

TRAPPING “MOUSETRAPPERS” WITH THE TRUTH IN DOMAIN NAMES ACT OF 2003: THE CONSTITUTIONALITY OF PROHIBITING “TYPOSQUATTING” ON THE INTERNET

INTRODUCTION

In 2003, Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT)¹ in order to “restore the government’s ability to prosecute child pornography offenses successfully.”² The PROTECT Act was promulgated in response to the Supreme Court’s invalidation of its prior efforts to produce child-protection legislation,³ and it includes numerous measures intended to supplement and enhance already existing child-protection initiatives.⁴ Included among these lofty legislative efforts is the Truth in Domain Names Act,⁵ enacted to “punish those who use misleading domain names to attract chil-

1. The PROTECT Act of 2003, Pub. L. No. 108-21, 17 Stat. 650-95 (codified in scattered sections of 18, 28, and 42 U.S.C.).

2. S. REP. NO. 108-2, at 1 (2003).

3. In 1997, the Supreme Court struck down the Communications Decency Act of 1996 (CDA), 47 U.S.C.A. § 223 (West 1996), *invalidated* by *Reno v. ACLU*, 521 U.S. 844 (1997). In *United States v. American Library Ass’n*, 539 U.S. 194, 196 (2003), the Court limited the application of the Children’s Internet Protection Act (CIPA) of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (to be codified at 20 U.S.C. § 7001). And, in 2004, the Court struck some provisions of the 1998 Child Online Protection Act (COPA), 47 U.S.C. § 231 (2000), *invalidated in part* by *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

4. Senator Orrin Hatch acclaimed the PROTECT Act, stating that the measures would “enhance existing laws, investigative tools, criminal penalties and child crime resources in a variety of ways.” 149 CONG. REC. S5115 (Apr. 10, 2003) (statement of Sen. Hatch).

5. Section 521 of the PROTECT Act provides:

(a) Whoever knowingly uses a misleading domain name on the Internet with the intent to deceive a person into viewing material constituting obscenity shall be fined under this title or imprisoned not more than 2 years, or both.

(b) Whoever knowingly uses a misleading domain name on the Internet with the intent to deceive a minor into viewing material that is harmful to minors on the Internet shall be fined under this title or imprisoned not more than 4 years, or both.

(c) For the purposes of this section, a domain name that includes a word or words to indicate the sexual content of the site, such as “sex” or “porn”, is not misleading.

(d) For the purposes of this section, the term “material that is harmful to minors” means any communication, consisting of nudity, sex, or excretion, that, taken as a whole and with reference to its context—

(1) predominantly appeals to a prurient interest of minors;

(2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(3) lacks serious literary, artistic, political, or scientific value for minors.

(e) For the purposes of subsection (d), the term “sex” means acts of masturbation, sexual intercourse, or physical [sic] contact with a person’s genitals, or the condition of human male or female genitals when in a state of sexual stimulation or arousal.

117 Stat. 686 (to be codified at 18 U.S.C. § 2252B).

dren to sexually explicit Internet sites.”⁶ Congress instituted the Act as a response to the rapidly evolving practice of “typosquatting,” wherein common misspellings of popular web sites are preemptively registered in order to “profit by exploiting weaknesses in the domain name system.”⁷

Typosquatters use misspellings or alterations of legitimate domain names to trick unsuspecting Internet users into viewing unrelated advertisements and possibly other websites.⁸ They also often use a method referred to as “mousetrapping,” where clicking the back button or attempting to close the unwanted screen only prompts several more websites to open, “barraging the user with images and data they did not intend to receive.”⁹ With its enactment of the Truth in Domain Names Act, Congress targeted those typosquatters who intentionally divert Internet users to unrelated sites which are pornographic in nature,¹⁰ specifically where those diversions lead unsuspecting children to pornographic sites and subject them to material which is considered “harmful to minors.”¹¹

Part I of this Note outlines the development of obscenity laws and the challenges posed therein by the emergence of the Internet. Further, it provides a context which enables the reader to understand the purposes behind the Truth in Domain Names Act. Part II details the first and only prosecution thus far under the Truth in Domain Names Act which resulted in the conviction of John Zuccarini, an individual whose cybersquatting and typosquatting practices are infamous. Finally, Part III discusses the various constitutional concerns that arise under the Act and concludes that, while there are legitimate alternative arguments, Congress’ interest in protecting individuals—specifically children—from being unwittingly exposed to obscene materials on the Internet via misleading domain names ultimately trumps the free speech interests voiced on behalf of those who would create such domain names.

I. HISTORY AND CONTEXT OF THE TRUTH IN DOMAIN NAMES ACT

A. *Obscenity and the First Amendment: What Speech is Protected?*

The notion of censorship of obscene materials was first documented in the late sixteenth century, when European historian Philippe Aries observed that “certain pedagogues . . . refused to allow children to be given indecent books any longer.”¹² However, it was not until three centuries later that the

6. 149 CONG. REC. 1363 (Feb. 26, 2003) (statement of Rep. Pence).

7. Christopher G. Clark, Note, *The Truth in Domain Names Act of 2003 and a Preventative Measure to Combat Typosquatting*, 89 CORNELL L. REV. 1476, 1480 (2003).

8. *See id.*

9. Sealed Compl. at 4 n.2, *United States v. Zuccarini*, 8 (S.D.N.Y. Aug. 29, 2003), available at <http://news.findlaw.com/cnn/docs/cyberlaw/uszuccarini82903cmp.pdf>.

10. *Id.*

11. *See* 18 U.S.C.A. § 2252B(d) (Supp. 2003).

12. PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* 109 (1962); *see also* THE FREE EXPRESSION POLICY PROJECT, *FACT SHEET ON SEX AND CENSORSHIP* [hereinafter

concern for corruption of the young prompted widespread governmental suppression of sexual materials.¹³

In 1868 the English courts, in the case of *Regina v. Hicklin*,¹⁴ defined obscenity subject to criminal sanctions as turning on “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”¹⁵ This standard of obscenity came to be known as the *Hicklin* Standard and was soon adopted by American courts.¹⁶ Anthony Comstock, a special agent of the U.S. Post Office and head of the New York Society for the Suppression of Vice, was the ringleader of the anti-obscenity movement in the United States.¹⁷ In 1873, he persuaded Congress to expand the federal obscenity laws.¹⁸ The new law was called the “Comstock law” and banned the use of the mail for the sending of any “obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character.”¹⁹ The Comstock law also prohibited the sending of “any article or thing designed or intended for the prevention of conception or procuring of abortion.”²⁰

Throughout the next few decades, there was some disagreement among the federal circuit courts over whether the *Hicklin* Standard correctly defined obscenity.²¹ The Supreme Court did not address the issue until 1957.²² In *Roth v. United States*,²³ with an opinion authored by Justice Brennan, the Court held that the First Amendment does not protect sexual materials which have a predominantly prurient appeal to the average adult and that utterly lack “redeeming social importance.”²⁴

Justice Brennan’s “utterly without redeeming social importance” standard served only to confuse the lower courts, who continued to struggle

SEX AND CENSORSHIP], <http://www.fepproject.org/factsheets/sexandcensorship.html> (last visited Jan. 11, 2006).

13. See MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP, AND THE INNOCENCE OF YOUTH 18-26 (2001); see also SEX AND CENSORSHIP, *supra* note 12.

14. *Regina v. Hicklin*, (1868) 3 L.R.Q.B. 360.

15. *Id.* at 371.

16. See SEX AND CENSORSHIP, *supra* note 12.

17. *Id.*

18. *Id.*; see also *Indecent Exposure: Oversight of Department of Justice’s Efforts to Protect Pornography’s Victims: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) [hereinafter *Hearings on Pornography Victim Protection*] (statement of Lawrence E. Maxwell, United States Postal Inspection Service, Inspector in Charge, Fraud and Dangerous Mail Investigations), available at http://www.judiciary.senate.gov/print_testimony.cfm?id=961&wit_id=2724.

19. An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, ch. 258, § 2, 17 Stat. 598, 599 (1873) (current version at 18 U.S.C. § 1461 (2000)).

20. *Id.*

21. SEX AND CENSORSHIP, *supra* note 12 (“Some judges questioned *Hicklin*’s underlying assumption: that the law’s censorship standard should turn on what society deems inappropriate for ‘those whose minds are open to . . . immoral influences’—meaning primarily adolescents and children.”). Judge Learned Hand wrote in *United States v. Kennerley*, that American authors, publishers, and readers should not have to “reduce our treatment of sex to the standard of a child’s library in the supposed interest of a salacious few.” 209 F. 119, 121 (S.D.N.Y. 1913).

22. SEX AND CENSORSHIP, *supra* note 12.

23. *Id.*; *Roth v. United States*, 354 U.S. 476, 483-87 (1957).

24. *Roth*, 354 U.S. at 484.

with the doctrine's application.²⁵ In 1973, the Supreme Court again addressed the obscenity issue in *Miller v. California*,²⁶ this time it providing a three-part test for constitutionally unprotected obscenity.²⁷ The *Miller* Test posed three questions:

1. Does the material depict or describe specific sexual or excretory activities or organs in a "patently offensive" manner?
2. Would the average person, applying "contemporary community standards," find that the material, taken as a whole, appeals predominately to a "prurient" interest in sexual or excretory matters?
3. Does the material, taken as a whole, lack "serious literary, artistic, political, or scientific value?"²⁸

The *Miller* Test defines constitutionally unprotected obscenity today. It has been applied to a wide variety of cases including nude dancing, photography, and public funding.²⁹

In the arena of constitutionally unprotected speech, there are three basic classes of unprotected pornography prohibited by both federal and state law. They are: obscenity, child pornography, and pornography harmful to minors.³⁰ In his testimony before the Senate Judiciary Committee, Bruce Taylor, the president and chief counsel of the National Law Center for Children and Families, described the three categories as follows:

Obscenity (which may include all hard-core adult pornography) is not protected by the First Amendment and is unlawful to produce or sell under the laws of most States and is a felony under Federal laws to transmit or transport by any facility of interstate or foreign commerce.

Obscene pornography is unprotected even for "consenting adults" and the Supreme Court upheld the right of Congress to declare it contraband and prohibit the use of any means or facility of interstate or foreign commerce to move or ship any obscene materials. Under

25. *Id.*

26. *Miller v. California*, 413 U.S. 15, 24 (1973).

27. *Id.*

28. SEX AND CENSORSHIP, *supra* note 12.

29. *Id.*; see also *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585, 588 (1998) (holding that general standards of decency, as required by a federal law passed in 1990, were not simply advisory, but mandatory, and that "Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding," and that Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest").

30. *Hearings on Pornography Victim Protection*, *supra* note 18 (statement of Bruce A. Taylor, President and Chief Counsel, National Law Center for Children and Families), available at http://judiciary.senate.gov/testimony.cfm?id=961&wit_id=2726.

existing U.S. Code sections, traffic in obscenity is a felony offense
....

The Supreme Court has consistently held that obscenity is not protected speech under the Constitution and upheld the power of Congress and State Legislatures to prohibit obscenity from the streams of commerce. "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." This is true even for "consenting adults."

Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles.

The "Miller Test" was announced by the Court to provide the legal guidelines for determining obscenity under both federal and state laws.

Child Pornography consists of an unprotected visual depiction of a minor child under age 18 engaged in actual or simulated sexual conduct, including a lewd or lascivious exhibition of the genitals. It is a crime under Federal and State laws to knowingly make, send, receive, or possess child pornography. In 1996, 18 U.S.C. § 2252A was enacted to include "child pornography" that consists of a visual depiction that "is or appears to be" of an actual minor engaging in "sexually explicit conduct". Section 2252A was upheld as Congress intended it to apply to computer generated realistic images that cannot be distinguished from actual photos of real children in *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999), and *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999), but the Supreme Court declared the statute invalid as applied to child pornography that is wholly generated by means of computer in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Congress then amended that law in the PROTECT Act of 2003, S.151, which also enacted a new section 18 U.S.C. § 1466A to give greater penalty for obscene child pornography.

Pornography Harmful To Minors (which may include soft-core pornography) is unlawful to knowingly sell or display to minor children under State laws and under federal law as enacted in the Child Online Protection Act of 1998, (COPA, 47 U.S.C. § 230), even if the material is not obscene or unlawful for adults. "HTM/OFM" pornography is known as "variable obscenity" or what is "obscene for minors". Under the "Millerized-Ginsberg Test," pornography is "Harmful To Minors" or "Obscene For Minors" when it meets the following three prong test, as defined by

statute and properly construed by the courts and judged in reference to the age group of minors in the intended and probable recipient audience:

(1) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion (as judged by the average person, applying contemporary adult community standards with respect to what prurient appeal it would have for minors in the intended and probable recipient age group of minors); and

(2) depicts or describes, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals (as judged by the average person, applying contemporary adult community standards with respect to what would be patently offensive for minors in the intended and probable recipient age group of minors); and

(3) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors (as judged by a reasonable person with respect to what would have serious value as to minors in the age groups of the intended and probable recipient audience of minors).³¹

The Truth in Domain Names Act provides an umbrella of prohibition, including prohibitions against exposing unsuspecting Internet users to images of obscenity, child pornography, or pornography considered harmful to minors. Congress seemingly has created a far-reaching criminal statute that enables prosecutors to pursue a large number of typosquatters, leaving few options for those who attempt to pursue such illegal and immoral ends.

B. Obscenity, the First Amendment, and the Internet: The Online Pornography Evolution Brings About Significant Challenges

The Internet is indubitably a technological milestone. It provides individuals with a means of communication and accessibility to information that was unimaginable twenty years ago.³² The Internet “enables the enrichment and improvement of human functioning in many areas, including health, education, commerce, and entertainment.”³³ It offers “unparalleled educational opportunities for our children.”³⁴

31. *Id.* (citations omitted) (emphasis added).

32. *Online Pornography: Closing the Door on Pervasive Smut: Hearing on Online Pornography Before the H. Comm. on Energy and Commerce, Subcomm. on Commerce, Trade, and Consumer Protection*, 108th Cong. 13 (2004) (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Commission) [hereinafter Beales Testimony], available at <http://energycommerce.house.gov/108/Hearings/05062004hearing1264/Beales1969.htm>.

33. Azy Barak & Storm A. King, Editorial, *The Two Faces of the Internet: Introduction to the Special Issue on the Internet and Sexuality*, 3 *CYBERPSYCHOL. & BEHAV.* 517, 517 (2000).

34. *Hearings on Pornography Victim Protection*, *supra* note 18 (testimony of Mary Beth Buchanan, U.S. Attorney, W.D. Pa.), available at http://www.judiciary.senate.gov/print_testimony.cfm?id=961&wit_id=2725.

Unfortunately, the Internet also has a dark side.³⁵ Fraud artists have proven exceptionally skilled in exploiting this new and evolving technology for personal gain.³⁶ They are the ultimate “early adopters” of new technology, and they have seized the opportunity to use the Internet as a ready vehicle of profit by deception.³⁷ In his testimony before the Senate Committee on the Judiciary,³⁸ John Malcolm, Deputy Assistant Attorney General of the U.S. Department of Justice, Criminal Division, summarized the problem:

While there is no doubt that the Internet provides access to a highly diverse network of educational and cultural content, it is also responsible for the proliferation of adult and child pornography and obscene material. Indeed, offensive material that used to be largely unavailable to average citizens and children is now largely unavoidable. Far from being hidden in brown paper bags behind the counters of disreputable stores, offensive material is now readily available to anyone with an Internet connection within a matter of minutes with a few clicks of a computer mouse, accessed oftentimes by unsuspecting children and by adults who had no intention to seek such material and no desire to view it.

Over the last several years, online pornographers have used various technological and marketing techniques designed to trick both adults and children into viewing their offensive material. One favorite trick of online pornographers is to send pornographic spam email. Another is to utilize misleading domain names or deceptive metatags (which is a piece of text hidden in the Hypertext Markup Language (HTML) used to define a web page) which can mislead search engines into returning a pornographic web page in response to an innocuous query. As a result of these deceptive metatags, searches using terms such as “toys,” “water sports,” “Olsen Twins,” “Britney Spears,” “beanie babies,” “bambi,” and “doggy” can lead to pornographic websites. Indeed, it has been estimated that ninety percent of children between the ages of 8 and 16 have been exposed to obscene material on the Internet. Moreover, once an unsuspecting person is on a pornographic website, online pornographers utilize other techniques such as “mousetrapping” to prevent that individual from exiting these websites and stopping the assault of offensive material.

35. *Id.*

36. Beales Testimony, *supra* note 32.

37. *Id.*

38. *Hearings on Pornography Victim Protection*, *supra* note 18 (testimony of John G. Malcolm, Deputy Assistant Attorney Gen., Criminal Division, U.S. Department of Justice), *available at* http://www.judiciary.senate.gov/print_testimony.cfm?id=961&wit_id=2559.

The proliferation of this material and the desire by pornographers to differentiate themselves in a highly-competitive market have prompted pornographers to produce ever-more offensive material. In addition to child pornography, pornography depicting and glorifying bestiality, scatology, and rape are readily available and aggressively marketed.

The harmful effects of obscene material and the victims of this sordid industry are very real. The images produced promote the idea of sex without consequences, such as unwanted pregnancies or sexually-transmitted diseases. The victims, usually women, are objectified and demeaned, presented as completely non-discriminating with respect to the number or type of sexual partners they have and as being aroused and gratified by being beaten, tortured or raped. Very few women grow up dreaming of being filmed having sex with an animal or being raped and beaten by multiple partners, and very few who see these powerful images and absorb the antisocial values they portray can remain unaffected by them. The negative, lasting impact that this has on the participants who are in these images, and on the attitudes that are formed by the predominantly-male viewers who see them, is incalculable.³⁹

Indeed, the evolution of the Internet over the past twenty years has created an unprecedented increase in the availability of sexually explicit material.⁴⁰ It has allowed “anonymous, cost-free, and unfettered access to an essentially unlimited range of sexually explicit texts, still and moving images, and audio materials.”⁴¹ In 2003, there were more than two-hundred and fifty million pornographic webpages on the Internet.⁴² Moreover, it has been estimated that Internet pornography will be a \$7 billion industry by 2008.⁴³ Nine out of every ten children have viewed pornography online, and most viewings are unintentional and occur while the children are online doing homework.⁴⁴ “Large numbers of young people encounter sexual solicitations they do not want and sexual material they do not seek. In the most serious cases, they are targeted by offenders seeking children for sex.”⁴⁵ Sexual predators use pornographic images, of both children and

39. *Id.*

40. William A. Fisher & Azy Barak, *Internet Pornography: A Social Psychological Perspective on Internet Sexuality*, 38 J. SEX RES. 312, 312 (2001).

41. *Id.*

42. *Hearings on Pornography Victim Protection*, *supra* note 18 (statement of Sen. Orrin Hatch), available at http://judiciary.senate.gov/member_statement.cfm?id=961&wit_id=2628.

43. *Id.*

44. *Id.*

45. *Hearings on Pornography Victim Protection*, *supra* note 18 (statement of J. Robert Flores, Administrator, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs), available at http://judiciary.senate.gov/print_testimony.cfm?id=961&wit_id=2723 (last visited Jan. 12,

adults, to break down the inhibitions of youths and desensitize them to the sexual acts as part of their scheme to lure and seduce them into sexual exploitation.⁴⁶ Additionally, the dissemination of obscene material to both children and adults through manipulation of common and well-known website names, particularly with children who are more likely to misspell such domain names, serves as “the commercial porn industry’s vehicle to create a new generation of pornography ‘junkies.’”⁴⁷ Because the commercial pornography industry pays them for each hit on a particular website, owners of misleading domain names can potentially earn millions of dollars per year by exposing unwitting Internet users to pornographic web images.⁴⁸

C. Congress Fights Back: A Trilogy of Anti-Obscenity Efforts

1. The Communications Decency Act

In response to these concerns, Congress enacted the Communications Decency Act (CDA) in 1996.⁴⁹ The CDA prohibited the knowing transmission over the Internet of obscene or indecent messages to any recipient under eighteen years of age.⁵⁰ It also forbade any individual from knowingly sending or displaying on the Internet certain “patently offensive” material in a manner available to persons under eighteen years of age.⁵¹ Specifically, the CDA prohibited “any comment, request, suggestion, proposal, image, or other communication that, in context, depict[ed] or describ[ed], in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.”⁵²

For those convicted under the CDA, two affirmative defenses were available.⁵³ Individuals who took “‘good faith, reasonable, effective, and appropriate actions’ to restrict minors from accessing obscene, indecent, and patently offensive material over the Internet” could use such efforts as an affirmative defense to any allegations of a CDA violation.⁵⁴ Also, an affirmative defense was available to those who restricted minors’ access to

2006).

46. *Id.* (“Cloaked in the anonymity of cyberspace, sex offenders can capitalize on the natural curiosity of children and seek victims with little risk of detection.”). Flores also provided this description: [C]hild pornography depicts the sexual assault of children and is often used by child molesters to recruit, seduce, and control future victims. However, predators do not use child pornography in all cases, but instead, send obscene, possibly adult, pornography to children. Predators employ these same tactics to break down a child’s barriers and desensitize them as a means to lure and seduce them into sexual exploitation.

Id.

47. *Id.*

48. *Id.*

49. *Ashcroft v. ACLU*, 535 U.S. 564, 567 (2002).

50. *Id.*; 47 U.S.C.A. § 223(a) (West 1996), *invalidated by Reno v. ACLU*, 521 U.S. 844 (1997).

51. *Ashcroft*, 535 U.S. at 567; 47 U.S.C.A. § 223(d).

52. *Ashcroft*, 535 U.S. at 567 (quoting 47 U.S.C.A. § 223(d)(1)) (alterations in original).

53. *Id.* at 568; 47 U.S.C.A. § 223(e)(5).

54. *Ashcroft*, 535 U.S. at 568 (citing 47 U.S.C.A. § 223(e)(5)(A)).

obscene Internet material “by requiring the use of a verified credit card, debit account, adult access code, or adult personal identification number.”⁵⁵

However, in *Reno v. American Civil Liberties Union*,⁵⁶ the Supreme Court struck down the CDA.⁵⁷ The *Reno* Court held that the CDA ran afoul of the First Amendment because it “lacked the precision that the First Amendment requires when a statute regulates the content of speech” since, “[i]n order to deny minors access to potentially harmful speech, the CDA effectively suppress[ed] a large amount of speech that adults ha[d] a constitutional right to receive and to address to one another.”⁵⁸ The Court considered three factors in overturning the statute.⁵⁹ First, “existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults.”⁶⁰ Second, the Court held that the CDA’s breadth of coverage was entirely unprecedented,⁶¹ covering “large amounts of nonpornographic material with serious educational or other value” because the CDA did not define the terms “indecent” and “patently offensive.”⁶² Third, the Court held that neither affirmative defense set forth in the CDA “constitute[d] the sort of ‘narrow tailoring’ that [would] save an otherwise patently invalid unconstitutional provision.”⁶³

2. *The Child Online Protection Act*

After the Supreme Court struck down the CDA, Congress attempted to create a new statute that could withstand constitutional challenges, enacting the Child Online Protection Act (COPA).⁶⁴ COPA prohibited any person from “knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors.”⁶⁵

Congress limited the scope of COPA’s application in several ways, apparently in response to the Supreme Court’s objections to the breadth of the CDA’s coverage.⁶⁶ First, COPA only applied to material displayed on the World Wide Web, while the CDA had applied to communications over the Internet as a whole, including emails.⁶⁷ Second, COPA covered only com-

55. *Ashcroft*, 535 U.S. at 568 (citing 47 U.S.C.A. § 223(e)(5)(B)).

56. *Reno*, 521 U.S. 844 (1997).

57. *Id.* at 874.

58. *Id.*

59. *Id.* at 876-82; *see also Ashcroft*, 535 U.S. at 568.

60. *Reno v. ACLU*, 521 U.S. 844, 876 (1997).

61. *Id.* at 877.

62. *Id.*

63. *Id.* at 882.

64. Pub. L. No. 105-277, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. § 231 (2000)).

65. 47 U.S.C. § 231(a)(1).

66. *Ashcroft*, 535 U.S. at 569.

67. *Id.*

munications that were “for commercial purposes.”⁶⁸ Third, while the CDA prohibited “indecent” and “patently offensive” communications, COPA restricted only “material that is harmful to minors,” a narrower category⁶⁹ modeled after the three-prong test for obscenity set forth in *Miller v. California*.⁷⁰

However, while COPA seemed to offer more certainty than the CDA, the Supreme Court once again dismissed Congress’ efforts and voided the statute in *Ashcroft v. American Civil Liberties Union*.⁷¹ The Court held that COPA was unconstitutional as a content-based speech restriction because it limited the access of adults to Internet sites considered “harmful to minors,” and because workable, yet less restrictive alternatives to COPA’s limitations existed.⁷²

3. *Third Time Is a Charm: Congress’ Enactment of the Truth in Domain Names Act of 2003*

President George W. Bush signed the PROTECT Act into law on April 30, 2003.⁷³ Lawmakers placed the bill on the legislative fast-track in order

68. *Id.* at 570 n.3 (quoting 47 U.S.C. § 231(e)(2)(A), which states that “A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.”). Specifically, COPA defines the term “engaged in the business” to mean someone who

makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course such person’s trade or business, with the objective of earning a profit as a result of such activities.

Id. (quoting 47 U.S.C. § 231(e)(2)(B)).

69. *Ashcroft*, 535 U.S. at 570.

70. COPA defines “material that is harmful to minors” as any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6).

71. 542 U.S. 656 (2004). In 2002, a district court in the Eastern District of Pennsylvania granted a preliminary injunction against the United States sought to Internet-content providers and civil liberties groups, alleging that COPA violated the First Amendment. *Ashcroft v. Civil Liberties Union*, 31 F. Supp. 2d 473 (E.D. Penn. 2002). On appeal, the Third Circuit Court of Appeals affirmed. 217 F.3d 162 (3d Cir. 2002). The Supreme Court granted certiorari, vacated the judgment, and remanded the case to the Third Circuit. 535 U.S. 564 (2002). On remand, the Third Circuit again affirmed the holding of the district court, stating that the COPA unconstitutionally prohibited adult access to protected speech under the First Amendment. 322 F.3d 240 (3d Cir. 2003), *cert. granted*, 540 U.S. 944 (2003), *aff’d and remanded by* 542 U.S. 656 (2004).

72. *Ashcroft*, 542 U.S. at 698.

73. Ambika J. Biggs, *The PROTECT Act and the First Amendment*, FIRST AMENDMENT CENTER, Aug. 27, 2003, http://www.firstamendmentcenter.org/analysis.aspx?id=11865&SearchString=the_protect_act_and_the_first_amendment.

to expedite the enactment of child-protection measures.⁷⁴ The Act was created to protect against kidnapers and pedophiles in the wake of the national publicity garnered by the abduction of fifteen-year-old Elizabeth Smart in 2002 specifically in light of the contemporaneous Supreme Court decisions striking down key portions of prior legislative efforts.⁷⁵ The Truth in Domain Names Act was added as an amendment to the PROTECT Act, which passed 98-0 in the Senate and 400-25 in the House.⁷⁶

The Truth in Domain Names Act provides that “[w]hoever knowingly uses a misleading domain name on the Internet with the intent to deceive a person into viewing material constituting obscenity shall be fined . . . or imprisoned not more than 2 years, or both.”⁷⁷ It further provides that “[w]hoever knowingly uses a misleading domain name on the Internet with the intent to deceive a minor into viewing material that is harmful to minors on the Internet shall be fined . . . or imprisoned not more than 4 years, or both.”⁷⁸ Specifically, the Act defines material that is “harmful to minors” as

any communication, consisting of nudity, sex, or excretion, that, taken as a whole and with reference to its context—

- (1) predominantly appeals to a prurient interest of minors;
- (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (3) lacks serious literary, artistic, political, or scientific value for minors.⁷⁹

The Act also defines the term “sex” as consisting of any “acts of masturbation, sexual intercourse, or physcial [sic] contact with a person’s genitals, or the condition of human male or female genitals when in a state of sexual stimulation or arousal.”⁸⁰ Additionally, the Act offers a “safe harbor” provision for those domain names which include “a word or words to indicate the sexual content of the site, such as ‘sex’ or ‘porn.’”⁸¹ Although its constitutionality has yet to be ruled upon, the legislation has already created a stir among those who advocate for the protection of children and those who advocate for free speech rights. A detailed discussion of the constitutionality issues raised by the Act is provided below in Part III.

74. *Id.*; see Truth in Domain Names Act, 18 U.S.C.A. § 2252B (West Supp. 2003).

75. Biggs, *supra* note 73.

76. *Id.*

77. 18 U.S.C. § 2252B(a).

78. *Id.* § 2252B(b).

79. *Id.* § 2252B(d).

80. *Id.* § 2252B(e).

81. *Id.* § 2252B(c).

The Act passed easily in both houses. However, it was received with some debate, primarily because of the haste in which it was passed and because of the lack of time it received on the floor.⁸² For instance, Senator Patrick Leahy of Vermont stated that the Act was “added as a floor amendment with no prior consideration in either body”⁸³ and expressed his concern over the constitutionality of the Act by stating that it might “unduly chill constitutionally-protected speech”⁸⁴ in failing to define the term “misleading.” Senator Leahy also voiced his concerns regarding the Act’s safe harbor provisions, stating that they are a “form of mandatory labeling of the site of a mainstream business, which includes material constitutionally protected as to adults, but which may be deemed inappropriate for some level of minors.”⁸⁵ Finally, he opined that to require the labeling of domain sites in this manner could create an “attractive nuisance” and generate more attention from children.⁸⁶ Nevertheless, Senator Leahy’s primary concern was the lack of debate surrounding the bill’s passage.⁸⁷

Despite the senator’s concerns, the bill passed the Senate 98-0, with two Senators not voting because they were absent.⁸⁸ The legislation’s drafter, Representative Mike Pence, described the law as follows:

[T]he very moment this conference report becomes law, not only will our children become safer from predators, but the Internet will become safer for our children, families, and teachers As we surf the Web for useful information about history or government or science . . . kids with the most innocent intentions will type in domain names which are harmless, but what pops up are sites with smut, profanity and pornography; and there was no law on the books to prevent that until today. With the Truth in Domain Names language in this legislation, we render those Web sites illegal; and anyone who uses a misleading domain name on the Internet to deceive a person into viewing material constituting obscenity can face fines of up to 2 years in prison; and if they mislead children, they

82. See 149 CONG. REC. S5137 (Apr. 10, 2003) (statements of Sen. Leahy).

83. *Id.* at S5147.

84. *Id.*

85. *Id.*

86. *Id.* Senator Leahy described his hesitancy about the law’s rapid passage as follows:

My uncertainty about the constitutionality of this provision is, of course, compounded by the fact that there is virtually no legislative record on it. It has never been introduced in the Senate, and received a grand total of 10 minutes of debate before being passed as a floor amendment in the House. And in case any judge is reading this and wondering, there was no discussion of this provision during the one afternoon that the conference committee actually met.

In recent years, Congress’s efforts to regulate protected speech on the Internet have not fared well in the Supreme Court It would not surprise me if the Court was especially dismissive of this current effort.

Id.

87. *Id.*

88. *Id.* at S5156-57.

can face 4 years in prison. The minute the President signs this bill, using a misleading domain name with the intent to deceive a child will become a criminal act.

. . . [T]his historic legislation will make our children measurably safer from those who would prey on them. Also, Congress can today make playing on the information superhighway much safer for our kids, and so they should.⁸⁹

II. CATCHING THE MOUSETRAPPER: JOHN ZUCCARINI, MILLIONAIRE BY "MISTAKE"

On February 26, 2004, the notorious typosquatter John Zuccarini was sentenced to two and a half years in prison for violation of the Truth in Domain Names Act,⁹⁰ specifically for his violation of 18 U.S.C. § 2252B(b).⁹¹ Zuccarini was the first to be prosecuted under the Act.⁹² According to the prosecution, Zuccarini, while operating from a hotel room in Hollywood, Florida, registered and used misleading domain names on the Internet to earn money by directing Internet users to websites which advertised, among other things, pornography.⁹³ Zuccarini, nicknamed the "Internet 'mouse-trapper,'" had registered more than nine thousand Internet sites that were close misspellings of popular sites for celebrities and retailers,⁹⁵ three thousand of which were variations of trademarked child-oriented titles such as

89. 149 CONG. REC. H3071 (Apr. 10, 2003) (comment of Rep. Pence).

90. Shari Claire Lewis, *Cyberspace Concerns: Typosquatting; Act May Apply to Misspelling Domain Names to Mislead Surfers*, N.Y.L.J., Sept. 14, 2004, at 5.

91. According to a statement by the office of James B. Comey, U.S. Attorney for the Southern District of New York, Zuccarini was charged for "taking advantage of children's common mistakes, and using that to profit by leading them by the hand into the seediest and most repugnant corners of cyberspace," and that Zuccarini's actions were "not clever but criminal." *Prosecutions; Online Pornography: First Arrest Made Under 2003 Truth in Domain Names Act*, 3 CYBERCRIME L. REP., Sept. 22, 2003, at 7, available at Westlaw, 3 No. 19 CYBER.

92. Press Release, U.S. Congressman Mike Pence, Pence Heralds First Prosecution Using Truth in Domain Names Law (Sept. 3, 2003), available at <http://johnshadegg.house.gov/rsc/word/Pence9803.doc>.

93. See Sealed Compl., *supra* note 9; see also Press Release, U.S. Attorney, S. Dist. of N.Y., "Cyberscammer" Sentenced to 30 Months for Using Deceptive Internet Names to Mislead Minors to X-Rated Sites (Feb. 26, 2004), [hereinafter U.S. Attorney Press Release Feb. 2004], available at <http://www.usdoj.gov/usao/nys/Press%20Releases/FEBRUARY04/zuccarini%20sentence%20pr.pdf>.

94. Daniel de Vise, *Luring Kids To Porn Websites Brings Prison Term*, MIAMI HERALD, Feb. 27, 2004, at 7B.

95. See Jeff Shields, *Internet Outlaw Pleads Guilty To 50 charges; His Abuse Of Domain Names Led Children To Internet Porn Sites. His Conviction Sets a Precedent*, PHILADELPHIA INQUIRER, Dec. 11, 2003, at A32; see also de Vise, *supra* note 94. Ben Edelman, a student fellow at Harvard's Berkman Center for Internet and Society, published a study profiling the many registrations of Zuccarini. Ben Edelman, *Large-Scale Registration of Domains with Typographical Errors*, <http://cyber.law.harvard.edu/people/Edelman/typo-domains> (last visited Jan. 12, 2006). Edelman reports that although the Federal Trade Commission issued a permanent injunction against Zuccarini in May 2002, Zuccarini still owns more than 8,000 misspelled domain names. *Id.*

Disney, Bob the Builder, and Teletubbies.⁹⁶ Almost all of the re-directive domain names led users to pornographic sites, such as www.Hanky-Panky-College.com and www.amaturevideos.nl.⁹⁷ Most of the advertisements were for free access to pornography and included images of hard-core pornography.⁹⁸ As described in the complaint, Zuccarini's activities in directing Internet users to websites depicting pornography were the subject of numerous consumer complaints,⁹⁹ lawsuits by legitimate domain name holders,¹⁰⁰ cases brought for arbitration under the Uniform Domain Name Dispute Resolution Policy¹⁰¹ (UDRP),¹⁰² and an enforcement action by the Federal Trade Commission¹⁰³ for unfair and deceptive practices.¹⁰⁴ Before admitting

96. See de Vise, *supra* note 94 (reporting that Zuccarini's work redirected persons who typed "www.bobthebuilder.com," or some other misspelling of the legitimate children's site "www.bobthebuilder.com," to "www.hanky-panky-college.com" and "Dorm Sex Party"); see also Shields, *supra* note 95 (giving the example of a child who was mousetrapped by a barrage of advertisements, most of which were for pornographic sites when the child entered "www.teltubbies.com," a misspelling of the popular children's website "www.teletubbies.com"); U.S. Attorney Press Release Feb. 2004, *supra* note 93 (describing how Zuccarini registered several misspellings of popular children's websites and linked the misspellings to pornographic Websites); Press Release, U.S. Attorney, S. Dist. of N.Y., "Cyberscammer" Pleads Guilty to Federal Charges of Using Deceptive Internet Names to Mislead Minors to X-Rated Sites (Dec. 10, 2003) [hereinafter U.S. Attorney Press Release Dec. 2003], available at <http://www.usdoj.gov/usao/nys/PressReleases/December03/ZUCCARINIPLEAPR.pdf> (noting that Zuccarini registered 16 misspellings and variations of the legitimate Web site "www.britneyspears.com" to "ensure that every possible misspelling of that legitimate domain would cause Internet users to access advertising Web sites that pay Zuccarini for bringing viewers to their sites"). For a more complete list of Zuccarini's website alterations, see Sealed Compl., *supra* note 9, Exhibit A.

97. U.S. Attorney Press Release Dec. 2003, *supra* note 96, at 3.

98. *Id.*

99. See Sealed Compl., *supra* note 9, at 5-6.

100. *Id.*

101. Domain name disputes involving the three most well-known unrestricted top-level domains (.com, .org, .net) fall under the UDRP. Anthony J. Malutta, *International Domain Name Disputes Persist: Notorious "Typosquatter" Has Been a Frequent Offender*, 10 INTERNET L. & STRATEGY 1 (Oct. 2003). This policy was established in 1999 by the Internet Corporation for Assigned Names and Numbers (ICANN) to establish internationally uniform and mandatory procedures to deal with what would frequently become cross-border disputes. *Id.* Neither a court nor a true arbitration, the UDRP is a procedure for resolving disputes over use of a particular domain name. *Id.* The proceedings are entirely written, and generally only a complaint and response are allowed. *Id.* The provider's sole power is to order deletion or transfer of domain names. *Id.* There are no monetary damages, and no other injunctive relief is available. *Id.* Accredited registrars are required to take the necessary steps to enforce a decision. *Id.* However, under the UDRP, either party retains the option to take the dispute to a court of competent jurisdiction for independent resolution. *Id.*

102. See Sealed Compl., *supra* note 9, at 6-8. UCRP panels found against Zuccarini in 98 of approximately 100 proceedings and ordered him to transfer the domain names at issue to the legitimate holder. *Id.* at n.5 (quoting *Dow Jones & Co., Inc. v. Zuccarini*, WIPO Case No. D2000-0578 (Aug. 28, 2000) (Plant, arb.)). The court held:

It is plain that Zuccarini registered and has used the . . . domain names solely for the purpose of trading on the global reputation of [a legitimate site], taking advantage of the tendency of Internet users to misspell . . . and thus to profit from his own sales of advertising and from links to other websites It is crystal clear that he registered thousands of domain names because they are confusingly similar to others' famous marks or personal names—and thus are likely misspellings of those names—in an effort to divert internet traffic to his sites. Zuccarini has without question acted in bad faith in registering and in using [these names].

Id. (alterations and second and third ellipses in original). Notwithstanding the rulings by federal courts and ICANN arbitration panels, Zuccarini continued to register misleading domain names to promote advertisements for pornography to minors. *Id.*

103. See *FTC v. Zuccarini*, No. Civ.A. 01-CV-4854, 2002 WL 1378421, at *1 (E.D. Pa. Apr. 9, 2002); Sealed Compl., *supra* note 9, at 6-8.

that he intentionally deceived minors into logging onto adult sites containing graphic sexual material, "Zuccarini broke down in tears."¹⁰⁵ Zuccarini confessed that one reason he chose to register domain names of websites popular with children was because children were more likely than adults to make spelling errors and to mistype website addresses.¹⁰⁶ Additionally, he admitted that he earned between ten cents and twenty-five cents for every viewer whom he brought to the websites which advertised for pornography, earning anywhere from \$800,000 to \$1 million per year from his use of misleading domain names.¹⁰⁷ Zuccarini also pled guilty to one count of possession of child pornography.¹⁰⁸ That count involved materials found on his computer, which was confiscated after his arrest.¹⁰⁹ In response to this first prosecution and sentencing under the Truth in Domain Names Act, former Attorney General John Ashcroft stated:

Individuals who use trickery and deceit to lure children to X-rated websites must know that they will pay a price for their criminal conduct. The Truth in Domain Names Act was designed to create a safer, cleaner online environment for children. As today's sentence demonstrates, those who violate that law and expose innocent children to pornography for their own financial gain will be prosecuted, and they will serve time in jail.¹¹⁰

While Zuccarini pled guilty to the charges brought against him by the State of New York, this was not the first time he had been punished by the judicial system.¹¹¹ A graphic artist and 1970 graduate of the Philadelphia College of Art, Zuccarini began using domain name misspellings and variations of common phrases and trademarks in 1998.¹¹² Zuccarini's long history of litigation over his cybersquatting and typosquatting activities¹¹³ included dozens of civil lawsuits and arbitration proceedings before the World Intellectual Property Organization,¹¹⁴ and a Federal Trade Commis-

104. Sealed Compl., *supra* note 9.

105. See Shields, *supra* note 95; see also de Vise, *supra* note 96. Zuccarini faced a maximum sentence of four years in prison and a \$250,000 fine on each of the forty-nine counts of using misleading domain names on the Internet. U.S. Attorney Press Release Dec. 2003, *supra* note 96.

106. U.S. Attorney Press Release Feb. 2004, *supra* note 93; see also Sealed Compl., *supra* note 9 (stating that, at a March 21, 2000 preliminary injunction hearing, Zuccarini admitted that "one reason he registered so many domain names which are of interest to children and teenagers is because teenagers and young people tend not to know how to spell").

107. See U.S. Attorney Press Release Feb. 2004, *supra* note 93; see also Sealed Compl., *supra* note 9; U.S. Attorney Press Release Dec. 2003, *supra* note 96.

108. See Shields, *supra* note 95. Zuccarini pled guilty to one count of possession of child pornography, which carries a maximum sentence of ten years in prison and a \$250,000 fine. U.S. Attorney Press Release Dec. 2003, *supra* note 96.

109. See Shields, *supra* note 95.

110. U.S. Attorney Press Release Feb. 2004, *supra* note 93.

111. See Lewis, *supra* note 90.

112. See Shields, *supra* note 95.

113. See *supra* text accompanying notes 99-104.

114. See *supra* text accompanying note 102.

sion civil enforcement action¹¹⁵ that resulted in a permanent injunction and monetary penalty of almost \$1.9 million.¹¹⁶ At the time of his arrest in 2003 for violating the Truth in Domain Names Act, Zuccarini had already lost fifty-three civil lawsuits, been ordered to surrender some two hundred domain names,¹¹⁷ and was still hiding from the owners of several trademarks.¹¹⁸ Zuccarini had amassed nearly \$4 million in judgments, but few plaintiffs were able to collect.¹¹⁹ He moved back and forth between his beachfront addresses in Fort Lauderdale and Hollywood, Florida,¹²⁰ finally relocating to the Bahamas in an apparent effort to evade trademark owners and the U.S. government.¹²¹ He also used a registrar located in Germany for his domain registration activities.¹²²

In 2000, Zuccarini set a legal precedent by losing one of the first cases in the country under the Federal Anti-Cybersquatting Consumer Protection Act.¹²³ In *Shields v. Zuccarini*,¹²⁴ the plaintiff, a graphic artist who had a legitimate website at “www.joecartoon.com,” alleged that Zuccarini had registered five variations on his site: joescartoon.com, joecarton.com, joes-cartons.com, joescartoons.com, and cartoonjoe.com.¹²⁵ Zuccarini’s alterations featured advertisements for other companies and used the “mousetrapping” technique to ensure that users were unable to exit without being exposed to a number of successive ads.¹²⁶ Zuccarini testified in the trial that he received between ten and twenty-five cents from the advertisers for every click.¹²⁷ The district court granted summary judgment in favor of the plaintiff, and awarded the plaintiff statutory damages of \$10,000 for each infringing domain name and more than \$39,000 in attorney’s fees and costs.¹²⁸ The Third Circuit Court of Appeals upheld the district court’s decision under the Anti-Cybersquatting Consumer Protection Act,¹²⁹ finding that (1) the plain-

115. See *supra* text accompanying note 103.

116. *Cybersquatting: Cybersquatter Accused of Luring Children to Porn Sites*: United States v. Zuccarini, 7 ANDREWS TELECOMM. INDUSTRY LITIG. REP., Sept. 23, 2003, at 11 [hereinafter *Luring Children to Porn Sites*].

117. *Id.*

118. Mulatta, *supra* note 101.

119. See Shields, *supra* note 95.

120. *Id.*

121. Mulatta, *supra* note 101.

122. *Id.* (“When decisions went against him (as they nearly always did), he would file an appeal in German courts. Filing a court complaint within the permitted time prevents the transfer of the domain name and forces the trademark owner to answer in a foreign jurisdiction—exponentially increasing costs.”).

123. Shields, *supra* note 95.

124. 254 F.3d 476 (3d Cir. 2001). For a detailed analysis of the district court and Third Circuit Court opinions, see Timothy Marsh, Note, *Shields v. Zuccarini: The Role of the Anticybersquatting Consumer Protection Act in Fighting Typosquatting*, 33 U. TOL. L. REV. 683, 691-94 (2002).

125. Lewis, *supra* note 90.

126. *Id.*

127. *Id.*

128. *Id.*

129. The Anti-Cybersquatting Consumer Protection Act (ACPA), 15 U.S.C. § 1125(d) (2000), which became law in 1999, bars a person from registering or using “bad faith” intent to profit from an Internet domain name that “is identical or confusingly similar to,” 15 U.S.C. § 1125(d)(1)(A)(i)(II) (2000), the distinctive or famous trademark or Internet domain name of another person or company. *Id.* §

tiff's site was distinctive and qualified as being famous under the statute,¹³⁰ (2) Zuccarini's domain names were "identical or confusingly similar to" plaintiff's mark,¹³¹ and (3) Zuccarini had registered the domain names with the bad faith intent to profit from them.¹³²

Zuccarini argued that registering domain names that were intentional misspellings of distinctive or famous names, what is now commonly referred to as "typosquatting," was not actionable under the ACPA which was only intended to prevent "cybersquatting," which he defined as registering someone's famous name and trying to sell the domain name to them or registering it to prevent the famous person from using it themselves.¹³³ However, the court rejected this argument, noting that the ACPA applies not only to the registration of domain names that are "identical" to distinctive or famous marks, but also to those domain names that are "confusingly similar" to distinctive or famous marks.¹³⁴ The court stated that the intentional registration of domain names that are misspellings of distinctive or famous names, causing an Internet user who makes a slight spelling or typing error to reach an unintended site, qualifies as a reasonable interpretation of conduct covered by the phrase "confusingly similar."¹³⁵ This was the court's first application of the ACPA to the practice of typosquatting.¹³⁶

However, the civil suits failed to deter typosquatters such as Zuccarini, mainly because the suits were unable to impose punishments that were severe enough to create an effective disincentive to the typosquatters' continuing efforts to profit by exploiting children. Where a typosquatter reaps millions of dollars each year from the creation of illegitimate domain names, mere civil suits, even a significant number of them, coupled with monetary damages may not be enough to deter him—particularly when he can simply pay the damages or settle the cases and then go back to work. Until Congress created criminal sanctions for creating such domain names, individuals like Zuccarini were unstoppable because there was no real incentive for them to stop making misleading websites.

1125(d)(1)(A)(i).

130. Shields v. Zuccarini, 254 F.3d 476, 483 (3d Cir. 2001).

131. *Id.*

132. *Id.* at 484.

133. *Id.* at 483.

134. *Id.* (citing to 15 U.S.C. § 1125(d)(1)(A)(ii)(I), (II)).

135. *Id.* at 484. The court also gave support to its reasoning by providing the following excerpt from the ACPA's legislative history:

[C]ybersquatters often register well-known marks to prey on consumer confusion by misusing the domain name to divert customers from the mark owner's site to the cybersquatter's own site, many of which are pornography sites that derive advertising revenue based on the number of visits, or "hits," the site receives. For example, the Committee was informed of a parent whose child mistakenly typed in the domain name for 'dosney.com,' expecting to access the family-oriented content of the Walt Disney home page, only to end up staring at a screen of hardcore pornography because a cybersquatter had registered that domain name in anticipation that consumers would make that exact mistake.

Id. (quoting S. REP. NO. 106-140, at 6 (1999)) (alterations in original) (emphasis omitted).

136. Lewis, *supra* note 90.

III. CONSTITUTIONAL CHALLENGES TO THE TRUTH IN DOMAIN NAMES ACT: WILL THEY BE SUCCESSFUL?

The enactment of the Truth in Domain Names Act, and the subsequent prosecution and conviction of John Zuccarini, created a significant stir among free speech advocates,¹³⁷ who argued that the “intrusive” regulation offends¹³⁸ the rights guaranteed by the First Amendment.¹³⁹ However, Congress has likely created a piece of legislation which will effectively withstand any constitutional challenge.¹⁴⁰ Indubitably, the Act will prove to be a successful prosecutorial tool against those domain name owners who use this deceptive practice to expose others, especially children, to unwanted and unsought pornographic Internet materials.¹⁴¹

Specifically, Congress has emphasized that the First Amendment does not protect speech which is obscene or misleading.¹⁴² Moreover, Congress has stated that, because neither obscene or misleading speech is protected, Congress has the power to ban such material outright so long as it does not create an “unnecessarily broad suppression of speech addressed to adults.”¹⁴³ Still, because a prohibition against misleading domain names that would expose children to harmful material would only prevent adults from accessing those sites *unintentionally*, such a ban would not constitute an unnecessarily broad restriction on adults’ ability to view the Internet sites.¹⁴⁴ Finally, Congress has supported its restrictions on misleading domain names by using the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.¹⁴⁵ That case stated that, because speech which is misleading is not protected speech where the speech proposes a commercial transaction, misleading domain names are not protected by the First Amendment.¹⁴⁶

While those in opposition to the Act admittedly understand the concerns which led Congress to create the Act,¹⁴⁷ they demand an elucidation of the effect these laws will have on free speech and property rights guaranteed by the Constitution.¹⁴⁸ First, opponents of the Truth in Domain Names Act

137. See, e.g., G. Beato, *Xtreme Measures: Washington’s New Crackdown on Pornography*, REASON, May 2004, at 24, available at <http://www.reason.com/0405/fe.gb.xtreme.shtml>.

138. Beato, *supra* note 137.

139. The First Amendment provides, in part, that Congress “shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.

140. See H.R. REP. NO. 108-66, § 521 (2003) (Conf. Rep.) [hereinafter *Protect Act Conference Committee Report*].

141. *Id.*

142. *Id.* (citing *Miller v. California*, 413 U.S. 15, 15 (1973); *Ginsberg v. New York*, 390 U.S. 629, 631 (1968)).

143. *Id.* (quoting *Reno v. ACLU*, 521 U.S. 844, 875 (1997)).

144. *Id.*

145. 447 U.S. 557 (1980).

146. *Id.* at 566; see also *Protect Act Conference Committee Report*, *supra* note 140, at 66.

147. A.B. Berens, *Speculative Fiction: What Do Misleading Domain Names and Intellectual Freedom Have In Common?*, REASONONLINE, Sept. 26, 2003, <http://www.reason.com/hod/abb092603.shtml>.

148. See *id.*

argue that the primary domains (.com, .org, and .net) have from the outset been registered on a first-come, first-serve basis,¹⁴⁹ and that the current Internet laws allow anyone to reserve a domain name not already held by another entity, so long as the domain meets basic technical standards, i.e., limits on length and acceptable characters.¹⁵⁰ Because of the first-come, first-serve basis and because of the lack of “background check” requirements on domain name registrars, those opposed to the anti-cybersquatting and anti-typosquatting laws reason that the laws make it illegal to purchase that property which is already lawfully sold.¹⁵¹

Nevertheless, those opposed to the Truth in Domain Names Act feel that the law created a violation of their rights to free speech under the First Amendment.¹⁵² They emphasized that “[i]t is a dangerous precedent, from a First Amendment standpoint, to criminalize one’s choice of domain names. While the courts are split as to whether a domain name, itself, constitutes protected speech, the focus of this law is clearly on the contents of identifying communications themselves.”¹⁵³ Moreover, they stress that the concept of “jailing someone for domain-name choice should worry everyone,”¹⁵⁴ and that “[f]undamentally, it criminalizes Internet speech, and the courts have not been kind to Congress’s attempts to do that in the past.”¹⁵⁵

However, where the Supreme Court has held that neither obscene nor misleading language is constitutionally protected speech, there are not as many First Amendment concerns as these opponents might suggest. The Act applies to those domain names which are misleading in nature, those which would lead an unknowing person to a website they did not intend or have any desire to view, and one which contains material that is obscene or harmful to minors, or both. The Act merely prohibits misleading speech and the forced exposure of innocent individuals to obscene materials. To allow otherwise would be to infringe upon the First Amendment rights of innocent Internet users, who have a protected right to avoid being tricked into viewing pornographic images, certainly where parents have consciously chosen to protect their children from such materials.¹⁵⁶

There are those opposed to the Act who claim that the term “misleading” is “inherently vague.”¹⁵⁷ The American Civil Liberties Union stated in its letter to Congress as follows:¹⁵⁸

149. *Id.*

150. *Id.*

151. *Id.*

152. *Arrest on Misspelled Domains Raises Free Speech, ICANN Fears*, WASH. INTERNET DAILY, Sept. 12, 2003.

153. *Id.* (quoting attorney Lawrence Walters).

154. *Id.* (quoting Assistant Professor Eri Goldman, Marquette University Law School).

155. *Id.* (quoting Gigalaw.com publisher Douglas Isenberg).

156. *See Protect Act Conference Committee Report*, *supra* note 140 (emphasis added).

157. Letter from the American Civil Liberties Union to the House of Representatives Opposing H.R. 1104, the Child Abduction Prevention Act (Mar. 26, 2003) [hereinafter *ACLU Letter*], available at <http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=12208&c=15>.

158. *Id.*

The proposed amendment attempts to circumvent th[e] problem by stating that the term “porn” or “sex” contained in the domain name will not be considered “misleading.” The result is that in order to avoid liability for a misleading domain name for a domain containing sexually explicit material, the domain owner will be forced to incorporate either “porn” or “sex” in the domain name. While this is a form of “compelled speech” upon which the First Amendment generally frowns, the additional problem is that it now becomes even easier for both children and adults to find sexually explicit material on the Internet. All they need do is search for domain names with “porn” or “sex” in the title.¹⁵⁹

However, this argument does not hold much weight, especially where the Act is used to prosecute those who would create any misspelling of a popular children’s website, and those who do so in order to increase the amount of hits and pop-ups received. The practice is about exposing children to pornographic images in order to make a profit. The term “misleading” is not so inherently vague, when considered within the contexts of the cases with which the Act deals. Misleading is merely using a misspelling or alteration of a popular website in order to generate Internet traffic to a commercial site which has no logical connection to the legitimate domain name it alters, thereby exposing unwitting individuals to material which is obscene and which they did not intend to view.

Further, these so-called “free speech advocates” call attention to the three-part test of obscenity outlined by the Supreme Court in *Miller v. California*¹⁶⁰ and enumerated in the Truth in Domain Names Act.¹⁶¹ They quip that the test is “so jurisprudentially limber that it has managed to survive for more than 30 years,”¹⁶² and describe its flaws as follows:

[The Court, while] offer[ing] some advice on what general types of material *might* qualify as obscene, [] ultimately left final determinations in the hands of jurors, so that individual communities could apply their own local standards on a case-by-case basis. In effect, then, the *Miller* test permits everything and nothing. A jury in California might decide a specific work is perfectly legal, while a jury in another state might say the same work is obscene.¹⁶³

Some proponents of free speech contend that the *Miller* Test is not readily applicable to the Internet, because evaluating material as a whole does not work, as a practical matter, for Internet content such as websites.¹⁶⁴

159. *Id.*

160. 413 U.S. 15, 24 (1973).

161. See Beato, *supra* note 137.

162. *Id.*

163. *Id.*

164. Lawrence G. Walters, *Top Five Reasons Why Obscenity Laws are Inappropriate in the Digital*

They first reason that a website has no coherent tangible boundaries and that the “lines [can] readily blur as to what constitutes ‘the website.’”¹⁶⁵ Secondly, critics propound that the evaluation of a website as a whole is complicated in that each site takes up varying amounts of bandwidth at any given time, and expands and contracts at the direction of the webmaster, at any moment, making it necessary to freeze the site in time to be able to “capture” its contents.¹⁶⁶ They compare the Internet to a live broadcast, with regularly changing content, and argue that a jury may come to different conclusions depending on the time in which they evaluate the website, making the standards for evaluation too vague to be even-handed.¹⁶⁷

Free speech advocates criticize the use of outdated terms such as “prurient interest[s]” and “patently offensive” in the test, finding them to be too ambiguous to enable a jury to effectively apply the test to those prosecuted under the law because they lack an understanding of such antiquated words.¹⁶⁸ They further press the courts to “take a fresh look at these laws in light of current language and societal conditions,” encouraging them to require that “laws be written in language that is relevant to today’s society.”¹⁶⁹

However, the Government has a right to create laws that are “jurisprudentially limber.”¹⁷⁰ Broad flexible interpretations—specifically in ever-evolving areas of the law like the Internet—are completely within the authoritative powers of the legislature. Where an area of regulation is consistently changing and where fraud artists have creatively adapted their actions to circumvent the reach of the law, the Government can, and arguably must, create a similarly adaptive standard. To do otherwise would create an overwhelming burden on both Congress and the judiciary to create laws on a case-by-case basis. The *Miller* Test has proven a successful standard for measuring obscenity for over forty years, and it continues to be the most flexible, appropriate means for determining what materials are obscene in an area that is in constant flux.

CONCLUSION

The Truth in Domain Names Act has yet to be challenged on constitutional grounds, and it remains to be seen whether the Supreme Court would uphold this congressional attempt to combat the dangers presented by Internet pornographers who use misleading domain names. It is likely, however, that in the event of a constitutional attack the Act will be deemed constitutionally sound for three reasons. First, the Act is limited to those websites which are misleading, taking an unwitting individual to an obscene website

Age, http://www.firstamendment.com/pubs_topfive-03-30-01.php3 (last visited Jan. 12, 2006).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. Beato, *supra* note 137.

and thereby exposing them to unwanted obscenity which they have a First Amendment right to avoid. Second, the interests proclaimed by Congress in passing the Act are legitimate, and they clearly and significantly outweigh the claimed free speech rights of those who would create domain names. Third, the Act is not overly vague. The tests of obscenity used in the Truth and Domain Names Act have been successful for over forty years and are appropriately flexible for such an ever-changing area of the law. For these reasons, any challenge to the constitutionality of the Act will likely be unsuccessful. The Truth in Domain Names Act is a significant piece of legislation that will help to protect innocent children from unwilling exposures to pornography. The Act will ultimately serve not only to prevent the harmful effects of such exposure, but will also effectively deter the continuation of heinous acts by individuals such as John Zuccarini.

Lisa D. Davis

