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Internet: Status Report on Legislative Attempts to Protect Children from Unsuitable Material on the Web

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Summary

Preventing children from encountering unsuitable material, such as pornography, as they use the Internet is a major congressional concern. Several laws have been passed, including the 1996 Communications Decency Act (CDA), the 1998 Child Online Protection Act (COPA), and the 2000 Children's Internet Protection Act (CIPA). Federal courts ruled, in turn, that certain sections of CDA, COPA and CIPA were unconstitutional. All the decisions were appealed to the Supreme Court. The Supreme Court upheld the lower court decision on CDA in 1997. It has agreed to again hear the COPA case, after a lower court ruled COPA unconstitutional for a second time; an injunction against the law's enforcement remains in place. The Supreme Court upheld CIPA on June 23, 2003. Congress also passed the "Dot Kids" Act (P.L. 107-317), which creates a kid friendly space on the Internet, and the "Amber Alert" Act (P.L. 108-21) which, inter alia, prohibits the use of misleading domain names to deceive a minor into viewing material that is harmful to minors. This report will be updated.

Background

The Internet has become a pervasive tool used by children to research school projects, look for entertainment, or chat with friends. Parents and policy makers are concerned that children are encountering unsuitable material — such as pornography — while they use the World Wide Web. Most agree that protecting children requires a multi-faceted approach, with parental or other adult supervision as a key ingredient. Many also believe that legislation is needed. Several federal laws have been enacted to date, including the 1996 Communications Decency Act (CDA), the 1998 Children's Online Protection Act (COPA), and the 2000 Children's Internet Protection Act (CIPA).

Such legislation has proved difficult to draft in a manner that does not violate rights guaranteed by the Constitution, particularly the First Amendment. One difficulty is that there can be considerable disagreement as to what is "unsuitable," "inappropriate," or "harmful," just as what constitutes pornography can be debated. Even the definition of "children" can be problematical, since some material may be deemed inappropriate for a pre-teen, but might not be deemed inappropriate for a senior in high school. (Congress

addressed the issue of sexually explicit e-mail advertisements in the CAN-SPAM Act, P.L. 108-187. See CRS Report RL31953.)

1996 Communications Decency Act (CDA)

Congress passed the Communications Decency Act (CDA) as Title V of the 1996 Telecommunications Act (P.L. 104-104), on February 8, 1996. That day, the American Civil Liberties Union (ACLU) filed suit against portions of the CDA [http://www.aclu.org/news/n103196b.html]. The American Library Association (ALA) and others filed suit later. They challenged two sections of the law — 47 U.S.C. § 223(d) and 47 U.S.C. § 223(a)(1)(B) — that made it a crime to engage in "indecent" or "patently offensive" speech on computer networks if the speech could be viewed by a minor (defined as under 18). The plaintiffs argued that the provisions were unconstitutional because they prohibited speech protected by the First Amendment, and the terms indecent and patently offensive were overbroad and vague. In June 1996, a special three-judge panel of the U.S. District Court in Philadelphia, established under procedures set forth in the CDA, agreed. It issued a preliminary injunction barring enforcement of those provisions. Under the CDA, the government could appeal the case directly to the Supreme Court, which it did. (For more information, see CRS Report 97-660, by Henry Cohen). In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Supreme Court upheld the lower court's ruling that the provisions were unconstitutional. Specifically, it found that, with regard to the use of the term "indecent," the CDA "is a blanket restriction on speech" and could be found to be constitutional only if it "serves to promote a compelling interest" and is the "least restrictive means to further the articulated interest."[1] The Court did not find that it met those tests.

In 2003, Congress passed the PROTECT Act (P.L. 108-21), which amended CDA by substituting "child pornography" for "indecent." Thus, it now bans obscenity and child pornography, neither of which is protected by the First Amendment. Therefore the Act no longer raises the constitutional issues that formed the basis of that Supreme Court ruling (see CRS Report 95-804A for more information).

A challenge also has been made to the provisions regarding obscenity. In 1999, the Supreme Court upheld the constitutionality of sections 223(a)(1)(A) and 223(a)(2) with respect to their prohibition on obscene communications.[2] In December 2001, the National Coalition for Sexual Freedom (NCSF) and others filed suit in the U.S. District Court for the Southern District of New York to overturn section 223(a)(1)(B) as it relates to obscenity.[3] A special three-judge panel was convened to hear the case. NCSF also filed a motion for a preliminary injunction to enjoin enforcement of the obscenity provision of CDA on May 24, 2002. On March 24, 2003, the panel denied that motion, but declined to dismiss the case, allowing it to proceed [Nitke v. Ashcroft, 253 F. SUPP. 2D 587 (S.D.N.Y. 2003)].

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[1] As quoted in CRS Report 95-804A, Obscenity and Indecency: Constitutional Principles and Federal Statutes, by Henry Cohen

[2] See Cohen, Ibid.

[3] See NCSF's Web site [http://www.ncsfreedom.org/].

1998 Child Online Protection Act (COPA)

Congress subsequently passed the Child Online Protection Act (COPA), as Title XIV of the FY1999 Omnibus Appropriations Act (P.L. 105-277), which was signed into law October 21, 1998. COPA prohibits communication of material that is "harmful to minors" on a Web site that seeks to earn a profit. COPA defines minor as under the age of 17, instead of 18 as in CDA. The term "material that is harmful to minors" is defined 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, 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."

Congress was reportedly optimistic that COPA would survive constitutional challenges in spite of the ruling on CDA because of the stated exceptions for communications that had literary, artistic, political or scientific value, its application only to commercial sites, and use of the court-tested "harmful to minors" language rather than "indecent." The definition of "harmful to minors" was based on the obscenity test created in *Miller v. California*, thereby requiring jurors to apply "contemporary community standards" when assessing material. The ACLU filed suit challenging the constitutionality of COPA, arguing that the statute violated the First Amendment rights of adults because it effectively banned constitutionally protected speech, and did not use the least restrictive means to advance a compelling government interest. A preliminary injunction was issued against enforcement on the act in February 1999, which was upheld by the Third Circuit Court of Appeals in June 2000. The Third Circuit ruled that the act was unconstitutional because its use of "community standards" resulted in material available to a nationwide audience being judged by the standards of the community most likely to be offended, since one cannot make material on the Internet available in some communities but not in others.

The Department of Justice appealed the Third Circuit decision to the Supreme Court. In May 2002, the Supreme Court held that COPA's use of the term "community standards" alone did not make the statute unconstitutional and vacated the Third Circuit's decision. However, the Court expressed no view as to whether COPA is unconstitutional for other reasons. Therefore, the Court remanded the case to the Third Circuit for further review, and allowed the injunction against enforcement of the law to remain in effect. The Third Circuit again ruled in March 2003 that the law was unconstitutional. That decision has now been appealed to the Supreme Court, which has agreed to hear the case. Oral argument is scheduled for March 2, 2004. (See CRS Report 95-804 A.)

COPA also created a Child Online Protection Commission to study methods to help reduce access by minors to material that is harmful to minors. The COPA Commission released its report in October 2000 [http://www.copacommission.org/report/], concluding that a combination of public education, consumer empowerment technologies and methods, increased enforcement of existing laws, and industry action was needed. Also in 1998, Congress directed (in P.L. 105-314, the Sexual Predators Act) the National

Research Council to conduct a study on how to limit the availability of pornography on the Internet. The NRC study, *Youth, Pornography, and the Internet*,[4] similarly concluded that a multi-faceted approach was needed.

2000 Children's Internet Protection Act (CIPA)

Congress next passed the Children's Internet Protection Act (CIPA) as Title XVII of the FY2001 Consolidated Appropriations Act (P.L. 106-554), signed into law on December 21, 2000. The law requires schools and libraries that receive federal funding to use filtering technologies to block from minors Web pages that contain material that is obscene, child pornography, or harmful to minors.[5] CIPA also requires libraries receiving federal funds to block Web sites containing obscene material or child pornography from access by adults. Minors are defined as persons under 17. The term "harmful to minors" is defined differently than in COPA. In CIPA, it is any " picture, image, graphic image file, or other visual depiction that (A) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (B) 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 act, or a lewd exhibition of the genitals; and (C) taken as a whole, lacks serious literary, artistic, political or scientific value as to minors." An exception allows blocking features to be disabled by an adult to allow access for "bona fide research or other lawful purposes." For more detail on CIPA's provisions, see CRS Report RS20036 and CRS Report 95-804 A.

The ALA and ACLU challenged sections 1712(a)(2) and 1721(b) as they apply to public libraries only. Opponents of the law say the software required to block the material cannot determine which material is protected by free speech. They also say that the law is unenforceable, censors speech to adults as well as children, is overbroad and vague, and denies those without home computers the same access to information.

In May 2002, a three-judge federal district court in Philadelphia established under the terms of CIPA (identical to those in CDA) ruled that "it is currently impossible given the Internet's size, rate of growth, rate of change, and architecture, and given the state of the art of automated classification systems, to develop a filter that neither underblocks nor overblocks a substantial amount of speech."[6] The court ruled that public libraries cannot be forced to use Internet blocking systems because they might also block access to sites that contain information on subjects such as breast cancer, homosexuality, or sperm whales. As provided for in CIPA, the Department of Justice appealed the case directly to the Supreme Court, which upheld the constitutionality of CIPA on June 23, 2003 (see CRS Report 95-804 A for more detail on the court's ruling). The ALA decried the court's decision (see [http://www.ala.org/cipa]). Some public libraries are considering forgoing government funding rather than install the filters.

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[4] [http://www.nap.edu/catalog/10261.html?onpi_webextra_050202]

[5] The No Child Left Behind Act (P.L. 107-63) applies this requirement to schools receiving educational technology (EdTech) grants established under that Act.

[6] O'Harrow Jr, Robert. Washington Post, June 1, 2002, p. A01

2002 "Dot Kids" Act (P.L. 107-317): A Domain Name Approach

The 107th Congress approached the issue from the aspect of creating or regulating the use of domain names. Web site addresses actually are a series of numbers, but to make the Internet more user friendly, the Domain Name System was created to provide a simple address (e.g., www.congress.gov) that corresponds to the Web site's numerical address.[7] Top Level Domains (TLDs) appear at the end of a Web address. They can be given a generic designation ("gTLD") such as .com, or a country code ("ccTLD") such as .us for the United States. TLDs are assigned by the Internet Corporation for Assigned Names and Numbers (ICANN), operating under a Memorandum of Understanding with the Department of Commerce (DOC).

Congress passed the Dot Kids Implementation and Efficiency Act (P.L. 107-317) in 2002. It creates a "dot kids" (.kids) second-level domain within the .us ccTLD as "a haven for material that promotes positive experiences for children and families using the Internet, provides a safe online environment for children, and helps to prevent children from being exposed to harmful material on the Internet."[8] Participation in the Web site is voluntary, and the DOC will monitor the site to ensure that only material that is "suitable for minors and not harmful to minors" is posted there. "Minors" are defined as children under 13. "Suitable for minors" is defined as material that is "not psychologically or intellectually inappropriate for minors, and serves the educational, informational, intellectual, or cognitive needs of minors, or the social, emotional or entertainment needs of minors." "Harmful to minors" is defined similarly to the way it is in COPA, although it omits obscene material and does not specify the types of material covered (communication, picture, image, etc.)

The legislation was originally introduced as H.R. 2417 and would have required ICANN to create a .kids gTLD. Concerns were raised, however, about the difficulties inherent in attempting to create a U.S.-defined "kid friendly" space on the Internet through ICANN because the Internet and the Domain Name System are global. Another concern was that the agreement between DOC and ICANN calls for actions based on mutual agreement, not DOC regulation. Timeliness was also mentioned, in terms of how long it might take ICANN to create a new gTLD. A revised bill, H.R. 3833, called for .kids to be created as a second-level domain within the .us ccTLD, giving the U.S. government direct control over it. That bill passed the House on May 21, 2002. In its report (H.Rept.107-449), the House Energy and Commerce committee expressed optimism that the bill would survive court challenges because it does not impose any unnecessary burden on First Amendment rights, likening it to creating a children's section of a public library.

The .us ccTLD is owned by DOC, which contracts with a company, NeuStar, for its operation. As passed by the House, the bill authorized the National Telecommunications and Information Administration (NTIA, part of DOC) to require NeuStar to establish, operate, and maintain .kids as a second-level domain of the .us ccTLD. However,

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[7] See CRS Report 97-868, *Internet Domain Names: Background and Policy Issues*, by Lennard Kruger.

[8] U.S. Congress. House. Committee on Energy and Commerce. Report to accompany H.R. 3833 (H.Rept. 107-449). Washington, U.S. Govt. Print. Off., 2002. p. 5.

DOC's contract with NeuStar does not obligate NeuStar to do that. During a September 12, 2002 Senate Commerce Committee hearing on a companion measure (S. 2537), NeuStar testified that although it had proposed creation of a .kids subdomain as part of its contract proposal to the DOC, it did not intend to do so immediately. NeuStar argued that it must be accomplished in a manner that makes it attractive to content providers, is supported by a long term business plan, and would be used by the audience it was meant to attract. As enacted, the law does not change the terms of the existing contract with NeuStar, but conditions any renewal of it, or award of a successor contract, on creation of a .kids second-level domain. The dot kids domain is activated [www.kids.us].

2003 "Amber Alert" Act (P.L. 108-21)

The 108th Congress passed the PROTECT (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today) Act, or AMBER Alert Act (S. 151, P.L. 108-21). Among its provisions, the Act makes it a crime to knowingly use a misleading domain name to deceive a person into viewing obscenity on the Internet, or to deceive a minor into viewing material that is harmful to minors. For the purposes of the Act, a domain name that includes a word or words that relates to the sexual content of a site, such as sex or porn, is not misleading. The term "harmful to minors" is defined similarly to CIPA, except that it applies to "any communication" rather than a "picture, image, graphic image file, or other visual depiction." The Act also amends the Communications Decency Act so that it applies to child pornography transmitted via the Internet (discussed above), and prohibits "virtual" child pornography (see CRS Report 98-670).

Continuing Congressional Issues

Concern is rising about the availability of pornography on "peer-to-peer" (P2P) networks that use file-sharing software to allow individual users to communicate directly with each other via computer, rather than accessing Web sites. Such file-sharing programs are perhaps best known because of their widespread use for downloading copyrighted music, raising concerns about copyright violations (see CRS Report RS21362). P2P networks can be used for sharing any type of files, however, not only music. A February 2003 General Accounting Office (GAO) report found that "When searching and downloading images on peer-to-peer networks, juvenile users face a significant risk of inadvertent exposure to pornography, including child pornography."[9] The House Government Reform Committee held a hearing on March 13, 2003 that focused on the issue of children's access to unsuitable material via P2P networks. On July 24, 2003, Representative Pitts introduced H.R. 2885, which would make it unlawful to distribute peer-to-peer file trading software in interstate commerce unless it conforms with regulations to be set by the Federal Trade Commission. Those regulations would require, inter alia, that recipients of P2P software receive warnings that the software might expose the user to pornography, illegal activities, and security and privacy threats. The distributor would have to check for a "do-not-install" beacon on the user's computer and not install the P2P software if it is found; obtain verifiable parental consent to install it if the recipient is under 18; ask if the recipient is under 13; and comply with COPPA.

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[9] U.S. General Accounting Office. File-Sharing Programs: Peer-to-Peer Networks Provide Ready Access to Child Pornography. GAO-03-351. February 2002. p. 3. [http://www.gao.gov]