Chapter 4:
The Internet and the First Amendment

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In this chapter of our report, I focus on the relationship between the Internet and the First Amendment. The Internet has emerged as a forum of information that is available to anyone with access to a computer. However, with myriad avenues for intellectual activity, the opportunity for access to obscene and indecent material has grown exponentially. While these opportunities grew, the Supreme Court had to forge a new path for the protection of personal freedoms. On the other hand, protection of children has also been in the forefront of the Supreme Court cases. Within these cases, the court has upheld the First Amendment by deciding in favor of freedom of speech and personal freedom. In three stages, this chapter explores the challenge facing the Court. It first examines the Supreme Court's rulings on the Communication Decency Act of 1996, then looks at the Child Online Protection Act; it concludes with a look at possible future avenues for protection of minors.

The Current State of the Law

Reno v. American Civil Liberties Union[1] served as the test case for the protection of children on the Internet. The Communication Decency Act of 1996 (CDA) was designed to extend the concept of indecency as applied to broadcasting to the Internet; however, it became Congress's first attempt to protect children from pornographic material. The CDA criminalized the knowing transmission of obscene or indecent messages over the Internet to any recipient under the age of 18.[2] However, the act ultimately prohibited any individual from knowingly sending or displaying certain material that was available to persons under the age of 18, "that, in context, depicted in terms as patently offensive and measured by contemporary community standards, sexual or excretory activities or organs."[3]

The American Civil Liberties Union filed suit, holding that sections 223 (a) and 223 (d) violated the First Amendment because these sections were overboard; the ACLU also contended the law violated the due process clause of the Fifth Amendment because it was too vague.[4] The Supreme Court held in a 7-2 decision that the provisions in question violated the First Amendment. The Court found that the CDA lacked the precision that the First Amendment requires when attempting regulation of speech content. In order to protect minors from harmful speech, the act attempted to suppress a large amount of speech that adults had a constitutional right to receive.[5] The Court based its decision on three considerations.

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[1] 4747 U.S.C. 223 (1995)
[2] See *Id*
[3] 47 U.S.C. 223 (d)
[4] *ACLU v Reno*, et al. 929 F.Supp.824 (E.D. Pa. 1996)
[5] 521 U.S., at 874

First, existing technology did not give a sender the resources to prevent only a minor from seeing their communication; rather, adults were denied access as well.[6] Second, the breadth of the CDA's coverage was unprecedented. The act failed to define the terms "indecent" and "patently offensive," which covered large amounts of nonpornographic material with serious educational or other value. As a result of this breadth, the CDA regulated subject matter such as prison rape, safe sex practices and nude artistic images. Third, the Court found that the affirmative defenses[7] set forth in the act did not constitute the sort of narrow tailoring that would justify an unconstitutional provision.

The Court also found that the *Pacifica* ruling did not help the government's case. First, in the *Pacifica* decision an agency regulation was in place (the FCC), which subsequently regulated specific broadcasts that were departures from traditional programming, thus designating *when* -- rather than *whether* -- certain programs would be permissible on the given medium. The CDA's broad categorical prohibitions were not limited to particular times, nor were they dependent on any subsequent evaluation by an agency familiar with the Internet, such as the FCC. Therefore, the government would have carte blanche, and could prosecute any web material they saw as indecent, thereby eliminating checks and balances. In *Pacifica*, the Court stated that the FCC had the authority to prohibit indecent broadcasts during hours when children were likely to be among the audience, and gave the FCC broad leeway to determine what constituted indecency in different contexts. However, the CDA's overbroad prohibitions were not comparable to *Pacifica* because of the remote risk of encountering indecent material by accident due to the series of affirmative steps required to access specific material. The Court also stated that no decision had ever upheld legislation that constituted an absolute ban on such speech, especially considering that other means of protection are available.[8] Thus, the Court held that the CDA was in fact unconstitutionally broad.

Following the unfavorable Court decision in *Reno v. ACLU*, Congress explored other avenues for restricting minors' access to pornographic material on the Internet. Congress and the President moved forward and passed the Child Online Protection Act (COPA).[9] The Child Online Protection Act was a direct response to the CDA decision, and therefore, narrowed the range of material covered. The act prohibited any person from "knowingly and with knowledge of the character of the material in

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[6] In *Erznoznik v. City of Jacksonville* the Court held that, "since not all nudity can be deemed obscene, even for minors, a regulation must be compelling not merely plausible because children have First Amendment rights." 422 U.S. 205 (1975).

[7] Affirmative defenses are provided for those who take good faith...effective...actions to restrict access by minors to the prohibited communications. 223(a) (5)(A)), and those who restrict such access by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number (223(e)(5)(B)).

[8] Justice Stevens noted unlike communications received by radio or television, the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read and retrieve material and thereby to use the Internet unattended.

[9] 47 U.S.C. 231

interstate or foreign commerce by means of the World Wide Web, making any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors."[10] Congress, responding to the rejection of CDA, limited the scope of COPA in three ways.

First, the CDA applied to all communication that took place on the Internet,[11] whereas COPA only applied to the material displayed on the World Wide Web.[12] Second, COPA only covered communication used for "commercial purposes,"[13] whereas CDA covered any transmission over the Internet. Nevertheless, the most important change made between the two acts is that while CDA prohibited "indecent" and "patently offensive" communications, COPA restricted only the category of "material that is harmful to minors." COPA drew from the three-part test for obscenity set forth in *Miller v. California*,[14] to define the term "material that is harmful to minors." *Miller* set forth the definition as:

> any communication, picture, image, 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) takes as a whole, lacks serious literary, artistic, political or scientific value for minors.[15]

However, even with the adjustments within COPA, many groups questioned the constitutionality of the act. Therefore, weeks before the implementation of the law, respondents filed for an injunction to halt enforcement. The federal government was enjoined from enforcing COPA by a court order in 1998. In 1999, the United States Court of Appeals for the Third Circuit upheld the injunction and struck down the law, ruling that it was too broad in using "community standards" as part of the

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[10] 47 U.S.C. 231 (a)(1)

[11] The Internet is a worldwide, publicly accessible network of interconnected computer networks that transmit data by packet switching using the standard Internet Protocol (IP). It is a "network of networks" that consists of millions of smaller domestic, academic, business, and government networks, which together carry various information and services, such as electronic mail, online chat, file transfer, and the interlinked Web pages and other documents of the World Wide Web.

[12] The World Wide Web is a system of interlinked, hypertext documents accessed via the Internet. With a web browser, users view web pages that may contain text, images, and other multimedia and navigates between them using hyperlinks.

[13] The statute provides 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 communication." 47 U.S.C. 231(e) (2) (A). COPA then defines the term "engaged in the business as:

> "a person who makes a communication or offers to make a communication, devotes time, attention or labor by means of the World Wide Web, that includes any material that is harmful to minors 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 for that person to make a profit or for it to be their sole source of income." 231(e)(2)(B).

[14] See 413 U.S. 15 (1973)

[15] 47 U.S.C. 231(e)(6)

definition of harmful materials.[16] In May 2002, the government sought review of the decision before the Supreme Court.

In *Ashcroft v. American Civil Liberties Union*, the Supreme Court again faced the prospect of reassessing the Internet and its obscenity issues. The Court limited the scope of the decision by solely delving into the use of "community standards to identify material that is harmful to minors."[17] The Court decided the use of "community standards" in the definition of harmful material was not enough to deem the act a violation of the First Amendment. However, the Supreme Court upheld the injunction on enforcement, ruling that the law was likely to be unconstitutional. Notably, the Court mentioned that new technology existed that could be superior to COPA, confirmed by the explicit findings of the Commission on Child Online Protection.[18] While the Court of Appeals examined COPA's constitutionality with regards to vagueness and over-breadth, they also scrutinized whether the act withstood the burden of being the least restrictive and most effective alternative in achieving compelling interest.[19]

After a five-year hiatus and a lengthy trial, the Court of Appeals reached a decision concerning *American Civil Liberties Union v. Alberto Gonzales.* U.S. District Court Judge Lowell A. Reed, Jr. struck down the Child Online Protection Act, finding the law facially violated the First and Fifth Amendments of the United States Constitution. Justice Reed held that COPA failed to meet the burden of proof by narrowly tailoring to Congress' compelling interest. The decision also declared that COPA was impermissibly vague and overbroad.[20]

The broad definitions of COPA prohibited significantly more speech than is necessary for Congress' compelling interest. The court found that the definitions of "commercial purposes" and "engaged in the business" apply to inordinate amounts of Internet speech, contrary to the claim that they only apply to commercial pornographers. Websites that receive profit from advertising or those that generate profit for their owners will ultimately be affected by the lack of clarity of these terms because the websites are inherently included by the vagueness of the terms. Defendants of COPA contend that the act regulates only commercial speech and therefore should be analyzed under less exacting standards.[21] However, if accepting advertising or selling subscriptions transformed speech into commercial speech than the First Amendment

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[16] The Court of Appeals concluded the act overbroad because "web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users who may deem harmful any material that does not stand up to the most puritan of communities in any state." 535 U.S. (I) (2002)

[17] The court reserved the right to not express any views as to whether COPA suffers from substantial over breadth for other reasons or whether the stature is unconstitutionally vague.

[18] Congress created the Commission on Child Online Protection to evaluate the relative merits of different means of restricting minors' ability to gain access to harmful materials on the Internet.

[19] See 2:98-cv-05591-LR (432)

[20] See *Id* at 1-3

[21] 47 U.S.C. 231(e)(2)(A)

would not even cover print material. The act of advertising on a website requires little more than proposing a commercial transaction, thus, eliminating engagement in the business. As a result, the court found COPA to be over-inclusive because it had a chilling effect on everyone that encountered a questionable website. The second failing in Congress' case for a compelling interest is the vagueness of the Act.

The doctrine that strikes down vague laws ensures fair notice and nondiscriminatory application of the laws.[22] Justice Reed used the doctrine to take issue with the definition of minors in COPA. The act defines a minor as "any person under the age of seventeen,"[23] which opens COPA up to differing interpretations of material. A sixteen-year-old viewer will have drastically different ideas regarding what constitutes "serious literary, artistic, political or scientific value" than those of a ten-year-old. Likewise, the term "patently offensive" will encompass a greater spectrum for an eight-year-old than for a seventeen-year-old. The Court noted that this vague definition left web publishers with a difficult decision as to what definition of "minor" to utilize when deciding to post their content. The fact that unknowing web publishers are faced with criminal prosecution for an alleged violation of COPA only serves to aggravate the chilling effect stemming from the vagueness of the terms within COPA.[24] Therefore, Justice Reed found that "the vagueness of COPA, is similar to the vagueness of CDA, which is especially concerning since they are both content-based regulations."[25] Consistent with the CDA ruling, the Court held that COPA was also unconstitutionally vague.

The vagueness issues examined in the previous section reveal the over-breadth of COPA. The over-breadth doctrine was created to prohibit the government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.[26] As seen above, the broad definitions of "commercial purposes" and "engaged in business" leaves COPA vague enough to be used in an arbitrary and capricious way against an extensive list of websites and web publishers. Such widespread application would prohibit and chill a substantial amount of protected speech for adults.[27] The Supreme Court noted, "The possible harms to a society that are associated with permitting unprotected speech are outweighed by the possibility that protected speech of others may be muted."[28] Thus, the Court of Appeals found COPA to be overbroad as well as impermissibly vague, and as of March

[22] The doctrine states: A statute or regulation fails for vagueness if men of ordinary intelligence must speculate as to the meaning of what the statute or regulation requires or prohibits. U.S. v. Tykarsky, 446 F.3D 458, 472 n.9 (3d Cir. 2006).
[23] See *Id* at 253-254
[24] An impermissible chill is created when one is deterred from engaging in protected activity by the existence of a governmental regulation or the threat of prosecution thereunder. 623 F.2d 845, 857 (3rd Cir 1980).
[25] See 2:98-cv-05591-LR (3rd Cir, 2007)
[26] *Free speech coalition*, 535 U.S. at 255
[27] See 2:98-cv-05591-LR (3rd Cir, 2007) 79-80
[28] See 413 U.S. at 255

22, 2007, Justice Reed permanently enjoined the government from the enforcement or prosecution of matters in relation to COPA.[29]

The Future of the Internet

With the exception of the Internet, Congress has restricted every new technology developed in the United the States from the telephone to cable television. Sometimes the courts have gone along with these restrictions, particularly when it comes to radio and television. However, the courts have consistently protected the Internet from government interference. Nevertheless, Justice Reed struggled in his COPA decision. The protection of minors from sexually explicit material has been deemed a social goal of the government. However, it should not come at the expense of our personal freedoms. In fact, Justice Reed commented, "perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection."[30] The Internet is still new technology, which has yet to be fine-tuned; thus, to place regulations on it may do more harm than good.

With the vast amount of material that is available on the Internet, one overarching agency or regulation is not likely to protect the youth of our nation completely. Attempts to create such an agency will force us to give up personal rights, as we have seen above. However, the cause is not lost; rather, by utilizing self-imposed filters, and drafting less restrictive laws, the people of this country can preserve their rights. Since the drafting of COPA, Internet technologies have increased greatly as has the effectiveness of filtering software. Filtering software offers an alternative to the content-based regulations offered up previously. The filters are computer applications, which attempt to block certain categories of material from view. These filters are low cost and give parents the freedom to restrict their children's viewing patterns as they see fit, without depending on the overbroad blanket protection that is suggested by Congress' proposed regulations.

Throughout this chapter, I have examined the constitutionality of Communication Decency Act and Child Online Protection Act. In both cases, the Courts found the regulations to be unconstitutional. In CDA, the Supreme Court found the act to be overbroad for the following reasons. First, existing technology did not give a sender the resources to prevent only a minor from seeing their communication. Second, the breadth of the CDA's coverage was unprecedented. Third, the Court found that the affirmative defenses set forth in the act did not constitute the sort of narrow tailoring that would justify an unconstitutional provision.

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[29] See *Id* at 84

[30] See 2:98-cv-05591-LR (3rd Cir, 2007) 82-83

The Child Online Protection Act was Congress' second attempt at protection of minors. After a lengthy trial the U.S. District Court struck down COPA, finding the law facially violated the First and Fifth Amendments of the United States Constitution. COPA failed to meet the burden of proof by narrowly tailoring to Congress' compelling interest, while also being impermissibly vague and overbroad. Finally, this chapter explored ways to be less restrictive on personal freedoms while still protecting the youth of America. By exploring new avenues of protection, we are offering parents the ability to be proactive in the monitoring of what their children see, rather than subjecting protected speech to rigorous penalties.