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Restrictions on Minors' Access to Material on the Internet

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Summary

On March 12, 1998, the Senate Committee on Commerce, Science and Transportation favorably reported two bills that would restrict material on the Internet deemed harmful to minors. S. 1482 (S.Rept. 105-225) would require anyone "in interstate or foreign commerce or through the World Wide Web," who "is engaged in the business of the commercial distribution of material that is harmful to minors," to "restrict access to such material by persons under 17 years of age." S. 1619 (S. Rept. 105-226) would require elementary schools, secondary schools, and libraries that accept "universal services" under 47 U.S.C. § 254(h)(1)(B) to install on their "computers with Internet access a system to filter or block matter deemed to be inappropriate for minors." This report summarizes and discusses interpretational issues in these two bills and addresses First Amendment issues that they raise.

S. 1482: Summary and Interpretation

S. 1482, 105th Congress, would require anyone "in interstate or foreign commerce or through the World Wide Web" who "is engaged in the business of the commercial distribution of material that is harmful to minors," to "restrict access to such material by persons under 17 years of age." It would impose criminal penalties of fines and imprisonment for violations. It would define "material that is harmful to minors" as any type of communication, in words, pictures, or sound, that —

> (i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
>
> (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(iii) lacks serious literary, artistic, political, or scientific value.

This definition parallels the Supreme Court's definition of "obscenity," which is pornography that is not protected by the First Amendment, even for adults. In *Miller v. California*, 413 U.S. 15, 24 (1973), the Court held that, to determine whether a work is obscene, it 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.

In *Pope v. Illinois*, 481 U.S. 497, 500 (1987), 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."

S. 1482 does not specify what standards are to be used in applying its three-prong definition of "material that is harmful to minors." Because it does not mention "community standards," but refers in its first two prongs, respectively, to "with respect to minors" and "with respect to what is suitable for minors," a court might construe it to intend a national standard to apply to these two prongs. A court would also seem likely to apply a uniform standard to the third prong, as the Supreme Court in *Pope v. Illinois* cited a constitutional basis for prescribing a "reasonable person" standard for the third prong of the *Miller* test; it wrote: "[t]he First Amendment protects works, which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." 481 U.S., at 500. The Court has not addressed whether the First Amendment protects such works even with respect to minors, but it seems likely that a court would construe the third prong of the definition in S. 1482 as governed by a "reasonable person" standard.

As for how a provider would have to "restrict access," S. 1482 provides:

> It is an affirmative defense to prosecution under this subsection that the defendant restricted access to material that is harmful to minors by persons under 17 years of age by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number or in accordance with such other procedures as the [Federal Communications] Commission may prescribe.

S. 1482 does not provide that these are the only methods a provider may use to restrict access; it provides merely that these are acceptable methods. A retailer of magazines who engaged in interstate commerce could presumably comply with the law by checking potential purchasers' driver's licenses or other IDs. S. 1482 does not define the terms it uses in setting forth the above affirmative defenses. It is unclear, therefore, what

it means by a "verified" credit card, and thus, whether it would be illegal, for example, to provide material to a minor (whom the provider may or may not know to be a minor) who uses his parent's credit card (with or without parental permission), which the provider of materials verifies to be an active credit card.

S. 1482 appears to contain other uncertainties as well. It does not state whether it would apply to Internet service providers, such as America Online, as well as to persons who post material, as both may be viewed as "engaged in the business of the commercial distribution of material." In this regard, S. 1482 might be construed as limited by 47 U.S.C. § 230(c)(1), which provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." S. 1482 also does not define "commercial distribution," and thus leaves uncertain whether a magazine (whether paper or electronic) that includes paid advertising but is made available for free is "commercial." As noted below, this could make a difference as to the constitutionality of the bill.

S. 1619: Summary and Interpretation

S. 1619, 105th Congress, would require elementary schools, secondary schools, and libraries that accept "universal services" under 47 U.S.C. § 254(h)(1)(B) to install on their "computers with Internet access a system to filter or block matter deemed to be inappropriate for minors." Schools would be required to install such a system on all their computers with Internet access, but libraries would be required to do so only "on one or more" of their computers with Internet access. This would ensure that, in libraries, adults would not be restricted in their access to material deemed inappropriate for minors — unless the library has only one computer with Internet access, and the filtering or blocking software cannot be turned off when adults use the computer.

S. 1619 would require schools and libraries that accept universal services to certify to the Federal Communications Commission that they are in compliance with the requirements of the bill. Under S. 1619, "the determination of what matter is inappropriate for minors shall be made by the school, school board, library or other authority responsible for making the required certification." S. 1619 does not, however, provide any standards for determining what matter is inappropriate to minors, and does not limit such matter to matter dealing with sex or any other subject. S. 1619 also prohibits any federal "agency or instrumentality" from reviewing "the determination made by the certifying school, school board, library, or other authority." "Instrumentality" is not defined, so might be construed to include federal courts, but this would apparently not preclude state court review. It is not clear whether, even if "instrumentality" is construed to include federal courts, S. 1619 would preclude federal court review of a determination of what matter is inappropriate for minors, if such determination is made not only pursuant to S. 1619's certification requirement, but is made simultaneously pursuant to state or local law.

S. 1482 and the First Amendment

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." The Supreme Court has held that the First Amendment applies to pornography, with two exceptions: obscenity and child

pornography. Obscenity, as noted above, is the subset of pornography defined by the *Miller* test. Child pornography is material that visually depicts sexual conduct by children, and 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. Pornography that constitutes neither obscenity nor child pornography, because it is protected by the First Amendment, may not be banned with respect to adults, but it may be regulated, to some extent, as to the "time, place, and manner" of its distribution or exhibition. In addition, the Supreme Court has upheld statutes that prohibit access by minors to material deemed harmful to minors. *E.g.*, *Ginsberg v. New York*, 390 U.S. 629 (1968); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).

In its most recent decision on the constitutionality of a statute intended to protect minors from harmful material, the Supreme Court, in *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997), struck down two sections of the Communications Decency Act (CDA). These sections 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." This latter prohibition would have, in effect, banned indecency from public (*i.e.*, non-subscription) Web sites.

The Court's concern in *Reno* focused on the CDA's potential restriction on the free speech rights of adults and its potential interference with relationships between parents and older teenagers. As for adults, the Court wrote:

> In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. . . . As we have explained, the Government may not "reduc[e] the adult population . . . to . . . only what is fit for children."

Id. at 2346. As for its concern with relationships between parents and older teenagers, the Court in *Reno* wrote:

> Under the CDA, a parent allowing her 17-year-old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term. . . . Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community, found the material "indecent" or "patently offensive," if the college town's community thought otherwise.

Id. at 2348. The Court in *Reno* "referred to possible alternatives [to the CDA] such as requiring that indecent material be 'tagged' in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some

portions of the Internet — such as commercial web sites — differently from others, such as chat rooms." *Id.*

As noted, the lack of a definition in S. 1482 of "commercial distribution" leaves uncertain whether S. 1482 would apply to a Web site that is freely accessible but includes paid advertising. If not — if S. 1482 is construed to apply only to Web sites that require users to subscribe or register, or to Web sites that offer for sale material that is harmful to minors — then it would appear to avoid the First Amendment impediments the Court identified in *Reno*. This is because, if S. 1482 is construed to apply only to such Web sites, then providers would have the capacity to require users to certify their age, or to use "a verified credit card" or other means specified in the affirmative defense provision of the bill. Providers could thus comply with the bill without restricting adults' access to material deemed harmful to minors. In addition, S. 1482's exclusion from its definition of "material that is harmful to minors" of material with "serious literary, artistic, political, or scientific value" would seem to allay the Court's concern with censorship of birth control information and the like.

If, however, all Web sites with advertisements were construed to be engaged in "commercial distribution," so that S. 1482 would apply to them, then S. 1482 would appear to be unconstitutional because, as the Supreme Court said in *Reno* with respect to the CDA, it would "effectively suppress[ ] a large amount of speech that adults have a constitutional right to receive and to address to one another."

S. 1619 and the First Amendment

S. 1619, unlike S. 1482, would not impose criminal penalties on the exercise of speech; it would limit access to speech only as a condition to the acceptance of a federal benefit. The Constitution grants Congress the power to "provide for the . . . general Welfare of the United States," and "[i]ncident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). In *Rust v. Sullivan*, 500 U.S. 173, 193 (1991), the Supreme Court held that the government may choose "to fund one activity to the exclusion of another. '[A] legislature's decision not to subsidize the exercise of a fundamental right [freedom of speech] does not infringe the right.'" *See also, National Endowment for the Arts v. Finley*, 66 U.S.L.W. 4586 (U.S. June 25, 1998).

Nevertheless, as even *Rust* and *Finley* indicated, there are limits to the speech restrictions that Congress may impose in connection with its spending power. S. 1619, by not providing any standards for determining what matter is inappropriate for minors and by not limiting such matter in any way, could be construed to authorize schools and libraries to deem material "inappropriate for minors" and to filter or block it for any reason. They could filter or block material even if it had serious literary, educational, artistic, political, or scientific value for minors, and they could do so solely because they deemed the ideas it expressed "inappropriate for minors." For example, a school or library official could find that Web sites that discussed socialism, or Darwinism, were harmful to minors, because the official disagreed with socialism on political grounds or with Darwinism on religious grounds. There might, of course, be Web sites that discuss socialism or Darwinism that, for reasons other than their subject matter, are inappropriate

for minors, and a school or library official could filter or block access to such Web sites for such reasons. Under the First Amendment, however, he apparently may not, even for legitimate reasons, deny students access only to material with which he disagrees on political, religious, or similar grounds. For example, although a school or library official may deny students access to semi-literate material generally, he apparently may not deny students access to semi-literate discussions of Darwinism but allow students access to semi-literate discussions of creationism.

Two Supreme Court decisions in particular support these conclusions. First, in *Board of Education, Island Trees School District v. Pico*, 457 U.S. 853 (1982), a plurality of Justices held that, although school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," they "may not remove books from school library shelves simply because they dislike those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" Second, in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court struck down an ordinance that prohibited the placing on public or private property of a symbol, such as "a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others, on the basis of race, color, creed, religion or gender." The Minnesota Supreme Court had construed the ordinance to apply only to conduct that amounted to fighting words, which are not protected by the First Amendment. The U.S. Supreme Court held, however, that although fighting words may be proscribed "*because of their constitutionally proscribable content*," they may not "be made the vehicles for content discrimination unrelated to their distinctively proscribable content." Thus, the government may proscribe fighting words, but it may not make the further content discrimination of proscribing particular fighting words on the basis of hostility "towards the underlying message expressed." By analogy, it appears that, even though a school or library official might deny minors access to material for legitimate reasons, or may, in fact, deny minors all access to the Internet, he may apparently not proscribe to minors only material with which he disagrees for political, religious, or similar reasons.

Nevertheless, S. 1619 would not appear to grant school or library officials any new power to engage in these possible unconstitutional acts. They can engage in them now, apart from S. 1619, and are subject to being judicially overturned. S. 1619 would at most seem to preclude federal but not state judicial review of such acts. This would not appear to render S. 1619 unconstitutional.

S. 1619 may, however, have an unrelated constitutional problem. If it were applied to a library that had only one computer, then S. 1619 would apparently, in contravention of *Reno v. ACLU*, "effectively suppress[ ] a large amount of speech that adults have a constitutional right to receive and to address to one another." Of course, this would not be the case if the filtering or blocking software could be turned on or off for each individual user, depending on his age.

We note that constitutional law in this area is in flux, as a challenge to the Loudoun County, Virginia, public library's Internet restrictions (which apply to adults and children) makes its way through the federal courts. On April 7, 1998, a federal judge refused to dismiss the case. *Mainstream Loudoun v. Board of Trustees*, No. 97-2049-A (E.D. Va.).