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CHILD ONLINE PROTECTION ACT

Legislative History of COPA

Communications Decency Act of 1996

COPA is the second attempt by Congress to make the Internet safe for minors by criminalizing certain speech. The first legislative enactment was the Communications Decency Act of 1996 (47 U.S.C. § 223), which amended the Communications Act of 1934. *See* 47 U.S.C. § 231. In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Court held the CDA unconstitutional because it was not narrowly tailored to serve a compelling governmental interest and because less restrictive alternatives were available to achieve the governmental interest.

Child Online Protection Act

COPA imposes criminal penalties of a $50,000 fine and six months in prison for the knowing posting, for "commercial purposes," of World Wide Web content that is "harmful to minors." § 231(a)(1). Material that is "harmful to minors" is defined 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." § 231(e)(6).

"Minor[s]" are defined as "any person under 17 years of age." § 231(e)(7). A person acts for

"commercial purposes only if such person is engaged in the business of making such communications." "Engaged in the business" –

"means that the person 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 of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income)." § 231(e)(2).

COPA provides an affirmative defense to those who employ specified means to prevent minors from gaining access to the prohibited materials on their Web site. A person may escape conviction under the statute by demonstrating that he

"has restricted access by minors to material that is harmful to minors –

(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." § 231(c)(1).

Litigation History of COPA

COPA was first enjoined by a federal district court in Pennsylvania in 1999. *See ACLU v. Reno*, 31 F. Supp.2d 473 (E.D. Pa. 1999).

On appeal, the Third Circuit affirmed the preliminary injunction for a different reason than relied upon by the district court. See *ACLU v. Reno*, 217 F.3d 162 (3rd Cir. 2000). The court of appeals found COPA unconstitutional because its use of the community standards language rendered the law overbroad.

In *Ashcroft v. ACLU*, 535 U.S. 564 (2002), the Supreme Court ruled that COPA's reference to contemporary community standards in defining what was harmful to minors did not alone render the law unconstitutional. However, the Court allowed the remaining portion of the injunction to stand pending trial. The case was sent back to the Third Circuit for further review.

On further review, the Third Circuit again upheld the preliminary injunction. *See ACLU v. Ashcroft*, 322 F.3d 240 (3rd Cir. 2003).

The Supreme Court also upheld the preliminary injunction in *Ashcroft v. ACLU*, 542 U.S. 656 (2004). The Court then sent the case back to the district court for a complete trial on the merits in order to (1) update the factual record to reflect current technological developments, (2) account for any changes in the legal landscape, and (3) to determine whether Internet content filters are more effective than COPA or whether other possible alternatives are less restrictive and more effective than COPA.

On March 22, 2007, the district court issued a permanent injunction against COPA. See *ACLU v. Gonzales*, 2007 WL 861120 (E.D. Pa.).

Rationale for Striking Down the Law

United States Supreme Court

The Supreme Court upheld the preliminary injunction by a vote of 5–4. In the majority were Kennedy, Stevens, Souter, Thomas and Ginsburg. Dissenting were Rehnquist, Scalia, O'Connor and Breyer.

The majority ruled that since COPA is a content-based regulation, the law must be subjected to strict scrutiny, meaning the government must have a compelling reason to restrict obscenity and pornography to minors and the regulation must be the least restrictive means available in achieving its interest. The majority stated that the government failed to prove that content filters are more restrictive than COPA. In other words, the Court found that, based on the record, content filters were more effective than COPA and were less restrictive than COPA.

Scalia dissented and would have upheld COPA. He stated that the First Amendment does not protect the kind of speech regulated by COPA.

Breyer, Rehnquist and O'Connor also dissented. While they assumed that the speech regulated by COPA was protected by the First Amendment, they believed that COPA was constitutional. They objected to the use of content filters being compared to COPA, because COPA was designed to go beyond the status quo with existing filtering systems.

District Court

The district court entered a permanent injunction for numerous reasons.

First, even though COPA applies to commercial purposes, the district court permitted certain plaintiffs who were not engaged in commercial purposes to challenge the law. The district court found COPA vague because it might apply to more than just commercial pornographers.

Second, COPA is underinclusive because a large portion of sexually explicit material originates from oversees and COPA applies only domestically.

Third, the affirmative defenses do not help COPA because (1) use of a credit card will prevent many users from accessing the web sites, (2) credit cards cannot verify age and credit card providers do not permit age verification, (3) use of a credit card will place substantial economic burdens on the web originator, (4) there is no electronic card that can verify age, (5) Bitpass is not a reasonable resolution to web site owners who provide their content for free but who cannot accept zero-dollar transactions on credit cards.

Fourth, content filters are more effective and less restrictive than COPA.

Fifth, COPA is vague: (1) It may apply to noncommercial enterprises; (2) It applies to all minors ("any person under 17 years of age"), and thus while some material may have serious literary, artistic, political or scientific value to a 16-year-old, the same would not value to a 3-year-old,

and what is patently offensive to a 3-year-old may not be to a 16-year-old; and (3) The "taken as a whole" language may be applied to a book to determine the context but not on the web since web sites are hyperlinked to many other web sites.

Sixth, COPA is overbroad. For the reasons above, COPA reaches more speech than necessary.

What Can be Done?

First, appeal COPA to the U.S. Supreme Court. But, unless Justice Thomas changes his vote, the outcome will again be 5–4.

Second, redraft COPA. But, if the Court compares COPA to content filters to determine which one is more effective, then there is not much that can be done with the current technology.

Third, enact legislation encouraging or, perhaps in certain situations, mandating content filters on the web, including HTTP (hypertext transfer protocol), FTP (file transfer protocol), email, chat rooms, instant messaging, IPODs, cell phones, hand-held devices, and any other similar use of the Internet.