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**INTERNET DECENCY REGULATION VS. FREE SPEECH:
ASHCROFT VS. ACLU**

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On June 29, 2004, the US Supreme Court upheld the ruling of the Court of Appeals for the Third Circuit enjoining the enforcement of the Child Online Protection Act (COPA) because the law “*likely*” violated the free-speech clause of the First Amendment of the US Constitution. The decision was reached by the High Court in the case of *Ashcroft, Attorney-General v. American Civil Liberties Union, et. al.* (No. 03-218) in a narrowly divided vote of 5-1.

Factual Antecedent

Alarmed over the exposure of minors to sexually explicit materials in the Internet, US Congress enacted the Communications Decency Act of 1996. This law sought to penalize persons and organizations that *knowingly* transmit or display obscene or indecent materials and messages to minors over the Internet. In a constitutional challenge posed by the American Civil Liberties Union in the case of *Reno vs. ACLU* (521 US 844), the US Supreme Court in 1997 struck down this law for violating First Amendment. The Court argued that the law was not narrowly tailored to serve compelling governmental interest and other regulatory alternatives, that are least restrictive, are available.

With the constitutional nullity of the Communications Decency Act, the US Congress, a year later, enacted COPA also in response to the clamor against Internet pornography. The law imposes a hefty fine and six months imprisonment for *knowingly* posting website contents for commercial purposes that are harmful to minors. The law also provides for an affirmative defense to commercial web speakers who restrict access to harmful materials by requiring the use of credit cards and other measures feasible under available technology. In determining whether or not an Internet material is harmful to minors, the law calls for the application of the following standards: (i) contemporary community standard test, (ii) depictions of sexual act or exposure of sexual organs, and (iii) the lack of serious literary, artistic, political or scientific value for minors of the web content taken as a whole.

Expectedly, civil libertarians also submitted COPA to judicial scrutiny. In February 1999, a US District Court for the Eastern District of Pennsylvania issued an injunction preventing the government from enforcing the law. The District Court held that COPA was invalid because there is no way to prevent minors from harmful material on the Internet without also burdening adults from access to protected speech. Restricting access through credit cards or adult access codes as affirmative defense would unduly burden free speech. The court likewise found that government failed to prove that the law was the least restrictive means available to achieve the public goal of restricting harmful materials to minors in the Internet.

On appeal, the Third Circuit Court of Appeals affirmed the findings of unconstitutionality of COPA by the Federal District Court but on a different ground. The appellate court anchored its ruling on the fact that the ‘contemporary community standards test’ provided for by the law would essentially require web content to abide by the most restrictive community standards given the peculiar geography-free nature of cyberspace. The standard imposed by the law was unconstitutionally overbroad, according to the appellate court.

In a petition for certiorari filed in 2001, the US Justice Department asked the US Supreme Court to reverse the decision of the Third Circuit Appellate Court affirming the ruling of the Federal District Court in Pennsylvania.

On May 13, 2002, the Supreme Court, without making any categorical ruling on the constitutionality of COPA, rendered judgment holding that the “contemporary community standard” test, standing alone, is not unconstitutionally overbroad. The High Court emphasized that its decision was limited on that narrow issue. At the same time, it ordered the appellate court to decide on a wide range of First Amendment issues posed by the law and determine whether the District Court was correct in granting preliminary injunction in the enforcement of COPA.

On remand, the Third Circuit Court of Appeals, on March 6, 2003, affirmed its earlier decision finding COPA in violation of the First Amendment because it denied access to online speech that is legally permissible for adults. The appellate court also held that the law was not the least restrictive approach available to government to serve the interest of preventing minors from using the Internet to gain access to indecent materials.

Consequently, the US Supreme Court was called upon to review the constitutionality of COPA for the second time.

The Majority Ruling

It can be recalled that COPA was enacted a couple of years after its predecessor-statute, the Communications Decency Act of 1996, was declared unconstitutional for violating the constitutional dictum on free expression. Thus, the majority opinion written by Justice Kennedy, and joined by Justices Stevens, Souter, Thomas, and Ginsburg, began with the following declaration:

“The imperative of according respect to the Congress, however, does not permit us to depart from well-established First Amendment principles. Instead, we must hold the Government to its constitutional burden of proof.”

The Court, in this case, further explained by saying that the US Constitution “demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality. This is true even when Congress twice has attempted to find a constitutional means to restrict, and punish, the speech in question.”

To uphold the constitutionality of a statute that regulates free speech, like COPA, the Supreme Court, reiterating the doctrine it laid down in *Reno vs. ACLU*, said:

“A statute that ‘effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.’ xxxx

When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.” (citation omitted)

The High Court noted that the Federal District Court granted the preliminary injunction on the pretext of the proposition that other alternatives, less restrictive and more effective than COPA, are available to restrict children’s access to indecent materials. These alternatives include the so-called “blocking and filtering software”.

Filters are less restrictive than COPA because they “impose selective restrictions on speech at the receiving end, not universal restrictions, at the source”. Filters restrict minors from all sorts of pornography, not only from American websites. If COPA were upheld, filtering software would diminish its effectiveness because content providers would simply move their operations overseas, beyond the jurisdiction of American courts. While filters are not the perfect solution to the problem being addressed by COPA, the Court observed the failure of government to show proof that the mechanisms provided for under the law is less restrictive than available filtering technologies.

The Supreme Court also took note of the findings of the Federal District Court that verification systems, like credit cards and access code, may be the subject of evasion and circumvention, even by the minors themselves. In fact, the Congressional Commission on Child Online Protection indisputably found that filters are more effective than age verification methods in limiting minors from accessing Internet pornography. Hence, COPA failed the “least restrictive alternative” test to justify a limitation on the exercise of free speech under the First Amendment.

In allowing the preliminary injunction to stand, pending a full trial on the merits by the District Court, the Supreme Court was concerned about the potential and extraordinary harm the law posed on protected speech. Despite the availability of affirmative defense to possible violators, the Court observed that web speakers would likely resort to self-censorship than risk the perils of criminal prosecution.

The majority of the highly divided court recognizes however that the factual circumstances of the case may not reflect current technological realities. And this is a serious flaw in any case involving the Internet, as this technology evolves at a rapid pace. The factual findings of the District Court were made five years ago, in 1999. In maintaining the preliminary injunction and remanding the case for trial in the merits, the parties to the case would be given ample opportunity to update and supplement their respective facts to reflect present-day technology, and allow the District Court to decide the case based on the current legal landscape.

On remand, the Supreme Court does not discount the possibility that government may be able to prove the constitutionality of COPA as the least restrictive alternative available to satisfy its legislative imperatives.

The Dissenting Opinion

In his dissenting opinion, Justice Scalia finds the COPA constitutional and should not be the subject of an exacting standard of review. Since the law punishes only violators of commercial pornography in the Internet - a form of business activity that could be banned entirely consistent with the provisions of the First Amendment - COPA does not raise any constitutional concern.

Justices Breyer, O’Connor, and Chief Justice Rehnquist also departed from the majority opinion but agreed with the majority that the law should be subjected to the “most exacting

scrutiny". They argued that the "least restrictive alternative" test is a comparative term that cannot be satisfied without examining "both the extent to which the Act regulates protected expression and the nature of the burdens it imposes on that expression".

The dissenters argued that in the first place the Internet materials classified as legally obscene does not enjoy the mantle of protection of the First Amendment citing the landmark case of *Miller vs. California* (413 US 15). The opinion also noted that the law does not censor, in fact, the materials within its ambit but merely requires web providers, of content considered harmful to children, to limit access through a verification screen.

The minority justices also find that the presence of the filtering system is not an alternative legislative approach to the problem of protecting minors from commercial pornography. This system is part of the status quo when Congress enacted COPA. And by definition, status quo is always less restrictive than a new regulatory law for it "is always less restrictive to do *nothing* than to do *something*". They concluded that filtering software, as presently available, does not solve the problem COPA seeks to address. It is precisely the inadequacies of the filtering system that prompted Congress to pass the law rather than rely on its voluntary use. The obvious fact is - that despite the existence of this blocking and filtering software, Internet pornography continues to proliferate.

The dissenting view also attacked the "less restrictive alternatives" propounded by the majority calling on the government to encourage the use of blocking and filtering software. The result might be an alternative that is extremely effective but in the process, will tax heavily on government resources. Thus, there is no other less restrictive way to advance the compelling interest to protect minors from Internet pornography. Hence, COPA should be viewed as constitutional within the framework of the First Amendment.

All told, the minority justices of the Supreme Court do not see any compelling and logical need to remand the case to the District Court for the reception of additional evidence.

Impression

The ruling of the US Supreme Court did not actually put an end to the nagging constitutional issue of whether or not the Child Online Protection Act (COPA) violates the free speech clause of the First Amendment. As stated in the opening statement of the opinion of the Court:

"We must decide whether the Court of Appeals was correct to affirm a ruling by the District Court that enforcement of COPA should be enjoined because the statute *likely* violates the First Amendment. (italics supplied)

From this perspective and with the remand of the case to the District Court for trial on the merits, it is certain that the US Supreme Court would be finally pass judgment on the law for the third time sometime in the future. It appears from the court decision that the constitutional permissibility or impermissibility of the law hangs on the balance based on the evidence that would be presented before the District Court on the "least restrictive alternative" test. The final determination on the constitutional challenge to COPA could still go either way.

The Internet is a new form of mass media that obviously fits within the framework of constitutionally protected speech in a democratic space. In this jurisdiction, the Bill of Rights of the 1987 Constitution provides:

"Sec. 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances."

Since cyberspace is not defined by any territorial boundaries the most serious challenge to governments all over the world is how to regulate and exercise jurisdiction over Internet activities that serve as avenues for the commission of crimes, and destroy the basic social norms and values of society like pornography or obscenity. To a certain extent, the Internet may capitulate the state's traditional exercise of police power unless governments act together to address this issue in unison, through treaties and international covenants.

Some has maintained the view that this state regulation is unnecessary and will only hamper the full development of information technology to serve the ends of society. Their view is to allow the advent, and look forward to the introduction, of new technologies that would effectively deter the use of the information superhighway in the commission of illicit, illegal, immoral or even plainly unacceptable web practices, an act of self-regulation.

The constitutional challenge on COPA, beyond the clash between a compelling state interest to shield minors from pornography and the freedom of adults to free expression, is also a reflection on who should, and can adequately, regulate the Internet: state laws or technology itself.