

LEGAL UPDATE

JUDICIAL SCRUTINY OF CONGRESSIONAL ATTEMPTS TO PROTECT CHILDREN FROM THE INTERNET'S HARMS: WILL INTERNET FILTERING TECHNOLOGY PROVIDE THE ANSWER CONGRESS HAS BEEN LOOKING FOR?

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I. INTRODUCTION

On November 12, 2002, the Supreme Court announced it would review a challenge to the Child Internet Protection Act ("CIPA")¹, Congress's third attempt to limit minors' access to online pornography.² At issue is whether Congress can require public libraries to use filtering software on their computers as a pre-requisite to the receipt of federal funds.³

II. BACKGROUND

As of September 2001, 143 million Americans were using the Internet.⁴ Children and teenagers constitute a large portion of Internet consumers with 75 percent of 14-17 year olds and 65 percent of 10-13 year olds online.⁵

Unlike more regulated media such as television and radio, the Internet "presents low entry barriers to any one who wishes to provide or distribute information."⁶ The World Wide Web ("Web") allows its users to search and access information stored in computers all over the globe.⁷ Thus, with content as "diverse as human thought,"⁸ the Internet poses few obstacles to a user's ability to access a remarkable amount of information. While the advantages of

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¹ Pub.L. 106-554, 114 Stat. 2763 (2000).

² Declan McCullach, *Supreme Court to hear filtering case*, CNET NEWS.COM, at <http://news.com.com/2100-1023-965434.htm> (Nov. 12, 2002).

³ See *Amer. Library Ass'n., Inc, et al. v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

⁴ Nat'l Telecomm. & Info. Admin. Web site, *A Nation Online: How Americans Are Expanding Their Use of the Internet, Executive Summary*, available at <http://www.ntia.doc.gov/ntiahome/dn/html/execsum.htm> (Feb. 2002).

⁵ *Id.*

⁶ *Amer. Library Ass'n.*, 201 F. Supp. 2d at 416.

⁷ See *Reno v. ACLU*, 521 U.S. 844, 852 (1997).

⁸ *ACLU v. Reno*, 929 F. Supp. 2d 824, 842 (E.D. Pa. 1996).

such variety are tremendous, one undesirable consequence is that many young children have unrestricted access to sexually explicit material on the Web.

Pornographic content can be found on a large number of Web sites including some with rather “innocuous” domain names.⁹ For example, by typing “www.whitehouse.com” instead of “www.whitehouse.gov,” or mistyping “www.netscape.com” as “www.betscape.com,” a child would unintentionally encounter graphic x-rated images.¹⁰

Congress’s challenge, when trying to curb children’s access to online pornography, is to draft legislation that effectively protects children from the Internet’s harms without abridging the freedom of speech protected by the First Amendment.¹¹ Congress has been both relentless and completely unsuccessful in grappling with this modern dilemma.¹² To date, it has passed three major pieces of legislation specifically directed at this problem, none of which have yet to survive judicial review.¹³

III. JUDICIAL RESPONSES TO CONGRESS’S ATTEMPTS TO REGULATE THE INTERNET

A. *The Communications Decency Act (“CDA”)*

The Communications Decency Act (“CDA”),¹⁴ part of the Telecommunications Act of 1996,¹⁵ was Congress’s first attempt to protect children from online pornography.¹⁶ The American Civil Liberties Union (“ACLU”) challenged the constitutionality of two CDA provisions.¹⁷

The first provision at issue criminalized the knowing transmission of

⁹ *Amer. Library Ass’n*, 201 F. Supp. 2d at 419. See also H.R. Rep. No. 105-775 (1998).

¹⁰ H.R. Comm Rep. No. 105-775 (1998).

¹¹ “As a general matter, ‘the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’” *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983) (quoting *Police Dept. of Chicago v. Moseley*, 408 U.S. 92, 95 (1972)); “The Supreme Court has recognized that the First Amendment encompasses not only the right to speak, but also the right to receive information.” *Amer. Library Ass’n*, 201 F. Supp. 2d at 451 n.21 (citing *Reno v. ACLU*, 521 U.S. 844, 874 (1987)).

¹² See Kathleen Conn, *Protecting Children from Internet Harm (Again): Will the Children’s Internet Protection Act Survive Judicial Scrutiny?*, 153 ED. LAW. REP. 469, 470 (July 5, 2001).

¹³ See generally *Ashcroft v. ACLU*, 535 U.S. 564 (2002), *Reno v. ACLU*, 521 U.S. 844 (1987), *Amer. Library Ass’n.*, 201 F. Supp. 2d 401.

¹⁴ 47 U.S.C. § 223 (2001).

¹⁵ Pub.L. 104-104, 110 Stat. 56 (1996).

¹⁶ See *Reno*, 521 U.S. at 844.

¹⁷ *ACLU v. Reno*, 929 F. Supp. 2d 824 (E.D. Pa. 1996).

obscene or indecent communications to persons under the age of 18.¹⁸ The ACLU also sought review of CDA's ban on knowingly sending or displaying to persons under 18 any message that "depicts or describes, in terms patently offensive, as measured by contemporary community standards, sexual or excretory activities or organs."¹⁹ Affirmative defenses included taking "good faith, reasonable, effective, and appropriate" actions to prevent minors from accessing these communications,²⁰ and requiring proof of age prior to access.²¹

Despite the availability of these defenses, in *Reno v. ACLU* the Supreme Court held that these provisions of CDA violated the First Amendment of the United States Constitution.²² The Court also noted that no "existing technology" encompassed a method of restricting minors' access to prohibited content while protecting adult users' right to view that same content.²³ The Court deemed the breadth of CDA's coverage "wholly unprecedented" and found that CDA's affirmative defenses were not narrowly tailored enough to survive strict scrutiny.²⁴

B. The Child Online Protection Act ("COPA")

Responding to the Court's criticism of the CDA, Congress passed the Child Online Protection Act ("COPA") in 1998.²⁵ Unlike the CDA, which covered all Internet communications, COPA applies only to material displayed on the World Wide Web.²⁶ Specifically, COPA prohibits knowingly making commercial communications via the Web that are available and harmful to minors.²⁷ Incorporating the *Reno* court's concern that "indecent" and "patently offensive" (key CDA terms) were overly vague, COPA drafters used the "harmful to minors" qualifier to conform to standards previously accepted by the Court.²⁸ COPA applies "contemporary community standards" in determining whether material is "harmful to minors."²⁹ In an effort to insure maximum flexibility, COPA provides that good faith efforts to restrict minors'

¹⁸ *Id.* at 827; 47 U.S.C. § 223(a)(i)(B)(ii).

¹⁹ *Id.*; § 223(d).

²⁰ *Id.* at § 223(e)(5)(A).

²¹ *Id.* at § 223(e)(5)(B).

²² *See Reno*, 521 U.S. at 844.

²³ *Id.* at 876.

²⁴ *See id.*

²⁵ 47 U.S.C. § 231 (2001).

²⁶ *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

²⁷ 47 U.S.C. § 231(a)(1).

²⁸ H.R. Rep. No. 105-775, at 13 (1998). ("H.R. 3783 conforms to the standards identified in Ginsberg, as modified by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973). H.R. 3783 modifies 'patently offensive' language by explicitly describing the material that is harmful to minors.").

²⁹ *Id.*

access to pornographic material, either (1) through use of a credit card, debit account, adult access code, or adult personal identification number, (2) by accepting digital certificates that verify age, or (3) via any other reasonably feasible measures, are affirmative defenses to prosecution.³⁰

As expected, a diverse group of plaintiffs, including publishers of online magazines and other Web content providers, filed a lawsuit challenging COPA's constitutionality. The COPA challengers use the Web to post and read information on obstetrics, gynecology, sexual health and "resources designed for gays and lesbians."³¹

The district court concluded that protecting children from exposure to harmful material is a compelling government interest.³² However, the court found that COPA was not the least restrictive means of advancing the government's interest, noting plaintiffs' suggestion that filtering or blocking technology would be a "more efficacious and less restrictive" means of protecting minors from harmful Internet content.³³ Although filtering software runs the risk of blocking inoffensive sites and letting some inappropriate sites "slip through the cracks," the district court noted that filtering software would "be at least as successful as COPA would be in restricting minors' access to harmful material online, without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators."³⁴ According to the district court, such software is evidence that COPA does not employ the least restrictive means possible.³⁵ Finding that plaintiffs had demonstrated a likelihood of irreparable harm and of prevailing on the merits, the district court issued a preliminary injunction against COPA's enforcement.³⁶

In affirming the district court, the Court of Appeals for the Third Circuit relied solely on the overbreadth of COPA's "harmful to minors" definition.³⁷ Specifically, the court of appeals found that application of "contemporary community standards" to determine what content is "harmful to minors," would require all Web publishers to comply with the most restrictive community's standards.³⁸ According to the court of appeals, this alone would lead to a holding of unconstitutionality at a trial on the merits.³⁹

³⁰ See H.R. Rep. No. 105-775, at 7.

³¹ Br. for the Respondents at 2-3, *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (No. 00-1293).

³² *ACLU v. Reno*, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999).

³³ *Id.* at 497.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 498.

³⁷ See *ACLU v. Reno*, 31 F.3d 162 (3d Cir. 2000).

³⁸ *Id.* at 166.

³⁹ See *id.*

The Supreme Court granted the government's petition for certiorari and vacated the Third Circuit decision.⁴⁰ The Court, per Justice Thomas, held that "reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment."⁴¹ The Court did not offer any coherent view of the District Court's strict scrutiny analysis, whether the Act is unconstitutionally vague, or whether COPA is overbroad for reasons other than its reliance on community standards.⁴² The Court let the injunction stand but remanded the case back to the court of appeals for determination of the remaining issues.⁴³

C. The Child Internet Protect Act ("CIPA")

Signed into law by President Clinton in December of 2000, The Child Internet Protection Act ("CIPA") is Congress's newest weapon in its fight to regulate access to Internet pornography.⁴⁴ In order to provide Internet services to their members, many public libraries rely on federal funds provided pursuant to the Library Services and Technology Act ("LSTA")⁴⁵ and so-called "E-rate" discounts which are part of the Telecommunications Act.⁴⁶ "CIPA requires that libraries, in order to receive LSTA funds or E-rate discounts, certify that they are using a 'technology protection measure' that prevents patrons from accessing 'visual depictions' that are 'obscene,' 'child pornography,' or in the case of minors, 'harmful to minors.'"⁴⁷

A group of libraries, library users, and Web site publishers brought suit against the United States in the Eastern District of Pennsylvania, alleging that CIPA was facially unconstitutional.⁴⁸ Pursuant to CIPA, a special three-judge court convened to hear the case.⁴⁹ Among the individual patron-plaintiffs noted by the court was Emmalyn Rood, a sixteen-year old girl who used computers at her public library to research her sexual identity. Emmalyn did not want to use filtering programs because she had previously found that such software blocked sites containing information that was valuable to her.⁵⁰ She

⁴⁰ See *Ashcroft v. ACLU*, 122 S. Ct. 1700, 1707 (2002).

⁴¹ *Id.* at 1713.

⁴² See generally *Ashcroft v. ACLU*, 122 S. Ct. 1700.

⁴³ *Id.* at 1713-14.

⁴⁴ Pub. L. No. 106-554, 114 Stat. 2763 (2000).

⁴⁵ 20 U.S.C. § 9101.

⁴⁶ 47 U.S.C. § 254.

⁴⁷ *Amer. Library Ass'n.*, 201 F. Supp. 2d at 407.

⁴⁸ See *id.*

⁴⁹ Pub. L. No. 106-554, 114 Stat. 2763 (2000).

⁵⁰ *Id.* at 415.

did not use home or school computers because she felt they did not offer adequate privacy.⁵¹

Plaintiffs claimed that because of the limits of available filtering technologies, CIPA would “induce public libraries to violate the First Amendment by imposing content-based restrictions on their patrons’ access to constitutionally protected public speech.”⁵² While the government contended “that because plaintiffs are bringing a facial challenge, they must show that under no circumstances is it possible for a public library to comply with CIPA’s conditions without violating the First Amendment,” plaintiffs argued that CIPA is facially invalid because it “will result in the impermissible suppression of a substantial amount of protected speech.”⁵³

The government phrased the issue differently from the plaintiffs, analogizing the use of filtering software to the choices library officials must make when deciding what materials to include in their print collection.⁵⁴ Since public libraries have limited budgets, library administrators must determine how to allocate funds amongst different subject areas, and more specifically, which books to purchase with those funds.⁵⁵ The content-based restriction at issue when a library chooses which books to buy is indisputably subject to rational basis review.⁵⁶ According to the government, “the fact that the Internet reverses the acquisition process” and requires libraries to “purchase” the entire Internet at the outset, does not mean that libraries are guilty of censorship when they subsequently choose to filter out offensive material.⁵⁷

In a detailed and thorough opinion, the court chose not to accept the government’s framing of the issue.⁵⁸ The court distinguished the situation at hand from that of book purchasing, noting that while certain standards govern the acquisition of a library’s print materials, when public libraries provide their patrons with Internet access, they “intentionally open their doors to vast

⁵¹ *Id.*

⁵² The Court has recognized certain constitutional limitations on Congress’s spending power. Among these limitations is the requirement that such power “not be used to induce the States to engage in activities that would themselves be unconstitutional.” *Amer. Library Ass’n.*, 201 F. Supp. 2d at 407 (quoting *South Dakota v. Dole*, 483 U.S. 203, 210 (1987)). Plaintiffs contend that by conditioning receipt of federal funds on the use of Internet filters, “CIPA will induce public libraries to violate the First Amendment rights of Internet content-providers to disseminate constitutionally protected speech to library patrons via the Internet, and the correlative First Amendment rights of public library patrons to receive constitutionally protected speech on the Internet.” *Id.* at 450.

⁵³ *Id.* at 451.

⁵⁴ *Id.* at 408-09.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 462.

amounts of speech that clearly lacks sufficient quality to ever be considered for the library's print collection."⁵⁹ By providing their patrons with access to the Internet, public libraries had created a diverse forum to be enjoyed by the public at large.⁶⁰ The court concluded that strict scrutiny applies to any restriction that singles out for exclusion from such a forum content that is disfavored.⁶¹

The court explained that even under the government's more restrictive test for facial validity, CIPA could not survive because of the limitations of available filtering technology.⁶² In concluding that "commercially available filtering programs erroneously block a huge amount of speech that is protected by the First Amendment,"⁶³ the court focused on the methods that

filtering companies use to develop their control lists of blocked sites.⁶⁴ The court concluded that "given the Internet's size, rate of growth, rate of change, and . . . the state of the art of automated classification systems," it would be "impossible" to develop a filter that "neither underblocks nor overblocks a substantial amount of speech."⁶⁵ Crediting the testimony of young plaintiffs like Emmalyn Rood, the court also concluded that CIPA's disabling provision, which allows library administrators to discontinue use of filtering software for legitimate research and "other lawful purposes," does not shield the Act from a facial challenge because the "requirement that library patrons ask a state actor's permission to access disfavored content violates the First Amendment."⁶⁶

Anticipating an immediate challenge to CIPA, Congress provided for fast-track appeal by the losing side to the Supreme Court.⁶⁷ The Supreme Court is set to review the CIPA challenge in 2003.⁶⁸

IV. CONCLUSION

Legislators must walk a delicate line in crafting laws that effectively regulate the Internet while preserving First Amendment rights. Thus far, courts have found Congress unable to strike the necessary balance. This consistent failure may bring into question the sincerity of Congress's efforts.⁶⁹

⁵⁹ *Id.* at 463.

⁶⁰ *Id.* at 469.

⁶¹ *Id.* at 461.

⁶² *Id.* at 453.

⁶³ *Id.* at 448.

⁶⁴ *See id.*

⁶⁵ *Id.* at 437.

⁶⁶ *Id.* at 486.

⁶⁷ Pub. L. No. 106-554, 114 Stat. 2763 (2000).

⁶⁸ *See* Linda Greenhouse, *Justices to review Internet Pornography Filters*, N.Y. TIMES, available at <http://www.nytimes.com/2002/11/13/politics/13SCOT.html> (Nov. 12, 2002).

⁶⁹ *See* Conn, *supra* note 12, at 492. "Intelligent and careful examination of CIPA . . . leads to the inescapable conclusion that the Congressional goal of protecting children from

The Supreme Court's determination in the CIPA case will most likely depend on whether the Court chooses to accept the lower court's framing of the issue as one of speech in a public forum, or instead adopts the government's argument that this case should be decided under the line of precedent indicating the government's broad discretion to decide what sort of materials it wants to provide to the public.⁷⁰ CIPA's survival is also likely to turn on the Supreme Court's evaluation of currently available filtering software.

The Henry J. Kaiser Foundation recently released the most systematic and comprehensive study to date of filtering software's interference with access to non-pornographic health sites;⁷¹ the results of this study were published in the *Journal of the American Medical Association*.⁷² Unlike the district court analysis, the Kaiser study focuses on how specific filtering products are configured. Noting teenagers heavy reliance on the Internet to research health issues such as birth control, sexually transmitted diseases, eating disorders, and drug abuse, the study found that at the least restrictive setting filtering software blocked the vast majority of pornographic sites and less than 10 percent of non-pornographic sites relating to safe sex.⁷³ However, when systems administrators specify the most restrictive filter setting, a substantial number of non-pornographic health sites, especially those dealing with safe sex, are blocked while access to an insignificant number of additional pornographic sites is also denied.⁷⁴ Interestingly, at the least restrictive setting, the filtering software was not particularly effective at blocking inadvertently retrieved pornographic sites.⁷⁵

The government may find the Kaiser study helpful in arguing that filtering software set to the least restrictive configuration provides a narrowly tailored means of furthering the government's interest in preventing the dissemination of obscenity, child pornography, and material that is harmful to minors. If the Supreme Court relies on the Kaiser report, it must still address the significant

harmful information may be more a political imperative than a sincere commitment to children's welfare. . . . If Congress were really serious, even about simply keeping sexually explicit Internet material from children, why does it continue to craft statutes using the same words and phrases that multiple courts have ruled impermissible burdened protected speech?"

⁷⁰ Greenhouse, *supra* note 68.

⁷¹ See Henry J. Kaiser Family Foundation Web site, *See No Evil: How Internet Filters Affect the Search for Online Health Information, Executive Summary*, available at <http://www.kff.org/content/2002/20021210a/> (Dec. 10, 2002).

⁷² Caroline R. Richardson et al, *Does Pornography-Blocking Software Block Access to health Information on the Internet?*, 288:22 JAMA 2887 (2002).

⁷³ See Henry J. Kaiser Family Foundation, *supra* note 71.

⁷⁴ See *id.*

⁷⁵ See *id.*; see also H.R. Rep. No. 105-775 (1998) (noting Congress's concern with inadvertent exposure to pornographic sites).

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deficiencies in currently available filtering software described by the district court.