

The Child Online Protection Act (“COPA”) Position Paper

The American Center for Law and Justice is committed to the defense of federal statutes restricting online publication of obscenity and child pornography, and the online publication of indecent materials to minors. The Internet is a highly effective, open, unregulated medium of communication with no one agency or government body watching over the content of material made available on the World Wide Web. The Internet is becoming the fastest growing medium for pornography distribution, and some have characterized it as the best hunting ground for pedophiles.¹ In enacting the Child Online Protection Act (“COPA”), Congress demonstrated its constitutionally reasonable judgment that those commercial vendors of indecent materials should bear the costs of insuring that children are not likely to access their wares.

The Child Online Protection Act (“COPA”)² requires commercial producers of indecent materials to take appropriate measures to insure that minors do not have access to such materials online. COPA authorizes the imposition of criminal and civil penalties on any person who “knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes 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).

COPA opponents argue that 1) its definition of “material that is harmful to minors” is not narrowly tailored; 2) its limitation to communications made “for commercial purposes,” does not sufficiently narrow COPA’s reach; 3) its methods of compliance unconstitutionally burden adult access to protected speech; and 4) filtering software is a less restrictive means to achieve COPA’s objective of restricting minors’ access to harmful material. Each of these arguments lacks merit.

COPA is narrowly tailored because it applies only to material displayed on the World Wide Web, covers only communications made “for commercial purposes,” and restricts only “material that is harmful to minors.”³ COPA’s definition of “material that is harmful to minors” parallels the definition of obscenity upheld by the Supreme Court of the United States in *Miller v. California*, 413 U.S. 15 (1973), and mirrors the statutory language examined and approved by the Court in *Ginsberg v. New York*, 390 U.S. 629, 646 (1968); therefore, it is consistent with current First Amendment jurisprudence.

¹ Joel Sanders, *The Regulation of Indecent Material Accessible to Children on the Internet*, 39 Catholic Law. 125, 129 (1999).

² See 47 U.S.C. § 231.

³ COPA defines “material that is harmful to minors” 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.

47 U.S.C. § 231(e) (6).

In targeting communications made for “commercial purposes,” COPA is modeled after state laws that require local stores to place pornographic material that is harmful to minors behind blinder racks, in sealed wrappers, or in opaque covers. Courts of appeals and state courts consistently have upheld those state display laws on the ground that they further the government’s compelling interest in shielding minors from material that would impair their psychological and moral development, without imposing an unreasonable burden on adults who seek access to such material. COPA is constitutional for the same reasons.

Furthermore, COPA provides “an affirmative defense to prosecution” for businesses that restrict access by minors to harmful material by requiring use of a credit card or an adult ID. 47 U.S.C. § 231(c) (1). That defense allows adults to obtain access to this speech, while protecting minors from material that is harmful to them. The claim that COPA’s requirements, such as the age verification, are too burdensome to the right of adults to access pornography on the Internet is a weak one. Requiring an adult to present an adult ID or a valid credit card number in order to obtain access to harmful material is not an unreasonable burden. The alleged burden which COPA places on commercial websites and its patrons should be viewed no differently than those imposed at the state level, requiring a grocery store, for example, to shield indecent magazines from unsuspecting minor patrons. At worst, COPA’s requirements create a slight inconvenience; requiring adults to verify their age to access indecent online materials does not rise to the level of an unconstitutional burden.

COPA opponents also portray as a constitutional crisis the possibility that some adults will be deterred or too embarrassed to pursue the material beyond these age verification screens. Given the known risks posed to children, it is altogether appropriate that the adult users and the Web site operators should bear the relatively minor burden associated with keeping harmful material away from minors.

Finally, the use of filters and/or blocking software, although less restrictive, is not an effective method for achieving the government’s compelling interest in protecting children from the dangers of pornography on the Internet. As applied to commercial Websites that display harmful material as a regular course of their businesses, COPA’s screening requirement is far more effective because COPA *compels* persons who display material on the Web to take steps to prevent minors from obtaining access to material that is harmful to them. In addition, blocking software is not without its deficiencies. Filters can block inoffensive materials while failing to screen other, offensive materials. Computer-savvy minors can easily defeat such filtering programs. And filtering software is not cheap to buy, or cheap to maintain. Furthermore, because the content of the Internet is ever-changing, it is virtually impossible for blocking software and filtering technology to keep up.

Because of the care taken by Congress, COPA is, in fact, the least restrictive means to accomplish the compelling interest in protecting minors from the harm associated with exposure to indecent materials on the World Wide Web. The requirements imposed by COPA will not destroy the Internet. The measures prescribed by COPA do not trench upon the rights guaranteed by the First Amendment. COPA simply places a reasonable restriction on access to commercially marketed indecency to prevent access to such materials by minors.