

CDT Files Brief Calling for the Overturning of COPA on Free Speech Grounds

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1) CDT Files Brief Calling for the Overturning of COPA on Free Speech Grounds

Last week, in the most significant Internet free speech case since the Supreme Court struck down part of the Communications Decency Act (CDA) in 1997, the Center for Democracy & Technology filed a "friend of the court" brief in a federal appeals court challenging the Child Online Protection Act (COPA) as a violation of the First Amendment.

The "amicus" brief, submitted to the Third Circuit court in Philadelphia on behalf of CDT and 17 other groups, argued that COPA places unconstitutional burdens on creators and distributors of legitimate Web content, including websites focusing on sexual identity, health, and art. Other strategies are more effective than COPA at protecting children from online content deemed inappropriate for them, and also impose fewer restrictions on lawful adult speech. Specifically, encouraging parents to use technological tools such as Internet filtering software and educating children about smart online behavior are far more effective and appropriate ways to protect kids on the Internet.

CDT also argued that COPA is overbroad and would affect many more speakers than the undefined "commercial pornographers" asserted by the government. Finally, the brief urged the Court of Appeals not to read COPA as applying to overseas websites, as this could invite the application of foreign censorship laws to U.S. speakers, thus creating a global "race to the bottom" against Internet freedom.

The groups signing onto the brief included organizations that represent corporate leaders in the Internet industry; publishers, distributors and retailers of books and other forms of content; libraries and librarians; newspapers, editors and journalists; and public interest organizations that believe a free and open Internet is key to upholding civil liberties. Human rights groups also filed an amicus brief against COPA, similarly arguing that the statute's asserted overseas applicability could lead to reciprocal foreign censorship of U.S. websites and toward a global trend of Internet censorship.

[CDT's COPA amicus brief](#) [1]

[Human rights groups' COPA amicus brief](#) [2]

2) COPA's Long Procedural History Shows That the Statute's Criminalization of Lawful Internet Speech is on Shaky Constitutional Ground

The Child Online Protection Act was Congress' second attempt to regulate speech on the Internet after the Supreme Court held the Communications Decency Act of 1996 (Public Law 104-104, Â§502) unconstitutional, in part, in *Reno v. ACLU* (1997). Two lawsuits - one led by the American Civil Liberties Union and one organized by CDT - challenged under the First Amendment the CDA's prohibition against distributing "indecent" Internet material to minors. The lawsuits argued that the CDA was unconstitutional because there were technological tools available that were as effective as the CDA in shielding minors from "indecent" online content but that also imposed less of a burden on adult speech.

Similar to the CDA, COPA (47 U.S.C. Â§231) makes it a crime to make "available" to minors via the World Wide Web and for "commercial purposes" any content that is "harmful to minors." Persons prosecuted under this statute could be thrown in jail for six months and/or fined \$50,000 a day.

"Harmful to minors" content is a murky category of speech that is illegal for minors to access but is legal for adults. See *Ginsberg v. New York* (1968). Thus, regulation of "harmful to minors" content may run afoul of the First Amendment if the regulation burdens the rights of adults to lawfully distribute and receive material that is illegal for minors to access.

Because COPA regulates the content of speech (rather than when, where, or how speech may be communicated), it must pass "strict scrutiny" by the courts. This means that it is the government's responsibility to show that the law is "narrowly tailored" to achieve a compelling governmental goal; in other words, the law cannot regulate more speech than necessary nor can it touch so little speech that it is virtually ineffective. A law will survive strict scrutiny if, in addition to being narrowly tailored, there are no equally or more effective alternative means of achieving the compelling governmental goal that also impose fewer restrictions on lawful adult speech. Asserting that COPA fails strict scrutiny has been the focus of the legal challenge to COPA.

The COPA case is now in its ninth year after having reached the Supreme Court twice. Back in 1998, the ACLU and other plaintiffs filed a lawsuit challenging COPA under the First Amendment. After a five-day evidentiary hearing, the District Court for the Eastern District of Pennsylvania granted a preliminary injunction against enforcement of the statute in 1999. In 2000, the Third Circuit Court of Appeals upheld the preliminary injunction, but in 2002 the Supreme Court remanded the case back to the Third Circuit for further consideration. Once again, in 2003, the Third Circuit upheld the preliminary injunction. In 2004, the Supreme Court again considered the case and this time upheld the district court's preliminary injunction, while also directing the district court to move forward with a full trial on the merits.

After a weeks-long trial on the merits in the fall of 2006, the district court held COPA unconstitutional and granted a permanent injunction against its enforcement by the government. The government has once again appealed to the Third Circuit, and CDT filed an amicus brief urging the Court of Appeals to affirm the district court's order.

While District Court Judge Lowell Reed found that protecting children from sexually explicit Web content is a compelling governmental goal, he nevertheless held that COPA fails strict scrutiny and thus violates the First Amendment because it is not narrowly tailored. He found that the statute's definition of "commercial purposes" is so broad that it sweeps in and significantly burdens "an inordinate amount of Internet speech and certainly cover[s] more than just commercial pornographers," such as websites that address sexual identity, health, and art. He also found that COPA is not effective because, contrary to the government's assertion, the law does not apply to the

large number of sexually explicit websites that are hosted overseas.

In addition to a lack of narrow tailoring, Judge Reed found that Internet filtering software is an alternative means of protecting minors from inappropriate Web content that is as effective, if not more effective, than COPA - and that imposes less restrictions on adults' First Amendment rights to distribute and receive sexually oriented material. Judge Reed's written opinion was exceptionally comprehensive and well argued.

[District court's COPA decision \(March 22, 2007\)](#) [3]

[CDT's policy post on the district court's COPA decision](#) [4]

3) CDT's Amicus Brief Urges the Court of Appeals to Uphold the Permanent Injunction, Arguing That Technological and Non-Technological User Empowerment Tools Are More Effective and Less Restrictive Than COPA

In the amicus brief to the Third Circuit urging the Court to affirm the district court's permanent injunction, CDT focused on the wide range of technological and non-technological user empowerment tools, including media literacy education, that are more effective and less restrictive than COPA. The value of user empowerment tools is that they are effective against all websites, not just those hosted in the United States; and they can be tailored to meet an individual family's values, and adjusted as children grow more mature and new material becomes appropriate. The value of education, in particular, is that it transcends the boundaries of the home - wherever a child is, he will have the ability to make smart choices for himself about what he does online.

Technological user empowerment tools include filtering and blocking software, which can weed out particular types of content, block specific websites ("blacklists"), or authorize access to specific websites ("whitelists"). Software can also monitor where a child has gone and what he has done online. Such capabilities are found in software products that can be downloaded onto a personal computer, that are incorporated into an operating system or an Internet Service Provider's (ISP) access package, or that are an optional feature on search engines offered by companies like Google and Yahoo!. Parental control tools are also making their way onto mobile devices that connect to the Web such as cell phones and personal digital assistants (PDAs).

Non-technological tools include setting house rules for Internet usage, signing a family "contract" that everyone agrees to, monitoring Internet usage (without software), placing computers in kitchens and other family rooms, or requiring the bedroom door be open when the child is online. And, of course, talking to children about both the benefits and risks of the Internet, and educating them about how to have safe online experiences is key. This was the central finding of the 2000 report by the congressionally-chartered "COPA Commission" and the 2002 report by the National Academy of Sciences entitled "Youth, Pornography and the Internet."

[Adam Thierer's report entitled Parental Controls & Online Child Protection: A Survey of Tools & Methods \(2007\)](#) [5]

[COPA Commission report \(2000\)](#) [6]

[National Academy of Sciences report entitled "Youth, Pornography and the Internet" \(2002\)](#) [7]

4) CDT is Optimistic That the Court of Appeals Will Uphold the Permanent Injunction Against COPA, and Urges Congress to Pass Legislation That Promotes User-Empowerment Tools and Media Literacy Education

Given that the Third Circuit has twice before ruled in favor of the plaintiffs, CDT is optimistic that the Court will once again find COPA unconstitutional and uphold the district court's permanent injunction against the government's enforcement of the statute. Whichever side loses in the Third Circuit is likely to ask the Supreme Court to review the case a third time. Thus it is quite possible that the COPA case will last almost two more years.

Whenever the COPA case ends, Congress should not make a third attempt to enact similar legislation. Instead, Congress should take the opportunity to embrace a fresh, constitutional approach that will actually be effective in protecting children from online content that may be inappropriate for them but that is perfectly legal for adults to distribute and access.

Specifically, Congress should develop educational programs (and provide adequate funding for such programs) for both parents and children that promote media literacy - which is knowing what benefits the Internet provides as well as the risks it poses, and knowing how to behave safely online. The key is to get parents "in the know" and to empower minors to make smart decisions for themselves. Educational programs - either directly managed by a federal agency, or offered by state or local community organizations supported by federal money - should also teach parents and caregivers about the myriad of technological and non-technological tools that can be used to tailor a child's online experience. Congress should also provide financial incentives that spur innovation in the area of technological user empowerment tools.

Rep. Melissa Bean (D-IL) introduced the "SAFER NET Act of 2007" (H.R. 3461), which directs the Federal Trade Commission to conduct a public awareness and education campaign regarding Internet safety. Similarly, Title I of the "Protecting Children in the 21st Century Act" (S. 1965) directs the FTC to conduct a public awareness and education campaign about how children can safely use the Internet. This is the type of legislation Congress should be proposing - not unconstitutional restrictions on legitimate Internet speech.

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