

Federal Court Rejects Censorship, Endorses User Empowerment

March 23, 2007

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In a major victory for free speech online, the federal District Court in Philadelphia on March 22 issued a sweeping rejection of the Child Online Protection Act (COPA), and a broad endorsement of the "user empowerment" approach to protecting children online. After a four-week long trial in the long-running ACLU v. Gonzales litigation, the court held that COPA would not be effective at protecting kids, and that filtering technology represents a "less restrictive" and more constitutional alternative to the goal of online safety. The court recognized the benefits of voluntary filtering by parents and families as an effective way to protect their children from harmful Internet content in a manner that is consistent with their own values, but still allows adults access to constitutionally protected speech.

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(1) Federal Court Rejects Censorship, Endorses User Empowerment

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Congress passed COPA in 1998, shortly after the U.S. Supreme Court voided the unconstitutional Communications Decency Act (CDA). COPA was immediately blocked from taking effect by a court injunction. COPA would make it a crime for anyone to make any Web communication for commercial purposes that is "harmful to minors" unless the person has used technological means to prevent access by minors (such as requiring credit card verification). COPA would impose criminal and civil penalties of up to \$50,000 per day for violations. CDT -- which played a central role in challenging the CDA -- opposed COPA because it threatened to chill constitutionally protected speech including a wide range of social commentary and health information.

The court's decision to permanently enjoin COPA is based on legal arguments that CDT has been making for over ten years: (1) that laws like the CDA and COPA will not be effective at protecting kids, (2) that those laws will burden and chill valuable, fully lawful online content aimed at adults (ranging from safe sex information to museum and art gallery web sites), and (3) that filtering technology, while not perfect, is far more effective than COPA and does not violate the First

Amendment. The court's decision is a ringing reaffirmation of the critical free speech principles declared by the U.S. Supreme Court in the CDA case.

[COPA Decision](#) [1]

(2) Six Court Decisions Have Rejected COPA as Unconstitutional

From 1998 until now, the federal courts have issued six separate legal opinions finding that the Child Online Protection Act (COPA) raises very serious constitutional problems. The case has followed a somewhat tortured path through the court system.

In 1998 and 1999, the District Court issued a "preliminary" injunction based on the conclusion that COPA would likely be held to violate the First Amendment because of its chilling impact on protected speech. The court focused its opinion primarily on the argument that plausible, less restrictive alternatives to COPA are available particularly in the form of filtering technology. On appeal in 2000, the Court of Appeals also found COPA to be unconstitutional, but based its decision on a theory that the District Court had not considered. In 2002, the Supreme Court found fault with the reasoning of the Court of Appeals, but the Supreme Court left in place an injunction against the law.

On reconsideration in 2003, the Court of Appeals again ruled against COPA, finding numerous constitutional problems with it. The appeals court determined that COPA would force Web publishers to block a wide range of legal material and was not the least restrictive means of protecting children online. The government appealed a second time to the Supreme Court, which decided in 2004 that the District Court's 1998 decision to issue a preliminary injunction against COPA had been correct. The Supreme Court sent the case back to the original District Court "to update and supplement the factual record to reflect current technological realities." The Court wanted to know if the lower court's 1998 conclusion that filtering was better than COPA still held true -- and the decision issued yesterday answered that question with a resounding "yes."

Taking COPA together with the 1996 Communications Decency Act (which was struck down by the Supreme Court in 1997), Congress has spent eleven years attempting to use criminal laws to censor online speech on the Internet that is lawful for adults to access. That approach has been an utter failure.

[Supreme Court Decision \(2004\)](#) [2]

(3) Court Decision a Detailed and Careful Analysis of COPA Faults

U.S. District Court Judge Lowell Reed's decision to permanently enjoin COPA as unconstitutional is a highly detailed, thorough, and careful analysis of the numerous problems with the COPA law. The court decision makes numerous factual conclusions about the ineffectiveness of COPA and the effectiveness of filtering. The court also makes crystal clear exactly what legal theories it is adopting, and what theories it is rejecting. Judge Reed clearly anticipates that his decision will go back for a third time to the U.S. Supreme Court, and he has written a clear and forceful decision that will withstand scrutiny on appeal.

One of Judge Reed's critical factual findings is that "approximately 50 percent" of sexually explicit websites are overseas, and thus outside the reach of the COPA law. Thus, the COPA law would fail to block access to at least 50 percent of such web sites on the Internet. In stark contrast, Judge Reed held that filtering technology "generally blocks about 95 percent of sexually explicit material." As Judge Reed noted, even the government's own expert witness found that most filtering tools blocked

a very high percentage of sexual sites.

Judge Reed also carefully analyzed the effectiveness and constitutional impact of "age verification" and other systems advocated by the government. According to the Judge: "From the weight of the evidence, I find that there is no evidence of age verification services or products available on the market to owners of Web sites that actually reliably establish or verify the age of Internet users. Nor is there evidence of such services or products that can effectively prevent access to Web pages by a minor." And critically, the Court found that such systems would burden and reduce the amount of lawful speech available to adults on the Internet.

(4) Congress Should Take Meaningful Action to Protect Children

Throughout the course of the challenge to COPA, CDT has argued that the most effective way to protect children online, and the means least restrictive of free expression, is to give families and teachers resources that allow them to control what children see and do online. This approach enables the protection of children while respecting the First Amendment and the diverse sensibilities of American families. The District Court's decision yesterday is a direct reaffirmation of this point.

The court's decision reflects the findings of two major, independent studies commissioned by the Congress: the COPA Commission, a study mandated by COPA itself, and a report of the National Research Council (NRC) of the National Academy of Sciences. Both studies concluded after exhaustive research that legislation will not solve the problem of children's access to objectionable content via the Internet, but rather that technology like filtering software in the hands of parents and teachers, along with educational efforts, offer the most effective means of protecting children online.

The district court decision made very clear that there are steps that the government could take to promote safety online. The court wrote that "in conjunction with the private use of filters, the government may promote and support their use by, for example, providing further education and training programs to parents and caregivers, giving incentives or mandates to ISP's to provide filters to their subscribers ... subsidizing the purchase of filters for those who cannot afford them, and by performing further studies and recommendations regarding filters."

Many Internet service providers and other companies already offer powerful filtering, blocking, and monitoring software that parents can use to protect their children from offensive material. CDT has worked with a wide cross-section of the Internet and public interest communities to compile parental tips, filtering tools and other online safety resources at the educational site GetNetWise.

Congress should not return to the repeatedly rejected approach of censoring the Internet. Instead, Congress should promote education and the availability of filtering technology to empower parents to protect their children, allowing parents to tailor what they do to their individual child's situation. As courts and experts have repeatedly found, this approach will be far more effective at actually protecting kids.

[GetNetWise](#) [3]

[COPA Commission Report \(2002\)](#) [4]

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