

United States Court of Appeals, Third Circuit.

AMERICAN CIVIL LIBERTIES UNION; Androgyny Books, Inc. d/b/a A Different Light Bookstores; American Booksellers Foundation for Free Expression; Artnet Worldwide Corporation; Blackstripe; Addazi Inc. d/b/a Condomania; Electronic Frontier Foundation; Electronic Privacy Information Center; Free Speech Media; Internet Content Coalition; OBGYN.Net; Philadelphia Gay News; Powell's Bookstore; Riotgrll; Salon Internet, Inc.; West Stock, Inc.; Planetout Corporation

v.

John ASHCROFT, Attorney General of the United States

No. 99-1324.

Originally Argued Nov. 4, 1999.

Argued on Remand Oct. 29, 2002.

March 6, 2003.

Before [NYGAARD](#) and [McKEE](#), Circuit Judges, and [GARTH](#), Senior Circuit Judge.

OPINION OF THE COURT*

[GARTH](#), Circuit Judge.

This case comes before us on vacatur and remand from the Supreme Court's decision in [Ashcroft v. ACLU](#), 535 U.S. 564 (2002). On remand from the Supreme Court, we once again will affirm.

I.

COPA represents an attempt by Congress, having been informed by the concerns expressed by the Supreme Court in *Reno I*, to cure the problems identified by the Court when it had invalidated the CDA. Thus, COPA is somewhat narrower in scope than the CDA. COPA provides for civil and criminal penalties for an individual who, or entity that,

knowingly and with *knowledge* of the character of the material, in interstate or foreign commerce by means of the *World Wide Web*, makes any communication *for commercial purposes* that is available to any minor and that includes any *material that is harmful to minors*.

[47 U.S.C. § 231\(a\)\(1\)](#) (emphasis added).

* In editing this opinion, I've made extensive deletions. For readability's sake, I haven't marked them with ellipses.

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Unfortunately, the recited standard for liability in COPA still contains a number of provisions that are constitutionally infirm. True, COPA, in an effort to circumvent the fate of the CDA, expressly defines most of these key terms. For instance, the phrase "by means of the World Wide Web" is defined as the "placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol." *Id.* [§ 231\(e\)\(1\)](#). As a result, and as is detailed below, COPA does not target *all* of the other methods of online communication, such as e-mail, newsgroups, etc. that make up what is colloquially known as the "Internet."

Further, only "commercial" publishers of content on the World Wide Web can be found liable under COPA. The statute defines "commercial purposes" as those individuals or entities that are "engaged in the business of making such communications." [47 U.S.C. § 231\(e\)\(2\)\(A\)](#). In turn, a person is "engaged in the business" under COPA if that person

who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the *objective* of earning a profit as a result of such activities (although it is not necessary that the person *make* a profit or that the making or offering to make such communications be the person's sole or principal business or source of income).

Id. [§ 231\(e\)\(2\)\(B\)](#) (emphasis added). Individuals or entities therefore can be found liable under COPA if they seek to make a profit from publishing material on the World Wide Web - thus, individuals who place such material on the World Wide Web *solely* as a hobby, or for fun, or for other than commercial profiteering are not in danger of either criminal or civil liability.

Furthermore, and of greater importance, is the manner in which the statute defines the content of prohibited material; that is, what type of material is considered "harmful to minors." In particular, whether material published on the World Wide Web is "harmful to minors" is governed by a three-part test, *each* prong of which must be satisfied before one can be found liable under COPA:

- (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, an 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.

[47 U.S.C. § 231\(e\)\(6\)](#).

COPA, as earlier noted, also provides a putative defendant with affirmative defenses. If an individual or entity "has restricted access by minors to material that is harmful to minors" through the use of a "credit card, debit account, adult access code, or adult personal identification number ... a digital certificate that verifies age ... or by any other reasonable measures that are feasible under available

technology," the individual will not be liable if a minor should access this restricted material. *Id.* [§ 231\(c\)\(1\)](#).

II

We hold that the following provisions of COPA are not narrowly tailored to achieve the Government's compelling interest in protecting minors from harmful material and therefore fail the strict scrutiny test: (a) the definition of material that is harmful to minors; and material which (when judged as a whole) lacks serious literary or other value *for minors*; (b) the definition of commercial purposes; and (c) the *affirmative defenses* available to publishers, which require the technological screening of users for the purpose of age verification.

(a) "Material Harmful to Minors"

We address first the provision defining "material harmful to minors." Because COPA's definition of harmful material is explicitly focused on minors, it automatically impacts non-obscene, sexually suggestive speech that is otherwise protected for adults. The remaining constitutional question, then, is whether the definition's subsets of "prurient interest" and lacking "serious ... value for minors" are sufficiently narrowly tailored to satisfy strict scrutiny in light of the statute's stated purpose.

COPA limits its targeted material to that which is designed to appeal to the "prurient interest" of minors. It leaves that judgment, however, to "the average person, applying contemporary community standards" and "taking the material as a whole."

As discussed in our initial opinion on the matter, when contemporary community standards are applied to the Internet, which does not permit speakers or exhibitors to limit their speech or exhibits geographically, the statute effectively limits the range of permissible material under the statute to that which is deemed acceptable only by the most puritanical communities. This limitation by definition burdens speech otherwise protected under the First Amendment for adults as well as for minors living in more tolerant settings.

This burden becomes even more troublesome when those evaluating questionable material consider it "as a whole" in judging its appeal to minors' prurient interests. As Justice Kennedy suggested in his concurring opinion [in *Ashcroft v. ACLU*], it is "essential to answer the vexing question of what it means to evaluate Internet material 'as a whole,' when everything on the Web is connected to everything else." We agree with Justice Kennedy's suggestion, and consider this issue here.

[T]he plain language of COPA's "harmful material" definition describes such material as "*any* communication, picture, image file, article, recording, writing, or other matter of any kind" that satisfies the three prongs of the "material harmful to minors" test: prurient interest, patently offensive, and serious value. In light of the particularity and specificity of Congress's language, Congress had to mean that each individual communication, picture, image, exhibit, etc. be deemed "a whole" by itself in determining whether it appeals to the prurient interests of minors, because that is the unmistakable manner in which the statute is drawn.

[T]he First Amendment requires the consideration of context. As the Supreme Court has recently

noted:

[It is] an essential First Amendment rule [that t]he artistic merit of a work does not depend on the presence of a single explicit scene.... Under *Miller*, the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive.

Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S.Ct. 1389, 1401 (2002) (citation omitted). Yet, here the plain meaning of COPA's text mandates evaluation of an exhibit on the Internet in isolation, rather than in context. As such, COPA's taken "as a whole" definition surely fails to meet the strictures of the First Amendment.

[O]ne sexual image, which COPA may proscribe as harmful material, might not be deemed to appeal to the prurient interest of minors if it were to be viewed in the context of an entire collection of Renaissance artwork. However, evaluating just that one image or picture or writing by itself rules out a context which may have alleviated its prurient appeal. As a result, individual communications that may be a integral part of an entirely non-prurient presentation may be held to violate COPA, despite the fact that a completely different result would obtain if the entire context in which the picture or communication was evaluated "as a whole."

[The following four paragraphs are relocated from elsewhere in the opinion:]

An examination of the claims of certain amici curiae that COPA threatens their speech illustrates this problem. For example, amicus California Museum of Photography/University of California at Riverside, maintains a Web site that, among other things, displays artwork from the museum's collection. The Web site contains a page that introduces the "photographers" section of the Web site. See California Museum of Photography/University of California at Riverside, *UCR/CMP Photographers*, at [http:// www.cmp.ucr.edu/photos/photographers.html](http://www.cmp.ucr.edu/photos/photographers.html) (last visited Feb. 6, 2003). This Web page contains several photographs, each which serves as a link to that museum's on-line exhibit on a particular photographer. One of these photographs on the introductory page, by Lucien Clergue, links to the museum's exhibit of his work. This photograph is of a naked woman whose "post- pubescent female breast," 47 U.S.C. § 231(e)(6)(B), is exposed.

Viewing this photograph "as a whole," but without reference to the surrounding context, as per COPA's definition of "material," the photograph arguably meets the definition of "harmful to minors." Yet, this same photograph, when treated in context as a component of the entire Web page, cannot be said to be "harmful to minors." In the context of the Web page, which displays several art exhibits, none of which are even arguably "harmful to minors," the Clergue photograph and its surroundings would have "serious [artistic] value." Of course, it would also be protected speech as to adults.

As another example, amicus Safer Sex Institute publishes a Web site that contains sexual health and educational materials. On one page of this Web site is a textual description of how to use a condom with accompanying graphic drawings. See Safer Sex Institute, *safersex / a journal of safer sex*, [http:// safersex.org/condoms/how.to.use/](http://safersex.org/condoms/how.to.use/) (last visited Feb. 6, 2003). The page lists six steps for properly using a condom. Next to this text are four drawings that detail how to place a condom on the penis and how to

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remove it after sex. Three of these drawings each "exhibit[] ... the genitals." [47 U.S.C. § 231\(e\)\(6\)\(B\)](#). An evaluation of any of these three drawings alone, all of which depict an erect penis "as a whole," might lead to the conclusion that they fit the "harmful to minors" standard. Yet, these same drawings, viewed in the larger context of the Web page, which provides instruction on the proper use of a condom, is protected speech as to adults. We also note that the same Web page provides links to other information within the same Web site of potential importance to adults (and possibly certain minors) regarding safe sex.

As these examples illustrate - and they are but a few of the very many produced by the plaintiffs and the amici - the burden that COPA would impose on harmless material accompanying such single images causes COPA to be substantially overinclusive.

[W]hile COPA penalizes publishers for making available improper material for minors, at the same time it impermissibly burdens a wide range of speech and exhibits otherwise protected for adults. Thus, in our opinion, the Act, which proscribes publication of material harmful to minors, is not narrowly tailored to serve the Government's stated purpose in protecting minors from such material.

[In addition], COPA's definition of "material that is harmful to minors" only permits regulation of speech that when "taken as a whole, lacks serious literary, artistic, political, or scientific value *for minors*." COPA defines the term minor as "any person under 17 [seventeen] years of age." The statute does not limit the term minor in any way, and indeed, in its briefing, the Government, in complete disregard of the text, contends that minor means a "normal, older adolescent."

[E]ven the Government does not argue, as it could not, that materials that have "serious literary, artistic, political or scientific value" for a sixteen-year-old would have the same value for a minor who is three years old. Nor does any party argue, despite Congress's having targeted and included *all* minors seventeen or under, that *pre-adolescent minors* (i.e., ages two, three, four, etc.) could be patently offended by a "normal or perverted sexual act" or have their "prurient interest" aroused by a "post-pubescent female breast," or by being exposed to whatever other material may be designed to appeal to prurient interests.

The term "minor," as Congress has drafted it, thus applies in a literal sense to an infant, a five-year old, or a person just shy of age seventeen. In abiding by this definition, Web publishers who seek to determine whether their Web sites will run afoul of COPA cannot tell which of these "minors" should be considered in deciding the particular content of their Internet postings. Instead, they must guess at which minor should be considered in determining whether the content of their Web site has "serious ... value for [those] minors." Likewise, if they try to comply with COPA's "harmful to minors" definition, they must guess at the potential audience of minors and their ages so that the publishers can refrain from posting material that will trigger the prurient interest, or be patently offensive with respect to those minors who may be deemed to have such interests.

Even if the statutory meaning of "minor" were limited to minors between the ages of thirteen and seventeen, Web publishers would still face too much uncertainty as to the nature of material that COPA proscribes. Therefore, COPA's definition of the term "minor," viewed in conjunction with the "material harmful to minors" test, is not tailored narrowly enough to satisfy the First Amendment's requirements.

(b) "Commercial Purposes"

COPA's purported limitation of liability to persons making communications "for commercial purposes" does not narrow the reach of COPA sufficiently. Instead, COPA's definitions subject too wide a range of Web publishers to potential liability. As the District Court observed, "There is nothing in the text of COPA ... that limits its applicability to so-called commercial pornographers only."

The statute includes within "commercial purposes" any Web publisher who meets COPA's broad definition of being "engaged in the business" of making such communications. *Id.* § [231\(e\)\(2\)\(A\)](#). The definition of "engaged in the business" applies to any person whose communication "includes *any material* that is harmful to minors" and who "devotes time ... to such activities, as a *regular* course of such person's trade or business, with the objective of earning a profit," if that person "knowingly causes [or solicits] the material that is harmful to minors to be posted on the World Wide Web." *Id.* § [231\(e\)\(2\)\(B\)](#) (emphasis added).

Based on this broad definition of "engaged in the business," we read COPA to apply to Web publishers who have posted *any* material that is "harmful to minors" on their Web sites, even if they do not make a profit from such material itself or do not post such material as the principal part of their business. Under the plain language of COPA, a Web publisher will be subjected to liability if even a small part of his or her Web site displays material "harmful to minors."

Moreover, the definition of "commercial purposes" further expands COPA's reach beyond those enterprises that sell services or goods to consumers, including those persons who sell advertising space on their otherwise noncommercial Web sites. Thus, the "engaged in the business" definition would encompass both the commercial pornographer who profits from his or her online traffic, as well as the Web publisher who provides free content on his or her Web site and seeks advertising revenue, perhaps only to defray the cost of maintaining the Web site. The latter model is a common phenomenon on the Internet. This expansive definition of "engaged in the business" therefore includes a large number of Web publishers. Indeed, the District Court in its findings of fact cited to testimony that approximately one-third of the 3.5 million global Web sites (existing at that time) are "commercial," or "intend[ed] to make a profit."

[T]he Government contends that COPA "covers only those communications that have a *substantial connection* to the *regular online marketing* of material that is harmful to minors." We do not find the Government's argument persuasive. COPA's use of the phrase "regular course" does not narrow the scope of speech covered because it does not place any limitations on the amount, or the proportion, of a Web publisher's posted content that constitutes such material. Thus, even if posted material that is harmful to minors constitutes only a very small, or even infinitesimal, part of a publisher's entire Web site, the publisher may still be subject to liability. For example, if a Web site whose content deals primarily with medical information, but also "regularly" publishes a bi-weekly column devoted to sexual matters which could be deemed "harmful to minors," the publisher might well be subject to criminal liability under COPA. Although such a Web site primarily publishes medical information that is not "harmful to minors," the biweekly column, according to the Government's reading of COPA, would be a publication in "regular course."

In sum, while the "commercial purposes" limitation makes the reach of COPA less broad than its

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predecessor, COPA's definition of "commercial purposes" nevertheless imposes content restrictions on a substantial number of "commercial," non-obscene speakers in violation of the First Amendment. We are satisfied that COPA is not narrowly tailored to proscribe commercial pornographers and their ilk, as the Government contends, but instead prohibits a wide range of protected expression.

(c) Affirmative Defenses

We examine whether the affirmative defenses in COPA serve to tailor the statute narrowly, as the Government asserts. COPA's affirmative defenses shield Web publishers from liability under the statute if they, in good faith, restrict access to material deemed harmful to minors. COPA provides as follows:

It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors -

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

[47 U.S.C. § 231\(c\)\(1\)](#).¹⁹ The District Court held that COPA's affirmative defenses burdened otherwise protected adult speech in a way that prevented the statute from surviving strict scrutiny.

Evidence presented to this Court is likely to establish at trial that the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users from accessing such materials and that the loss of users of such material may affect the speakers' economic ability to provide such communications. The plaintiffs are likely to establish at trial that under COPA, Web site operators and content providers may feel an economic disincentive to engage in communications that are or may be considered to be harmful to minors and thus, may self-censor the content of their sites. Further, the uncontroverted evidence showed that there is no way to restrict the access of minors to harmful materials in chat rooms and discussion groups, which the plaintiffs assert draw traffic to their sites, without screening all users before accessing any content, even that which is not harmful to minors, or editing all content before it is posted to exclude material that is harmful to minors.

We cannot say that the District Court's factual determination is clearly erroneous.

We agree with the District Court's determination that COPA will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial. People may fear to transmit their personal information, and may also fear that

¹⁹ The District Court found, and the Government does not argue otherwise, that the "digital certificate" and "other reasonable measures" are not effective or feasible: "The parties' expert witnesses agree that at this time, while it is technologically possible, *there is no certificate authority that will issue a digital certificate that verifies a user's age....* The plaintiffs presented testimony that there are *no other reasonable alternatives that are technologically feasible* at this time to verify age online.... The defendant did not present evidence to the contrary."

their personal, identifying information will be collected and stored in the records of various Web sites or providers of adult identification numbers.

The Supreme Court has disapproved of content-based restrictions that require recipients to identify themselves affirmatively before being granted access to disfavored speech, because such restrictions can have an impermissible chilling effect on those would-be recipients.²² The effect of the affirmative defenses, as they burden "material harmful to minors" which is constitutionally protected for adults, is to drive this protected speech from the marketplace of ideas on the Internet. This type of regulation is prohibited under the First Amendment. As the Supreme Court has recently said, "[S]peech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it." [Free Speech Coalition](#).

3. Least Restrictive Means

As we have just explained, COPA is not narrowly tailored and as such fails strict scrutiny. We are also satisfied that COPA does not employ the "least restrictive means" to effect the Government's compelling interest in protecting minors.

We first examine the alternative of blocking and filtering technology. The District Court concluded that blocking and filtering technology, although imperfect, "may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users." Indeed, the District Court found that blocking and filtering technology, if installed by parents, would shield minors from harmful Internet communication occurring within a broader range of venues than that covered by COPA: "Blocking and filtering software will block minors from accessing harmful to minors materials posted on foreign Web sites, non-profit Web sites, and newsgroups, chat, and other materials that utilize a protocol other than HTTP."

The Government, however, argues that filtering software is not a viable means of protecting children from harmful material online because it is not nearly as effective as COPA at protecting minors. The Government offers the following reasons for this conclusion: (1) filtering software is voluntary - it transfers the burden of protecting children from the source of the harmful material, i.e., the Web publishers, to the potential victims and their parents; [and] (2) filtering software is often both over- and under- inclusive of targeted material.

The Government makes much of the notion that the voluntary use of blocking and filtering software places an onus on parents. But the Supreme Court has effectively answered this contention. The Court stated in [*Playboy v. United States*]: "A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." The *Playboy* Court held unconstitutional a federal statutory provision that required cable operators who provide channels primarily dedicated to sexually-oriented programming to scramble or block those channels completely, or to "time channel" their transmission, i.e., limit their availability to

²² See, e.g., [Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 732-33 \(1996\)](#) (holding unconstitutional a federal law requiring cable operators to allow access to sexually explicit programming only to those subscribers who request access to the programming in advance and in writing).

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hours between 10 p.m. and 6 a.m., when, in Congress's view, children are unlikely to be viewing television. By this provision Congress sought to prevent children's exposure to content contained on such channels as a result of "signal bleed."

The Court determined that this provision constituted a "significant restriction of [protected] communication between speakers and willing adult listeners." The Court held that this provision failed strict scrutiny because Congress had available to it an effective, less restrictive means of achieving its ends. In particular, Congress had provided for an "opt-out" provision whereby a cable subscriber could request the cable company to scramble fully or block completely the receipt of sexually explicit channels. The Court explained that the voluntary nature of the "opt-out" provision rendered it less restrictive: "It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time." Instead, the Court explained that reliance upon "informed and empowered parents," was the preferable alternative:

The regulatory alternative of a publicized ["opt-out" provision], which has ... the choice of an effective blocking system, would provide parents the information needed to engage in active supervision. The government has not shown that this alternative, a regime of added communication and support, would be insufficient to secure its objective, or that any overriding harm justifies its intervention.

Id. at 825-26.

As with the "opt-out" alternative available in *Playboy*, which would allow parents to block sexually-oriented cable channels effectively, here filtering software is a less restrictive alternative that can allow parents some measure of control over their children's access to speech that parents consider inappropriate. To be sure, blocking and filtering software may sometimes block too little and sometimes block too much Internet speech. [But] the District Court, as noted above, determined that blocking and filtering software could be at least as effective as COPA, because COPA does not reach "foreign Web sites, noncommercial sites, and ... [materials available online] via protocols other than http."²⁸

A three-judge court has recently held that a federal law requiring the use of filtering and blocking software on computers at libraries that received federal funding violates the First Amendment. See [*American Library Ass'n v. United States*, 201 F.Supp.2d 401, 406 \(E.D.Pa.\)](#) (three-judge court), *prob. juris. noted*, [*123 S.Ct. 551 \(2002\)*](#). This decision does not compel a different result here. In that case, the *American Library* court noted that blocking and filtering technology overblocks and underblocks Internet content. That decision, however, is distinguishable because, whereas the Act at issue in *American Library* involved Government-mandated use of blocking and filtering software, here we only consider the *voluntary* use of such software by parents who have chosen to use this means to protect their children. We also note that, in *American Library*, the Government sought to defend the legislation at issue by reference to the statute's "disabling provision," which *required* adults to identify themselves to librarians in order to disable the filtering software on library computers, and thus gain unfettered access to the wide range of speech on the Internet. The court held that this "disabling provision" created a chilling effect on adult library patrons' access to protected speech, just as we have determined that

²⁸ * * * It follows that both COPA and blocking and filtering technology are over- and underinclusive in differing ways, and we agree with the District Court's conclusion that as a result, such technology may be at least as effective as COPA. * * *

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COPA's affirmative defenses, by requiring the use of a credit card or adult identification number, similarly place an impermissible burden on adult users.

We agree with the District Court that various blocking and filtering techniques may be substantially less restrictive than COPA in achieving COPA's objective of preventing a minor's access to harmful material.

B. Overbreadth

Though the Supreme Court held in *Ashcroft* that COPA's reliance on community standards did not alone render the statute overbroad, the Court specifically declined to "express any view as to whether COPA suffers from substantial overbreadth for other reasons [or] whether the statute is unconstitutionally vague," instead explaining that "prudence dictates allowing the Court of Appeals to first examine these difficult issues." [For the reasons discussed earlier, we hold that COPA] is substantially overbroad. [It] places significant burdens on Web publishers' communication of speech that is constitutionally protected as to adults and adults' ability to access such speech. In so doing, COPA encroaches upon a significant amount of protected speech beyond that which the Government may target constitutionally in preventing children's exposure to material that is obscene for minors.