



COMPUTER LAW

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COPA Litigation and Internet Content Regulation

It is widely recognized that the Internet has made access to pornography much easier than at any time in history. While the First Amendment protects the rights of adults to view such material, this protection does not extend to minors.

Congress has been attempting, for slightly more than a decade, to craft legislation that protects minors from harmful exposure to pornographic material on the Internet while balancing the constitutional rights of adults. The key difficulty is that the Internet often can be an anonymous medium, which makes it relatively simple to conceal one's age and identity.

The Child Online Protection Act (COPA) is Congress' most recent attempt to confront this difficult issue.

In the latest decision of a case begun in 1998 that has twice made it to the Supreme Court, the U.S. District Court for the Eastern District of Pennsylvania, in *ACLU v. Gonzales*, 2007 U.S. Dist. LEXIS (E.D. Pa. 2007), issued a permanent injunction against enforcement of COPA last month, concluding that the statute, for several reasons, is unconstitutional.

Background

COPA is federal legislation, which was signed into law on Oct. 21, 1998. The statute was enacted on the heels of and in response to the U.S. Supreme Court's 1997 decision in *Reno v. American Civil Liberties Union*, 521 US 844, 117 S. Ct. 2329 (1997), which struck down certain provisions of the Communications Decency Act (CDA) because its limitations on indecent and patently offensive content constituted an impermissible content-based blanket restriction on free speech. 521 US at 865.

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COPA seeks to regulate Internet speech by prohibiting commercial Web sites from making available material that is "harmful to minors."¹ In particular, COPA provides civil and criminal penalties for whoever violates it by "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 USC §231(a) (1). Under the statute, a person is considered to make a communication for "commercial purposes" if such person is "engaged in the business" of making such communication. 47 USC §231(e)(2)(a).

COPA also provides an affirmative defense to Web sites that restrict access to harmful material by requiring the use of a credit card, debit card, adult access code, or adult personal identification number or "by accepting a digital certificate that verifies age" or by using "other reasonable methods." 47 USC §231 (e)(2)(b).

The day after COPA was enacted, the American Civil Liberties Union (ACLU) and 16 other plaintiffs filed a complaint challenging the constitutionality of the law. On appeal, the U.S. Court of Appeals for the Third Circuit found that the "harmful to minors" standard would require Web-site operators—operating in the borderless community of cyberspace—to abide by the most restrictive community standards in the country to avoid liability, and concluded that the statute was overbroad, keeping in place

the lower court's preliminary injunction barring application of the act. *ACLU v. Reno*, 217 F3d 162 (3d Cir. 2002).

In May 2002, however, the U.S. Supreme Court held that the application of community standards to Internet speech does not violate the First Amendment and therefore, COPA was wrongly invalidated by the Third Circuit. *Ashcroft v. ACLU*, 535 US 564, 122 S. Ct. 1700 (2002). The Supreme Court remanded the case to the Third Circuit to further address whether the statute was unconstitutionally vague and whether it can survive review under the strict scrutiny standard, but left intact the district court's preliminary injunction against enforcement of the statute.

On remand, the Third Circuit affirmed the prior issuance of an injunction. In June 2004, the Supreme Court affirmed the circuit court's conclusion that the statute "likely violates the First Amendment" because it was not narrowly tailored to serve a compelling government interest, was overbroad, and was not the least-restrictive means for the government to achieve its interest of preventing minors from using the Internet to gain access to harmful, pornographic materials. *Ashcroft v. ACLU*, 542 US 656, 124 SCt 2783 (2004). The Supreme Court also affirmed the trial court's decision granting the preliminary injunction and sent the case back to the district court for a trial on the merits in order to, among other things, update the factual record to reflect current technological developments, account for any changes in the legal landscape, and to determine whether Internet content filters would be a less restrictive alternative than COPA. *Ashcroft*, 542 US at 671-673.²

The Court's Decision

In ruling that COPA facially violates the First and Fifth amendments, thereby warranting the issuance of a permanent injunction against the statute's enforcement, the district court reasoned that: (1) the statute is not narrowly tailored to achieve Congress' compelling interest; (2) the

defendant has failed to meet his burden of showing that the statute is the least restrictive, most effective alternative in achieving the compelling interest; and (3) the statute is impermissibly vague and overbroad.

In its constitutional analysis, the court noted that COPA is clearly a content-specific restriction on free speech and, accordingly, the statute was required to survive the strict scrutiny standard (i.e., the statute must serve a compelling state interest and be narrowly tailored to achieve this interest). Although it acknowledged that Congress' interest in protecting minors from exposure to sexually explicit material on the World Wide Web was compelling, it still found that the statute was vague, overbroad and not the least restrictive means to accomplish its goal. As written, according to the court, the statute was unclear as to which entities beyond commercial pornographers would be bound by its language, given the statute's relevant definitions of "commercial purposes" and "engaged in the business" apply to an inordinate amount of Internet speech and commentary beyond pornography. *Id.* at *98.

Furthermore, in support of its conclusion that the statute was not the least-restrictive means to protect children from harmful Internet content, the court relied on the effectiveness of content filters, devoting a substantial portion of its opinion to a discussion of the technology and its applicability to the case. Generally speaking, Internet content filters are software, often downloadable without cost from Internet service providers, that offer a variety of settings so that parents or businesses can block certain unwanted categories of Web sites and Internet applications. Unpersuaded by the defendant's contention that filters were not a less restrictive alternative to COPA, the court noted that Internet content filters are quite effective in blocking sexually explicit material for a variety of reasons and are "more effective than COPA in furthering Congress' stated goal." *Id.* at *113.

Possible Implications

The decade of litigation surrounding the constitutionality of COPA has brought to light the difficult challenges that lawmakers face in the Internet age when seeking to enact legislation protecting children from sexually explicit or harmful materials that does not violate free speech rights, particularly when it comes to age-verification methods. In the pre-Internet era, as the court noted in this case, it was not completely necessary—especially in face-to-face transactions—to be highly specific

in delineating what was obscene to minors in various age groups. Many laws that sought to protect children from obscene materials, generally speaking, only created legal difficulty in borderline cases. For example, a minor close to the age of majority seeking to purchase obscene periodicals from a retail store, might, without some form of identification, make it difficult for the store employee to ascertain whether he was an adult, whereas a child of 10 or 11 years of age in the same situation would create no such problem.

Today, however, children, like adult Web users, are faceless and can remain fairly anonymous on the Internet, with the ability, absent installed Internet filters, to view the same Internet materials as adults. These new realities have dramatically altered the available methods to shield children from certain harmful materials without impinging the free speech

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rights of adults, particularly through the use of age verification. *Id.* at **123-124. In the COPA decision, the verification methods (e.g., credit card, adult access code) were found to be technologically ineffective at achieving the statute's purported goals. Among other things, those Web sites wishing to offer their content for free might be unable to handle the costs, which, the court concluded, would "impermissibly burden Web-site operators with demonstrating that their speech is lawful." *Id.* at *106. Additionally, requiring users to go through a verification process would also result in the loss of personal privacy, particularly to those that wish to "browse and access sexually explicit materials privately and anonymously." *Id.* at *86.

In the Future

In the event the district court's decision stands, it may have broader implications on laws that seek to regulate certain types of speech on the Internet. For example, currently there are at least two bills pending in Congress that use the term "harmful to minors" in their text and seek to amend the Communications

Act of 1934 to protect children from certain Internet content, namely the Deleting Online Predators Act of 2007 (H.R. 1120) and the Protecting Children in the 21st Century Act (S. 49).

The Deleting Online Predators Act seeks to require recipients of federal support for schools and libraries to protect minors from commercial social networking Web sites and chat rooms, while the latter act seeks to protect children from online predators and restrict the sale or purchase of children's personal information in interstate commerce. Depending on the ultimate outcome of the *ACLU v. Gonzales* litigation, lawmakers and regulators may be forced to rethink pending or future Internet content-related legislation that might contain potentially vague and overbroad statutory standards akin to the "harmful to minors" standard that was struck down by the U.S. District Court for the Eastern District of Pennsylvania.



1. Under the statute, harmful to minors means, "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 USC §231(e)(6).

2. This case has also resulted in related litigation during the discovery phase. In an attempt to further its position, the government, last year, served third-party subpoenas on major search engines seeking, among other things, designated listings of all available URLs in the search index, as well as a text of users' search queries during a specific period. In a challenge by Google to quash the government's broadly worded subpoenas, the court ruled that the government had established a need for only a significantly scaled down request for a sample of 50,000 URLs from the search engine's search index, in order to measure the effectiveness of filtering software. *Gonzales v. Google Inc.*, 234 FRD 674 (N.D. Cal. 2006).