May the Child Online Protection Act Rely on Community Standards to Identify Material that is Harmful to Minors?

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FIRST AMENDMENT

May the Child Online Protection Act Rely on Community Standards to Identify Material That Is Harmful to Minors?

by Susanna Frederick Fischer


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ISSUE

Does the Child Online Protection Act (COPA) violate the First Amendment by relying on contemporary community standards to determine whether material on the World Wide Web is harmful to minors?

FACTS

COPA was enacted into law on Oct. 21, 1998. It prohibits an individual or entity 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.” 47 U.S.C. § 231(a)(1). Violations are subject to civil and criminal sanctions, including imprisonment up to six months, fines, and civil penalties of up to $50,000 per violation. 47 U.S.C. § 231(a)(1)-(3).

COPA defines “material that is harmful to minors” as material that is “obscene” or that satisfies a three-part test, namely, material 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.

COPA provides for an affirmative defense when a defendant "in good faith, has restricted access by minors to material that is harmful to minors" by "reasonable measures that are feasible under available technology," including the imposition of a requirement to use a credit card, debit account, adult access code or adult personal identification number, or through the acceptance of a digital age-verification certificate. 47 U.S.C. § 231(c)(1).

On the day after COPA's enactment, the American Civil Liberties Union and other plaintiffs (collectively, ACLU) filed suit in the United States District Court for the Eastern District of Pennsylvania, challenging COPA's constitutionality and seeking to enjoin the government from enforcing it.

The district court granted a temporary restraining order prohibiting the government from enforcing COPA. This temporary order was later briefly extended on consent. Plaintiffs then moved for a preliminary injunction. After holding extensive evidentiary hearings, the district court granted the plaintiffs' motion on the basis that the plaintiffs were likely to succeed on the merits of their claim that COPA was unconstitutional. The district court found that the use of blocking and filtering technologies, though imperfect, would likely be just as effective as COPA and would impose a lesser burden on constitutionally protected speech.

The U.S. Court of Appeals for the Third Circuit affirmed the district court, but on a different ground first raised by the Third Circuit on oral argument. Although the Third Circuit agreed that COPA was subject to a strict scrutiny analysis and that it was undisputed that the government had a compelling interest in protecting minors from harmful materials, even if these were not obscene by adult standards, the Third Circuit did not agree that the government could not establish that COPA was the least restrictive means to achieve this compelling interest. Rather, the Third Circuit took issue with the "contemporary community standards" aspect of COPA, finding that this was constitutionally overbroad in the Web context. The Third Circuit reasoned that since Web publishers lacked the ability to control the geographic distribution of their publications, the "contemporary community standards" criterion would result in every Web communication being required to comply with the most restrictive community's standards.

The government's petition for rehearing was denied. After two extensions of time, the Supreme Court granted the government's petition for review of the Third Circuit's decision. 121 S.Ct. 1997 (2001).

**Case Analysis**

The parties agree that COPA regulates speech based on its content, which is presumptively invalid under the First Amendment and subject to a strict scrutiny analysis. To survive constitutional scrutiny, COPA must be supported by a compelling government interest, and it also must be the least restrictive and most narrowly tailored means to further that interest.

In the "real world" context of traditional media sold in physical space, many states have laws regulating the sale of materials that are harmful to minors although not obscene for adults. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Supreme Court upheld the constitutionality of a New York statute that prohibited the sale to minors of magazines that were obscene as to minors, though not obscene for adults. Since *Ginsberg*, many states have enacted "blinder" laws that regulate not only the sale of materials that are harmful to minors but also the display of such materials. A number of federal courts of appeals and state courts have ruled that such blinder laws are constitutional. See, e.g., *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117 (1997), *American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir.1989), cert. denied, 494 U.S. 1056 (1990), *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991), *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993).

The problem of regulating materials that are "harmful to minors" and disseminated in cyberspace arose in the mid-1990s after the Internet became a widely used communica-

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tions medium in the United States. Congress first addressed this problem in the Telecommunications Act of 1996. Title V of this act, entitled the Communications Decency Act of 1996 (CDA), prohibited the knowing transmission to minors over the Internet of obscene or indecent messages, 47 U.S.C. § 223(a) (informally known as the “indecent transmission” provision), as well as using the Internet to knowingly send or display, in a manner available to minors, material that is “patently offensive as measured by contemporary community standards,” 47 U.S.C. § 223(d) (informally known as the “patently offensive display” provision). The CDA contained two affirmative defenses. One applied to defendants who took reasonable and effective actions to limit access by minors to prohibited material. 47 U.S.C. § 223(e)(5)(A). The second applied to defendants who restricted access to such material through the use of certain specified forms of age verification. 47 U.S.C. § 223(e)(5)(B).

In Reno v. ACLU, 521 U.S. 844 (1997), the Supreme Court found that both the indecent transmission provision and the patently offensive display provision violated the First Amendment. While the Court found that the government had a compelling interest in protecting minors from indecent and patently offensive communications, the government had failed to prove that the challenged provisions of the CDA were the least restrictive alternative available to further that compelling interest. The Court found that the Internet’s lack of geographical boundaries meant that the CDA’s “contemporary community standards” criterion would subject all Internet material to the standards of the most restrictive community.

Moreover, the Court found the CDA to be unconstitutionally overbroad because it applied to large amounts of non-pornographic material with serious educational or other value. The Court found that the CDA to be significantly broader than the “harmful to minors” statute found constitutional in Ginsberg because (1) the CDA was not limited to commercial transactions; (2) the CDA, unlike the Ginsberg statute, failed to contain any exception for parents who permitted their children to view the prohibited material; (3) the CDA’s key terms, indecent and patently offensive, were undefined and also failed to exempt material that was of serious literary, artistic, political, or scientific value; (4) the CDA’s definition of minors as those under 18 years of age would include many first-year college students, unlike the Ginsberg statute, which limited minors to those under 17. Nor did the CDA’s affirmative defenses amount to sufficiently narrow tailoring to save the CDA from unconstitutional overbreadth. According to the district court’s findings of fact, existing technologies were not yet effective in blocking minors’ access to harmful materials, nor in verifying age in chat rooms, e-mail, mail exploders, or newsgroups. Moreover, again relying on the district court’s findings of fact, the Court noted that the adoption of age-verification technology was not economically feasible for most noncommercial Web sites.

In enacting COPA, Congress has attempted to address all of the Court’s concerns about the CDA’s vagueness and overbreadth. The government argues that this tailoring has resulted in a statute that successfully stands up to constitutional scrutiny as the least restrictive alternative to further the compelling interest in protecting minors from harmful material. The government points out that COPA is now limited only to commercial entities, who can bear the costs of implementing age-verification technologies. Also, COPA applies only to Web communications, for which age screening is technologically and economically feasible according to the district court’s findings of fact. Moreover, COPA’s definition of minor has been more narrowly tailored to track the Ginsberg statute’s definition of persons under 17 years. Furthermore, COPA now specifically contains a definition of “material that is harmful to minors” that tracks the three prongs of the Ginsberg test.

In light of the finding of the court of appeals that COPA is the least restrictive means to further the government’s compelling interest, the government’s principal argument is that COPA’s reliance on community standards in its definition of harmful materials is constitutionally acceptable. The government contends that community standards are an established component of state “harmful to minors” statutes that have been held constitutional in regulating the real-world sale and display of material that is obscene for minors though not for adults. Moreover, it is not unreasonable to hold commercial entities to the standards of each community in the nation where such entities have chosen to obtain the advantage of nationwide markets by displaying material nationwide on the World Wide Web. In support, the government relies on two previous Supreme Court decisions upholding the constitutionality of applying community standards to determine the issue of obscenity under federal statutes. Hamling v. United States, 418 U.S. 87 (1974), concerned a law prohibiting mailing obscene material, and Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989), concerned a law prohibiting obscene telephone messages. The government also contends that applicable community standards are likely to
be reasonably constant throughout the nation.

Additionally, the government contends that COPA is saved from unconstitutional overbreadth by its "serious value prong" that excludes material of "serious literary, artistic, political, or scientific value." This prong does not incorporate a community-standards test, thus limiting COPA’s application to clearly pornographic material. Thus, the government argues that COPA does not impose an undue burden on speech because it is primarily directed to commercial pornographers who already make use of age-verification screens to block access to most of their material that is harmful to minors. According to the government, COPA’s main effect will be to require these commercial pornographers to place their teasers behind age-verification screens. That burden is modest in that it requires only that somewhat more material must be placed behind age-verification screens. That burden is outweighed by the compelling interest in protecting minors from harmful material.

In response, the ACLU argues not only that COPA’s contemporary community-standards test is unconstitutional, but also that COPA mirrors the CDA in its unconstitutional overbreadth and failure to meet the strict-scrutiny test. The ACLU argues that COPA's community-standards test is unconstitutional in that it subjects all communications on the Internet to a national mandate equal to the standards of the most restrictive community in the nation. The ACLU contends that unlike telephone or mail communications, the Internet is a communications medium for which access cannot be limited based on a user’s geographic location. Moreover, the ACLU argues that the government has failed to establish that community standards are reasonably constant throughout the United States.

The ACLU also argues that COPA is unconstitutionally overbroad in that it invalidly suppresses a wide range of speech that is constitutionally protected for adults under the guise of protecting children. The ACLU takes issue with the government’s contention that COPA is directed primarily to commercial pornographers and that COPA’s principal effect would be to require these commercial pornographers to place their teasers behind age-verification screens. The ACLU contends that COPA applies broadly to all Web speech, so long as the speaker is funded through advertising. Moreover, COPA’s affirmative defenses do not save it from violating the First Amendment because the effect of these affirmative defenses is to prevent or deter adults from accessing constitutionally protected speech. According to the ACLU, COPA is not narrowly tailored to further the government's asserted interest in protecting minors from harmful material because the district court found that parental use of blocking software is an effective and less restrictive alternative to COPA’s criminal penalties.

SIGNIFICANCE

The significance of this case is immense, not only for the debate over the proper balance between protecting children from World Wide Web pornography and the protection of free speech, but also for the broader problem of Internet regulation generally. The ease with which children can access pornographic materials on the World Wide Web is a matter of widespread concern. One significant aspect of this decision will be to determine who bears the burden of implementing blocking or filtering technologies to restrict access by minors to harmful materials. If the government prevails, Web content providers will bear this burden, while a ruling in the ACLU’s favor would mean that the burden of implementing end-user blocking or filtering technologies rests instead on parents. The decision is thus likely to have a significant impact on the broader question of the extent to which the government should assist parents in their primary responsibility to supervise the welfare of their children.

This case is also highly significant in that it presents the difficult challenge of determining the extent to which cyberspace differs from the physical world. If the government prevails, Web businesses may have to conform to community standards nationwide. But if the ACLU prevails, there is a risk that “real-world” state “harmful to minors” laws will be rendered meaningless by the widespread availability of pornographic material on the World Wide Web. On a more abstract level, this issue is significant for the ongoing debate over the extent to which the Internet can and should be regulated by national law. Some commentators, such as David Johnson and David Post, have endorsed the view that the absence of territorial borders in cyberspace renders cyberspace so unique that national laws are an entirely ineffective method of regulation and an entirely new system of transnational cyberspace law is required. See David Johnson & David Post, “Law and Borders—The Rise of Law in Cyberspace,” 48 Stanford L. Rev. 1367 (1996). Other commentators, such as Jack Goldsmith, have con-

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tended that the Internet is not significantly different from other communications media and can thus be adequately regulated by territorially based systems of national law. See Jack L. Goldsmith, “The Internet and the Abiding Significance of Territorial Sovereignty,” 5 Indiana J. Global Legal Studies 475 (Spring 1998). A ruling in favor of the government in this case would support the contention that the Internet has similarities to other communications media, specifically telephone and mail, while a ruling in favor of the ACLU would further the contention that the Internet is a truly unique communications medium.

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Burdens/Standards of Proof — As a general matter, the party in a lawsuit asserting a claim or defense has the burden of presenting evidence that establishes the claim or defense. This is known as the burden of proof.

There are three burdens of proof. From the least to the most demanding, they are the preponderance-of-the-evidence burden of proof; the clear-and-convincing burden of proof; and the beyond-a-reasonable-doubt burden of proof. The first two burdens can apply in either criminal or civil cases, while the third applies only in criminal cases and then only to the prosecution.

There are no ready definitions for these burdens. There are, however, working definitions. Under the preponderance standard, the party with the burden of proof is required to come forward with credible evidence establishing that a claim or defense is more likely true than not. Under the clear-and-convincing standard, the party with the burden of proof is expected to present evidence establishing that the claim or defense is quite likely true. Under the beyond-a-reasonable doubt standard, the prosecution must present such evidence of the defendant’s guilt that a reasonable person would not hesitate to find the defendant guilty. See Victor v. Nebraska, 114 S. Ct. 1239 (1994).

Class Action Lawsuit — As a general rule, a class action lawsuit is one in which one or several named individuals sue for themselves and others believed to have sustained injuries or losses similar to those sustained by the named plaintiffs, but who, at the time the case is filed, are unknown both as to their identitites and their actual numbers. In order for a plaintiff’s lawsuit to be given class action status, the named plaintiff must show that (1) the class is so large as to make it impracticable to specify each and every plaintiff by name, (2) there exist questions of law or fact common to all members of the plaintiff class, (3) the claims of the named plaintiffs are representative of the claims of the unnamed plaintiffs, and (4) the named plaintiffs can fairly and adequately represent the interests of the entire plaintiff class. (Note: Less common is the class action lawsuit in which the class is composed of named and unnamed defendants or in which both the plaintiffs’ and the defendant’s side of the case constitute a class.)

Collateral review (see also habeas corpus) — Collateral review is the criminal law’s fail-safe mechanism. It is intended to ensure that a conviction and sentence satisfy the requirements imposed by law, constitutional and statutory. As its name suggests, collateral review looks at a convicted defendant’s trial and in some cases the sentencing proceeding; it is not, however, a second trial. As a general rule, collateral review is limited to issues of law.

To be eligible for collateral review, the petitioning party must be in custody at the time the process begins. Typically but not necessarily, custody means imprisonment. For those convicted of state-law crimes, collateral review is available under state law and federal law, the latter in the form of a petition for a writ of habeas corpus. As a general rule, state-law petitioners must exhaust all avenues of collateral review under state law before filing a federal habeas corpus petition. For federal-law petitioners, federal habeas corpus review is available after certain post-conviction avenues such as a motion to vacate a conviction or sentence have been exhausted.

For both state-law and federal-law petitioners, federal habeas corpus review begins in a trial-level court but in the collateral-review context, the trial court functions as a reviewing court. However, if the federal habeas corpus petitioner is unsuccessful in habeas court, he or she is permitted, within limiting procedural rules, to seek further review of the habeas court’s decision in the appropriate intermediate federal appeals court and if unsuccessful there, in the Supreme Court.

Damages — In law, damages means money given to a party whose legal interests have been injured. While there are several types of damages that can be given to an injured party, two of the most prominent types are compensatory damages and punitive damages.

An award of compensatory damages is a sum of money intended to make the injured party whole, insofar as this is possible. An award of punitive damages is intended to punish the wrongdoer in order to deter future wrongdoing. Usually, punitive damages go to the injured party and are over and above any award of compensatory damages. However, in some states, a portion of any punitive damages award goes to the state treasury.

Direct review — In American criminal law, a defendant is tried once, but the trial itself can be reviewed many times by many appellate courts. One channel of review is called direct review because it is initiated by a first appeal as a matter of statutory right. Direct review also is wide-ranging review because the convicted defendant is permitted to raise all procedurally proper issues regarding the trial court’s disposition of his or her case — including issues of law, issues of fact, issues concerning the trial judge’s use of discretion.

If the first appeal is resolved against the convicted defendant, appellate rules permit the defendant to seek discretionary review by still higher courts, generally by the highest court of the convicting state and then by the United States Supreme Court. (In federal criminal cases, the convicted defendant’s initial appeal as a matter of right is to a circuit court of appeals and then as a matter of discretion to the Supreme Court.) If these courts decline to hear the defendant’s case, hear the case but decide against the defendant, or if the

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defendant defaults on his or her right to seek discretionary review, the direct review process ends and it is said that the defendant's conviction and sentence are final. At this point, the only avenue of relief from a conviction or sentence — retrial, resentencing, or outright release — is collateral review defined above.

Discovery — Discovery is a pretrial device in which each party to a lawsuit seeks information from the other party as well as from non-parties believed to have knowledge relevant to the issues in the case. The plaintiff seeks information through discovery to make his or her case; the defendant seeks information to support any defenses that may be available.

Diversity — This term is used whenever a federal court has jurisdiction over a case that does not involve a question of federal law. While there are several types of diversity jurisdiction, the most common type has two requirements: (1) the plaintiff and the defendant are residents of different states; (2) the dollar amount of the dispute between the parties is at least $75,000, exclusive of interest and costs.

Habeas corpus — Under the federal habeas corpus statute, 28 U.S.C. §2254 (1994), a person held in state/local custody who believes that his or her custody violates federal law — typically, the Constitution — may challenge that custody by filing a petition for a writ (i.e., an order) of habeas corpus in federal district court. If the petitioner wins, he or she must be released or retried, at the option of the prosecuting authority.

In banc — In banc (sometimes spelled en banc) literally means "full bench." The term applies to those courts — typically, intermediate appellate courts — in which more than one judge, but less than all judges of the court, hears a case. As a general rule, when an appellate court sits in banc, all active judges sit. However, in the federal system, some circuit courts of appeals have so many active judges, e.g., the Ninth Circuit with 28 judges, that sitting literally in banc is not feasible. Thus, for those circuits with 15 or more active judges, the size of an in banc court is set by circuit rule. Currently, in banc courts in the Fourth, Fifth, Sixth, and Ninth Circuits are composed of fewer than the entire court, with the exact number varying by circuit according to circuit rule.

Per curiam opinion — This term literally means "the opinion of the court," the Supreme Court or any appellate court. Because the opinion is the court's opinion, there is no indication of which justice/judge wrote it.

Plurality opinion — This term denotes an opinion of the United States Supreme Court in which there is no majority opinion; that is, fewer than a bare majority of five justices were able to agree on the legal basis for the Court's action in affirming, reversing, or vacating a lower court decision.

In some cases, the Court's opinion can be a partial plurality opinion. A partial plurality opinion is one in which at least one part of the opinion represents the views of four or fewer Justices. For an example of a partial plurality opinion, see Hubbard v. United States, 115 S. Ct. 1754 (1995) (Parts IV and V, a plurality of three Justices; Parts I, II, III, and VI, a majority of six Justices).

Preemption — Under the Supremacy Clause, U.S. CONST. art. VI, § 2, federal law — whether based on the Constitution, a statute, or a treaty — takes precedence over state or local law on the same matter. In other words, if federal law addresses a matter, either expressly or by implication, it trumps and renders unenforceable any state or local law on the matter.

Qualified Immunity — Qualified immunity is a defense that can be raised by a government employee whenever there is uncertainty about the lawfulness or unlawfulness of certain actions taken by the employee, actions claimed by the plaintiff to be unlawful. A government employee can avoid a trial under this defense if the employee can show that, at the time of the complained-of action, he or she could not have known that it violated the law.

Strict scrutiny — Strict scrutiny is a searching level of judicial review applied to governmental actions — federal, state, and local — challenged as unconstitutional. Strict scrutiny requires the governmental actor to show that it had a compelling reason to take the challenged action and that the action taken goes no further than necessary — is narrowly tailored — to advance the cited compelling reason.

Summary judgment — This is the name of a procedural device available to either party to a civil lawsuit that enables one or the other party to win without a trial. A party seeking summary judgment is entitled to a judgment in its favor if there is no genuine dispute about the pertinent facts, and, based on those undisputed facts, the law compels a judgment for the party who has asked for a favorable ruling.
COVERING THE COURT’S ENTIRE JANUARY CALENDAR OF CASES, INCLUDING...

TAHOE-SIERRA PRESERVATION COUNCIL, INC. ET AL. V. TAHOE REGIONAL PLANNING AGENCY ET AL.
The Fifth Amendment’s takings clause provides that private property shall not be taken for public use without just compensation. The Supreme Court previously has held that even temporary "takings" are compensable. In this case, residential lot owners who have been precluded from building homes around Lake Tahoe by a series of "temporary moratoria" that have lasted close to two decades are now asking for compensation for a part of those moratoria.

RUSH PRUDENTIAL HMO, INC. V. MORAN ET AL.
States are increasingly adopting statutes that establish independent review panels to decide disputes between enrollees and their HMOs over whether treatment is medically necessary. If the independent reviewer disagrees with the HMO, such laws often require the HMO to pay for the treatment. Litigation that grapples with the acceptability of this approach under ERISA preemption rules has now reached the Supreme Court.

ABA
Division for Public Education
**MONDAY**

**JANUARY 7**

Riisdale et al. v. Wolverine Worldwide, Inc.

Tahoe-Sierra Preservation Council, Inc. et al.

v. Tahoe Regional Planning Agency et al.

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**TUESDAY**

**JANUARY 8**

Edelman v. Lynchburg College

Pesto Corporation v. Shoketsu Kinzoku Kogyu Kabushiki Co., Ltd., w/ata

SMC Corporation and SMC Pneumatics, Inc.

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**WEDNESDAY**

**JANUARY 9**

Young et al. v. United States

National Railroad Passenger Corp. v. Morgan

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**JANUARY 14**

Porter et al. v. Nussle

United States v. Graft

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**JANUARY 15**

Huffman Plastic Compound, Inc. v. National Labor Relations Board

Steierkiewicz v. Sorena N.A.

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**JANUARY 16**

Rush Prudential HMO, Inc. v. Moran et al.

Barnhart v. Walton

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