance questions posed in this litigation. Such decisions were
considered binding and applicable precedent in the passage of the Child
Online Protection Act and would be binding upon any prosecution under the
Act in any federal district by the Department of Justice or a United States
Attorney.

As stated in the COMMITTEE REPORT, particularly at 13-14 and 27-28,
Congress relied upon the disposition of these cases and of federal
challenges to state HTM laws as applicable precedent for the required scope
of the federal harmful to minors law as limited to sexually explicit "adult"
pornography and that the anticipated restrictions on its commercial sale and
display be reasonably good faith measures that are feasible under available

technology that would protect "most juveniles" except "the most enterprising and disobedient young people".

As stated above, the guidance of the historical precedent and limitations recognized by Congress should be adopted by this Court and thus avoid any real or substantial overbreadth or vagueness feared or alleged for litigation purposes by the Plaintiffs or their amici in this matter. This Court would thus be the forum that protects the rights of those before it and all those who are not before it, since both groups will benefit from the constitutionally limiting focus and clarifying gloss put on the law by an authoritative declaratory judgment by this District Court that recognizes, saves, and declares COPA to be valid and enforceable.

Such reasonable judicial limitation of the law should not, therefore, be disregarded in determining the validity of any arguably hypothetical overbreadth or vagueness as perceived by a challenger of the Act, as is the case now before this Court.

Respectfully submitted,

Bruce A. Taylor

J. Robert Flores
Co-counsel for Amici Curiae,
Members of Congress

January 14, 1999

CERTIFICATE OF SERVICE

Two copies of the foregoing Motion for Leave to File a Brief Amicus Curiae and Brief of Members of Congress as Amici Curiae in Opposition to the Motion for Preliminary Injunction were served by delivery to Federal Express on this 13th of January for delivery on the morning of January 14, 1999, to the counsel for the parties:

"APPENDIX A"

Ann Beeson, Esq.
Christopher Hansen, Esq.
ACLU Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Theodore Hirt, Esq.
Karen Stewart, Esq.
DOJ Civil Division
901 E Street, N.W.
Washington, D.C. 20530
(202) 514-2849

A copy hereof is also being mailed to local counsel for the ACLU Plaintiffs, Stefan Presser, Esq., and to counsel for amici curiae, Ass'n of American Publishers, et al., Marguerite S. Walsh, Esq. and R. Bruce Rich, Esq.

So certified,

Bruce A. Taylor
January 13, 1999

Other Speech Issues

The Center For Democracy And Technology
1634 Eye Street NW, Suite 1100
Washington, DC 20006
(v) +1.202.637.9800 (f) +1.202.637.0968
info@cdt.org
For more information, write **webmaster@cdt.org**

http://www.cdt.org/http://www.cdt.org/