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Obscenity, Child Pornography, and Indecency: Recent Developments and Pending Issues

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Summary

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press” The First Amendment applies, with two exceptions, to pornography and indecency, with those terms being used to refer to any words or pictures of a sexual nature. The two exceptions are obscenity and child pornography; because these are not protected by the First Amendment, they may be, and have been, made illegal. Pornography and indecency that are protected by the First Amendment may nevertheless be restricted in order to limit minors’ access to them.

Obscenity¹

To be legally obscene, and therefore unprotected by the First Amendment, pornography must, at a minimum, “depict or describe patently offensive ‘hard core’ sexual conduct.”² The Supreme Court has created a three-part test, known as the *Miller* test, to determine whether a work is obscene. The *Miller* test asks:

(a) whether the “average person applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.³

¹ For additional information, see CRS Report 95-804, *Obscenity and Indecency: Constitutional Principles and Federal Statutes*.

² *Miller v. California*, 413 U.S. 15, 27 (1973).

³ *Id.* at 24 (citation omitted).

In *Pope v. Illinois*, the Supreme Court clarified that “the first and second prongs of the *Miller* test — appeal to prurient interest and patent offensiveness — are issues of fact for the jury to determine applying contemporary community standards.” However, as for the third prong, “[t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.”⁴

Obscenity: Recent Developments. The Communications Decency Act of 1996 (P.L. 104-104, § 507) expanded the law prohibiting the importation of, or interstate commerce in, obscenity (18 U.S.C. §§ 1462, 1465) to apply to the use of an “interactive computer service” for that purpose. It defined “interactive computer service” to include “a service or system that provides access to the Internet.” 47 U.S.C. § 230(e)(2). These provisions were not affected by the Supreme Court’s decision in *Reno v. American Civil Liberties Union* declaring unconstitutional two provisions of the CDA that would have restricted indecency on the Internet.⁵

Obscenity: Pending Issues. In *Reno*, the Court noted, in dictum, that “the ‘community standards’ criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.”⁶ This suggested that, at least with respect to obscenity on the Internet, the Court might replace the community standards criterion, except perhaps in the case of Internet services where the defendant makes a communication available only to subscribers and can thereby restrict the communities in which he makes a posting accessible. However, in *Ashcroft v. American Civil Liberties Union*, decided May 13, 2002, the Court held that the use of community standards does not by itself render a statute banning “harmful to minors” material on the Internet unconstitutional. (See below under “Indecency.”)

Child Pornography⁷

Child pornography is material “that *visually* depict[s] sexual conduct by children below a specified age.”⁸ It is unprotected by the First Amendment even when it is not obscene; *i.e.*, child pornography need not meet the *Miller* test to be banned.⁹ The reason that child pornography is unprotected is that it “is intrinsically related to the sexual abuse of children Indeed, there is no serious contention that the legislature was unjustified

⁴ 481 U.S. 497, 500 (1987).

⁵ 521 U.S. 844 (1997).

⁶ *Id.* at 877-878.

⁷ For additional information, see CRS Report 95-406, *Child Pornography: Constitutional Principles and Federal Statutes*.

⁸ *New York v. Ferber*, 458 U.S. 747, 764 (1982) (italics in original).

⁹ This means that child pornography may be banned even if does not appeal to the prurient interest, is not patently offensive, and does not lack literary, artistic, political, or scientific value. See *Ferber*, *supra* note 8, 458 U.S., at 764.

in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies.”¹⁰

Federal law bans interstate commerce (including by computer) in child pornography (18 U.S.C. §§ 2252, 2252A), defines “child pornography” as “any visual depiction” of “sexually explicit conduct” involving a minor, and defines “sexually explicit conduct” to include not only various sex acts but also the “lascivious exhibition of the genitals or pubic area of any person.” 18 U.S.C. § 2256.

Child Pornography: Recent Developments. In 1994, Congress amended the child pornography statute to provide that “lascivious exhibition of the genitals or pubic area of any person” “is not limited to nude exhibitions or exhibitions in which the outlines of those areas were discernible through clothing.” 18 U.S.C. § 2252 note. This amendment expressed Congress’s support for a court decision upholding a conviction for possessing “videotapes that focus on the genitalia and pubic area of minor females . . . even though these body parts are covered by [opaque] clothing.”¹¹ Then, the Child Pornography Prevention Act of 1996 (CPPA) created a definition of “child pornography” that included visual depictions that *appear* to be of a minor, even if no minor was actually used. 18 U.S.C. § 2256(8). The statute, thus, may be read to include visual depictions using adult actors who appear to be minors, as well as computer graphics and drawings or paintings done without any models.

On April 16, 2002, in *Ashcroft v. Free Speech Coalition*, the Supreme Court declared the CPPA unconstitutional to the extent that it prohibited pictures that were not produced with actual minors.¹² Child pornography, to be unprotected by the First Amendment, must either be obscene or depict actual children engaged in sexual activity (including “lascivious” poses), or actual children whose images have been “morphed” to make it appear that the children are engaged in sexual activity. The Court observed in *Ashcroft* that statutes that prohibit child pornography that use real children are constitutional because they target “[t]he production of the work, not the content.” The CPPA, by contrast, targeted the content, not the means of production. The government’s rationales for the CPPA included that “[p]edophiles might use the materials to encourage children to participate in sexual activity” and might “whet their own sexual appetites” with it, “thereby increasing . . . the sexual abuse and exploitation of actual children.” The Court found these rationales inadequate because the government “cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts” and “may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’”

The government also argued that the existence of “virtual” child pornography “can make it harder to prosecute pornographers who do use real minors,” because, “[a]s imaging technology improves . . . , it becomes more difficult to prove that a particular picture was produced using actual children.” This rationale, the Court found, “turns the

¹⁰ *Ferber*, *supra* note 8, 458 U.S., at 759-760.

¹¹ *United States v. Knox*, 977 F.2d 815, 817 (3d Cir. 1992), *vacated and remanded*, 510 U.S. 375 (1993); 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995).

¹² 535 U.S. 234 (2002).

First Amendment upside down. The Government may not suppress lawful speech as a means to suppress unlawful speech.”

In response to *Ashcroft*, Congress enacted Title V of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, or PROTECT Act, Public Law 108-21. This statute prohibits any “digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct. It also prohibits “a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that . . . depicts a minor engaging in sexually explicit conduct,” and is obscene or lacks serious literary, artistic, political, or scientific value. Section 603 of the PROTECT Act amended the CDA to apply to child pornography transmitted via the Internet.

Child Pornography: Pending Issues

To the extent that the PROTECT Act prohibits non-obscene child pornography that was produced without the use of an actual child, it may be challenged as unconstitutional.

Indecency¹³

“Indecency” has no precise definition. The Supreme Court has said that “the normal definition of ‘indecent’ merely refers to nonconformance with accepted standards of morality.”¹⁴ More specifically, the term has been defined as material that “depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.”¹⁵

Indecent material is protected by the First Amendment unless it constitutes obscenity or child pornography. Indecent material that is protected by the First Amendment may be restricted by the government only “to promote a compelling interest” and only by “the least restrictive means to further the articulated interest.”¹⁶ The Supreme Court has “recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.”¹⁷

¹³ For additional information, see CRS Report 95-804, *Obscenity and Indecency: Constitutional Principles and Federal Statutes*.

¹⁴ Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 740 (1978).

¹⁵ This quotation is from 47 U.S.C. § 223(d), a provision of the CDA that the Supreme Court held unconstitutional. This definition is similar to the FCC’s definition of “indecent” in the context of dial-a-porn and broadcast media. See, *Dial Information Services Corp. v. Thornburgh*, 938 F.2d 1535, 1540 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992); *Pacifica*, *supra* note 14, 438 U.S., at 732.

¹⁶ *Sable Communications of California v. Federal Communications Commission*, 492 U.S. 115, 126 (1989).

¹⁷ *Id.*

There are federal statutes in effect that limit, but do not ban, indecent material transmitted via telephone, broadcast media, and cable television.¹⁸ There are also many state statutes that ban the distribution to minors of material that is “harmful to minors.” Material that is “harmful to minors” under these statutes tends to be defined more narrowly than material that is “indecent,” in that material that is “harmful to minors” is generally limited to material of a sexual nature that has no serious value for minors. The Supreme Court has upheld New York’s “harmful to minors” statute.¹⁹

Indecency: Recent Developments. In 1997, the Supreme Court declared unconstitutional two provisions of the Communications Decency Act of 1996 that would have prohibited indecent communications, by telephone, fax, or e-mail, to minors, and would have prohibited use of an “interactive computer service” to display indecent material “in a manner available to a person under 18 years of age.”²⁰ This latter prohibition would have banned indecency from public (*i.e.*, non-subscription) Web sites.

The CDA was succeeded by the Child Online Protection Act (P.L. 105-277), which differs from the CDA in two main respects: (1) it prohibits communication to minors only of “material that is harmful to minors,” rather than material that is indecent, and (2) it applies only to communications for commercial purposes on publicly accessible Web sites. “Material that is harmful to minors” is defined as material that (A) is prurient, as determined by community standards, (B) “depicts, describes, or represents, in a manner patently offensive with respect to minors,” sexual acts or a lewd exhibition of the genitals or post-pubescent female breast, and (C) “lacks serious literary, artistic, political, or scientific value for minors.” A communication is deemed to be for “commercial purposes” if it is made in the regular course of a trade or business with the objective of earning a profit. Requiring a viewer to use a credit card to gain access to the material would constitute a defense to prosecution. The law was scheduled to take effect on November 20, 1998, but a suit challenging it was filed, and a federal district court in Philadelphia, finding that there was a likelihood that the plaintiffs would prevail, issued a preliminary injunction against enforcement of the statute pending a trial on the merits.²¹ The Third Circuit upheld the preliminary injunction, and, on May 13, 2002, the Supreme Court vacated and remanded the Third Circuit’s decision, but did not remove the preliminary injunction. On March 6, 2003, the Third Circuit again affirmed the district court’s preliminary injunction.

Indecency: Pending Issues. In light of the Supreme Court’s decision in *Reno*, is the Child Online Protection Act constitutional? The primary problem the Court found with the CDA was that, “[i]n order to deny minors access to potentially harmful speech,

¹⁸ 47 U.S.C. § 223(b) (commercial dial-a-porn), 18 U.S.C. § 1464, 47 U.S.C. § 303 note (broadcast media), 47 U.S.C. §§ 531(e), 532(c)(2), 532(h), 559-561 (cable television). The Supreme Court declared section 561 unconstitutional. *United States v. Playboy Entertainment Group, Inc. v. United States*, 529 U.S. 803 (2000).

¹⁹ *Ginsberg v. New York*, 390 U.S. 629 (1968).

²⁰ *Reno v. American Civil Liberties Union*, *supra*, note 5.

²¹ *American Civil Liberties Association v. Reno*, 31 F. Supp.2d 473 (E.D. Pa., 1999), *aff’d*, 217 F.3d 162 (3d Cir. 2000), *vacated and remanded sub nom.* *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002), *aff’d on remand*, 322 F.3d 240 (3d Cir. 2003).

the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.”²² The fact that COPA does not apply to material with serious literary, artistic, political, or scientific value for minors, and that it applies only to commercial Web sites, makes it more likely than the CDA to be upheld. Nevertheless it may well, like the CDA, be found to “suppress[] a large amount of speech that adults have a constitutional right to receive and to address to one another.” This is because a Web site that is freely accessible, but is deemed “commercial” because it seeks to make a profit through advertisements, would apparently have to stop making its Web site freely accessible, or, in the alternative, would have to remove all words and pictures that might be deemed “harmful to minors” according to the standards of the community most likely to be offended by the material. In its May 13, 2002 decision, the Supreme Court held that COPA’s use of community standards does not by itself render the statute unconstitutional, but it remanded the case to the Third Circuit to consider whether it is unconstitutional nonetheless, and the Third Circuit held that it is.

The Children’s Internet Protection Act (CIPA), P.L. 106-554²³

CIPA restricts access to obscenity, child pornography, and material that is “harmful to minors,” and so is discussed here separately. CIPA amended three federal statutes to provide that a school or library may not use funds it receives under these statutes to purchase computers used to access the Internet, or to pay the direct costs of accessing the Internet, and may not receive universal service discounts, unless the school or library enforces a policy to block or filter minors’ Internet access to visual depictions that are obscene, child pornography, or harmful to minors; and enforces a policy to block or filter adults’ Internet access to visual depictions that are obscene or child pornography. It provides, however, that filters may be disabled “for bona fide research or other lawful purposes.”

On May 31, 2002, a three-judge federal district court declared CIPA unconstitutional and enjoined its enforcement insofar as it applies to libraries. (The provisions affecting schools were not challenged.) The government appealed directly to the Supreme Court, which, on June 23, 2003, reversed the district court, holding CIPA constitutional.²⁴ The plurality opinion acknowledged “the tendency of filtering software to ‘overblock’ – that is, to erroneously block access to constitutionally protected speech that falls outside the categories that software users intend to block.” It found, however, that, “[a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled.” The plurality also found that CIPA does not deny a benefit to libraries that do not agree to use filters; rather, the statute “simply insist[s] that public funds be spent for the purposes for which they were authorized.”

²² *Reno*, *supra* note 5, at 874.

²³ P.L. 106-554 incorporated H.R. 5666, 106th Congress, Title 17 of which is CIPA.

²⁴ *United States v. American Library Association*, No. 02-316 (U.S., June 23, 2003).