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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.

Obscenity[1]

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 the three-part *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]

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[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] In *Brockett v. Spokane Arcades*, the Supreme Court held that material is not obscene if it "provoke[s] only normal, healthy sexual desires." To be obscene it must appeal to "a shameful or morbid interest in nudity, sex, or excretion."[5]

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.[6]

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."[7] 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 Pornography[8]

Child pornography is material "that *visually* depict[s] sexual conduct by children below a specified age."[9] 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.[10] The reason

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[4] 481 U.S. 497, 500 (1987).

[5] 472 U.S. 491, 498 (1984).

[6] 521 U.S. 844 (1997).

[7] *Id*. at 877-878.

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

[9] New York v. Ferber, 458 U.S. 747, 764 (1982) (italics in original).

[10] 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.

(continued...)

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 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."[11]

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."[12] Then, the Child Pornography Prevention Act of 1996 (CPPA) enacted 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 banned visual depictions using adult actors who appear to be minors, as well as computer graphics and drawings or paintings done without any models.

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.[13] 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.'"

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[10] (...continued)
See Ferber, *supra* note 9, 458 U.S., at 764.

[11] *Ferber, supra* note 9, 458 U.S., at 759-760.

[12] 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).

[13] 535 U.S. 234 (2002).

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 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 PROTECT Act, Public Law 108-21 (2003). 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.

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 unconstitutional.

Indecency[14]

The Supreme Court has said that "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."[15] The FCC defines the term to refer to material that "describe[s] or depict[s] sexual or excretory organs or activities" in terms "patently offensive as measured by contemporary community standards for the broadcast media."[16]

Indecent material is protected by the First Amendment unless it constitutes obscenity or child pornography. Except on broadcast radio and television, 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."[17] 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."[18]

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

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

[16] *In the Matter of Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, File No. EB-00-IH-0089 (April 6, 2001). This definition is similar to the FCC's definition of "indecent" in the context of dial-a-porn. *See*, Dial Information Services Corp. v. Thornburgh, 938 F.2d 1535, 1540 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992).

[17] Sable Communications of California v. Federal Communications Commission, 492 U.S. 115, 126 (1989).

[18] *Id.*

There are federal statutes in effect that limit, but do not ban, indecent material transmitted via telephone, broadcast media, and cable television.[19] 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.[20]

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."[21] 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 (COPA), P.L. 105-277 (1998), 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. COPA has never taken effect because a constitutional challenge was filed and a federal district court, 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.[22] The case is now pending in the Supreme Court.

Indecency: Pending Issues. In light of the Supreme Court's decision in *Reno*, is the COPA constitutional? The primary problem the Court found with the CDA was that, "[i]n 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

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[19] 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).

[20] Ginsberg v. New York, 390 U.S. 629 (1968).

[21] Reno v. American Civil Liberties Union, *supra*, note 6.

[22] 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), *cert. granted*, No. 03-218 (Oct. 14, 2003).

to address to one another."[23] 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 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.

On another matter, the FCC held that, on broadcast television, the use of a word that would be "indecent" if used to describe sexual or excretory activities or organs is not indecent if used "as an adjective or expletive to emphasize an exclamation."[24] In response, H.R. 3687, 108th Congress, was introduced to amend 18 U.S.C. § 1464 to define "profane" to include eight specific words in any grammatical form.

The Children's Internet Protection Act (CIPA), P.L. 106-554

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 images 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."

In 2002, a three-judge federal district court declared CIPA unconstitutional; the provisions affecting schools were not challenged. The government appealed directly to the Supreme Court, which, in 2003, reversed, holding CIPA constitutional.[25] 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."

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[23] *Reno, supra* note 6, at 874.

[24] *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program 1*, File No. EB-03-IH-0110 (Oct. 3, 2003). *See*, CRS Report RL32222, *Regulation of Broadcast Indecency: Background and Legal Analysis*.

[25] United States v. American Library Association, 123 S. Ct. 2297 (2003).