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Look at the Bare Naked Facts

All the solicitor general's Google research can't save a clearly unconstitutional anti-porn law.

BY JOHN B. MORRIS JR.

A funny thing happened at the Supreme Court's March 2 argument over the Child Online Protection Act. The Court heard new factual testimony in a case in which the District Court had made extensive factual findings six years previously. The most unusual thing was the identity of the researcher: Theodore Olson, solicitor general of the United States.

In defending the 1998 law known as COPA, which restricts access to Internet speech that is lawful for adults but "harmful to minors," Olson relied on his own research conducted the weekend before oral argument. Apparently anxious to distract attention from the District Court's factual findings that COPA would chill significant protected expression, the solicitor general turned to a recognized authority on all things Internet—the Google.com search engine. Olson ran searches for "free porn" and "disable filter." Some of his main arguments on March 2 were based on those searches.

This was not the first time that Olson had assumed an unusual role when defending an anti-porn law. In his successful 2003 oral argument to uphold the federal library filtering statute, Olson redrafted the law on the spot: He told the Court that adult library users had a *right* to get the mandated filtering software disabled, although this right is nowhere in the text of the Children's Internet Protection Act. Six justices in *United States v. American Library Association* expressly relied on Olson's assertion—first offered in oral argument—and now what might be called the Olson Amendment is the law of the land.

In the COPA argument this month in *Ashcroft v. American Civil Liberties Union,* Olson went beyond creative construction: He became an expert witness conducting research and interpreting the relevance of what he found through Google. A close review of the solicitor general's "evidence," however, provides ample support for the normal wisdom that fact-finding is best left to the adversarial give-and-take of a trial court. Moreover, close analysis of Olson's research provides additional support for a conclusion already reached multiple times by the lower courts: COPA is unconstitutional.

HOW MUCH PORN?

The solicitor general's leadoff argument to the Supreme Court was that pornography is an enormous problem that merits strong governmental action, and that the need is "overwhelming and growing." In support of his position, Olson described how he had entered "free porn" into the Google search engine and had received more than six million hits. An impressive total, indeed, but that number is far out of context.

Chief Justice William Rehnquist's response to Olson's data was to ask how many Web sites are on the entire Internet. Clearly, Rehnquist took Olson's testimony as a meaningful count of porn sites, and the chief justice wanted to know how Olson's figure compared with the larger whole. Though the solicitor general could not provide an answer, the justices continued to use the six million figure as if it meant something.

In fact, "adult-oriented" sites account for a "relatively small fraction" of the public World Wide Web, according to a National Academy of Sciences report co-authored by former Attorney General Richard Thornburg (not one known to be sympathetic to

the porn industry). The "Youth, Pornography, and the Internet" report, issued in 2002, determined that sexually oriented content accounted for about 1.5 percent of all content on the Web—a fact that would have been helpful for the Supreme Court to understand.

Moreover, even a simple analysis of Olson's Google search undercuts the six million figure still further. First, given that Google often returns multiple pages from the same Web sites (and certainly does so if you search for "free porn" today), the six million figure says little about how many Web sites actually offer free porn (which is what Olson was asserting).

Second, many of the Google hits for "free porn" are not porn sites at all. For example, searching for the words "lawsuit" or "litigation" or "court" within those six million produces more than 350,000 hits, mostly directed at news stories about the six years of litigation challenging COPA—or its predecessor, the Communications Decency Act, which the Court struck down as unconstitutional in *Reno v. ACLU* (1997). Indeed, Olson's own name appears in about 30,000 of the six million hits he argued to the Court were somehow relevant to the COPA appeal.

THE UNTOUCHABLES

This is not to deny that there is a lot of porn on the Internet. Qualified researchers have put the figure in the hundreds of thousands of separate sites. The Thornburg report indicates that there are about 400,000 subscription porn sites. But whatever the correct number, the vast quantity of pornography on the Internet does *not* indicate that COPA should be upheld. Instead, the broad availability of porn indicates the opposite—that the chilling effect of COPA on speech is not a constitutionally acceptable trade-off because COPA will not significantly further the government's claimed interest.

According to the government, the purpose of COPA is to keep children from being able to access sexually explicit content on the Internet. Indeed, the solicitor general suggested that the goal is to prevent even a motivated teen-ager from being able to access porn online. But the fundamental reality is that a great deal of pornography originates overseas, and thus is wholly beyond the reach of COPA. According to the Thornburg report, approximately three-quarters of porn sites are located outside the United States.

Applying this fraction to Olson's six million figure (or using the more plausible number of 600,000 sites), one can see the utter futility of COPA. Let us assume that the government's appeal is successful, and the decision by the U.S. Court of Appeals for the 3rd Circuit to strike down COPA is overturned. Let us further assume that the law is absolutely 100 percent effective in keeping children from accessing all U.S. porn sites. That still leaves vast quantities of overseas porn available to children—4.5 million Web sites if you use Olson's number, or 450,000 sites if 600,000 is a more accurate starting point. Either number is more than an ample supply of pornography if kids are looking for it. As much as the government would like to keep sexual content out of the hands of children, this is a battle that it cannot win through criminal statutes such as COPA.

RELYING ON PARENTS

Which brings us to the question: What can be done to shield children from sexually explicit content? As forcefully explained by Ann Beeson, arguing the case on behalf of the ACLU and other plaintiffs, the District Court found that the voluntary use by parents (and, Beeson added, the mandatory use by some libraries) of filtering software can be far more effective than COPA in keeping porn away from children.

And that conclusion is strongly supported by the findings of the Thornburg report. Although Thornburg himself said that he went into the analysis process assuming that more criminal laws were the answer, he came to understand the limits of laws such as COPA. He and his fellow committee members ended up emphasizing that the best protection for children is *education*—that is, teaching kids how to handle themselves when they are surfing the Internet, including how to avoid undesirable types of content. The Thornburg report concluded that a mix of education, voluntary filtering, and vigorous enforcement of existing obscenity laws would provide the best protection for children in the United States.

But Solicitor General Olson argued to the Supreme Court that filtering software was not a solution. To bolster his attack, Olson again resorted to his weekend Google research. He reported to the Court that he had looked for the words "disable filter" and was able to locate Web sites that describe how some types of filtering software can be disabled or evaded. Building on this search result, Olson argued to the Court that filtering is not a useful alternative to COPA.

BETTER THAN GOOGLE

Again, Olson's Google search is totally out of context. First, it tells us nothing about how many people use the disabling software. Second, it ignores the "server-side" filtering techniques (such as those offered by America Online) that are harder to evade. Third, when the government proposes to restrict speech to protect some governmental interest, it is the government's burden of proof to show that its proposal—in this case, a criminal statute—is more effective than less restrictive alternatives—such as filtering. The government should not attempt to carry its constitutional burden based on some weekend Googling.

An undeniable difficulty in the COPA case is that the District Court decision is about six years old. The case has been up to the 3rd Circuit and the Supreme Court once already, then was remanded to the 3rd Circuit, and is now before the Supreme Court again. So the facts found by the District Court are not the most recent, which is why the conclusions of the Thornburg report (of which the 3rd Circuit took judicial notice) are so interesting. As that report suggests, the approach taken by COPA both inhibits protected expression and ultimately fails to achieve the law's purpose.

The real lesson to be learned from the COPA case is that if the Supreme Court properly strikes down this law (as it did the Communications Decency Act before), Congress should think very carefully before it drafts yet another criminal statute. Will any child be shielded from porn on the Internet by another cycle of lengthy and costly litigation? It's time that Congress took the Thornburg report's advice and focused on education, an approach that can reap real benefits in protecting kids online.

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