



Pornography

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Background

Internet [PORNOGRAPHY](#) is a battlefield in U.S. law. Since the explosion of [PUBLIC INTEREST](#) in the Net in the 1990s, the public, lawmakers, and the courts have argued over how to control online porn. Congress and state legislatures have passed several laws aimed at protecting children from exposure to so-called cyber porn, but the most sweeping of these have often failed to pass constitutional tests. The failure of these laws in court means this popular yet controversial medium faces few regulations. According to Forbes magazine, the online porn business in 2001 swelled to \$1 billion a year, a significant part of a larger industry estimated to earn anywhere between \$3 and \$8 billion annually.

In some respects, the issue continues a legal struggle many decades old. Opponents of pornography have long tried to control it on moral grounds, even as proponents sought to protect it as a valid expression of free speech. Traditionally, opponents won these battles. The Supreme Court established that [OBSCENITY](#) is not protected by the First Amendment, but the difficult question in each case has been defining what is and what is not obscene. Its rulings gradually shifted from a broad, forbidding position of the late 1950s to holding in the 1970s that communities could set their own standards for obscenity. Replayed in countless courtrooms, the tug-of-war between these camps has continued ever since.

But the fight over cyber porn carries traditional arguments into new areas shaped by technology. A chief concern is that the Internet allows minors easy access to it through search engines—sometimes even accidentally. In 2001, U.S. SOLICITOR GENERAL Ted Olson contended that minors could stumble upon or intentionally enter 28,000 commercial porn websites. Also of worry is the Internet's ability to facilitate the illegal dissemination of child pornography. And the ubiquity of Internet access has raised new social problems by introducing pornography into new settings, such as public libraries and the workplace.

Milestones in the development of Internet pornography law include the following.

- The Supreme Court established that obscenity is not protected by the First Amendment in *Roth v. United States* (1957), declaring obscenity to be "utterly without redeeming social importance."
- After subsequent cases showed the difficulty of finding a conclusive definition of obscenity, the Court restated its definition in *Miller v. California* (1973). It substituted a detailed three-part test ultimately to be used by each locality—the so-called "community standards" test.
- The Court ruled that child pornography is not a form of expression protected under the constitution in *New York v. Ferber* (1982). It has also upheld a state law prohibiting the possession and viewing of child porn in *Osborne v. Ohio* (1990).

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- Seeking to control Internet porn, Congress first passed legislation in 1996. The Communications Decency Act (CDA) criminalized the dissemination over computer networks of obscene or indecent material to children.. Immediately blocked from enforcement by the courts, it was ruled unconstitutional under the First Amendment in 1997.
- Seeking to update federal child pornography law for the Internet, Congress passed the Child Pornography Prevention Act (CPPA) of 1996. Among other features, the law criminalized any visual depiction that "appears to be" child pornography, including so-called virtual porn created by computer. After lower courts struck down provisions of the [STATUTE](#), the U.S. Supreme Court agreed to hear an appeal in *Ashcroft v. Free Speech Coalition*, with a verdict expected in late 2002.
- The Child Online Protection Act (COPA) of 1998 revived the CDA by modifying its scope. COPA criminalized the use of the World Wide Web to sell material harmful to minors. Ruled unconstitutional, the case remained on appeal before the Supreme Court with a decision expected by summer 2002.
- The Protection of Children from Sexual Predators Act of 1998 included Internet-specific provisions for reporting child pornography to authorities and prohibiting federal prisoners from being allowed unsupervised Internet usage.
- Two federal laws regulate access to Internet pornography at libraries and schools, the Children's Internet Protection Act (CIPA) and the Neighborhood Internet Protection Act. Together, they require so-called filtering software to be installed on computers in public schools and libraries as a condition for federal funding. Both laws were challenged in court in early 2002, with their outcome uncertain.

As these federal cases suggest, recent outcomes have favored those who regard federal control of Internet pornography as [CENSORSHIP](#). That does not mean the issues are settled, as indeed partisans on both sides of the issue eagerly anticipate forthcoming court decisions on major cases in 2002.

Federal Restrictions on Cyber Porn

Child Pornography

Child pornography has long been treated severely under both federal and state law. Congress first addressed the issue with the Protection of Children Against Sexual Exploitation Act of 1977. Lawmakers later toughened restrictions in the Child Protection Act of 1984, the Child Protection and Obscenity Enforcement Act of 1988, and the Child Protection Restoration and Penalties Enhancement Act of 1990.

In the 1990s, lawmakers twice passed legislation targeting child porn online. The first was the Child Pornography Prevention Act (CPPA) of 1996, designed both to close loopholes in existing federal child pornography law and address new technological issues by the following:

- Criminalizing the act of knowingly possessing, selling, receiving, sending, or transmitting child pornography via the internet or e-mail.
- Criminalizing so-called "virtual" depictions of child pornography, those that appear to involve minors and those created by computer graphics software.

Lower federal courts split over the constitutionality of some provisions in the law, and an appeal in *Ashcroft v. Free Speech Coalition* will be decided by the U.S. Supreme Court in 2002.

The Protection of Children from Sexual Predators Act of 1998 contains further anti-child porn provisions. Title II of the law contains the following provisions:

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- Provides for the prosecution of individuals for the production of child pornography if the visual depiction was produced with materials that have been mailed, shipped, or transported in interstate or foreign commerce, including by computer.
- Tightens previous federal law by making it a criminal offense to possess for even one depiction of child pornography
- Outlines responsibilities for Internet Service Providers in reporting child pornography to authorities
- Increases federal criminal penalties for child pornography, which include fines and prison sentences ranging from 15 to 30 years

Disseminating Cyber Porn to Minors

Although several federal laws have sought to control Internet porn, none has specifically tried to forbid it. In large part this is a recognition of the legal protections pornography enjoyed toward the end of the twentieth century. CASE LAW has established that much pornography is protected speech under the First Amendment. Obscenity is not protected. However, as the Supreme Court's "community standards" doctrine acknowledges, communities measure obscenity differently: what is likely to be considered obscene by a jury in Utah is not guaranteed to similarly move a jury in New York. The difficulty of formulating one broad standard of obscenity for all communities is made even greater by the Internet's being a global network, available everywhere at once.

Thus rather than trying to eliminate cyber porn, Congress has twice sought to protect children from exposure to it. These laws have yet to be enforced. Both wound up in court, where sections of each were ruled unconstitutional. Crucially, the fate of one law still remains as of 2002 on appeal.

The Communications Decency Act (CDA) of 1996 was lawmakers' first attempt to regulate the availability of indecent and obscene material online to minors. The CDA prohibited the "knowing" dissemination of such material to minors over computer networks or telephone lines, establishing penalties for violations of up to five years [IMPRISONMENT](#) and fines of up to \$250,000. But it quickly fell to a legal challenge brought by the American Civil Liberties Union (ACLU) and a coalition of major publishers. Bringing a traditional First Amendment case against censorship, they argued successfully that the law was too broad: in trying to protect kids, its prohibitions would have limited the speech of adults to a level suitable for children. After a special three-judge panel ruled against the law in Philadelphia in 1996, the Supreme Court by 7-2 vote in *American Civil Liberties Union v. Reno* (1997) held that the law unconstitutionally abridged [FREEDOM OF SPEECH](#), and thus struck down key provisions.

Seeking to draft a constitutionally viable law, Congress responded by passing the Child Online Protection Act (COPA) of 1998. More narrowly written, COPA took aim at commercial online porn sites that disseminate material to minors. And, anticipating constitutional objections, it mandated that criminal cases brought under it would be tried according to contemporary community standards. The law set stiff penalties of \$150,000 for each day of violation and up to six months in prison. However, COPA suffered similar setbacks in court after the ACLU and several non-pornographic online websites successfully contested it, first in federal district court in Philadelphia and then before the U.S. Court of Appeals for the 3rd Circuit. As before with the CDA, the **JUSTICE DEPARTMENT** has continued to appeal; this time, it has argued that online porn is even more readily accessible to children and thus in need of urgent control. The U.S. Supreme Court heard oral arguments in late 2001 and was expected to rule on the case, *Ashcroft v. ACLU*, in summer 2002.

If the Supreme Court reverses the two lower rulings, an enforceable COPA would represent a milestone in the evolution of Internet law. It would almost certainly open a flood of [LITIGATION](#) by opponents of pornography and pose new, difficult questions of [JURISDICTION](#). But even if the Court finds the law unconstitutional, few legal observers believe this will be the last word. It is likely that legislators will continue to press forward to find other legal means to regulate the availability of online porn to minors.

Filtering in Federally-funded Public Schools and Libraries

In another attempt to protect children from exposure to cyber porn, Congress passed two laws in 2000 aimed at public schools and public libraries. Federally-funded institutions of this kind are required to put in effect Internet safety policies in order to continue qualifying for federal support. They must install so-called Internet filters on their public computers: these are commercially-available software programs, with names like Cyber Patrol and Net Nanny, that intercept and block pornographic materials. Under the terms of the Children's Internet Protection Act (CIPA) and the Neighborhood Internet Protection Act (NCIPA), filters had to be in place by 2001, although libraries were ultimately given extra time to comply.

Proving as controversial as the CDA and COPA, the laws have been challenged by the American Library Association and civil liberties groups. They have argued that the law will result in censorship because it relies upon inaccurate technology, citing [EVIDENCE](#) that some software filters erroneously block non-pornographic material, too. Oral [TESTIMONY](#) on the case was heard in spring 2002, with a verdict expected later in the year.

State Laws

State laws on Internet pornography have evolved rapidly. Prior to the rise in popularity of the Internet, most states already had laws on the books regulating age limits for purchasing pornography as well as statutes criminalizing child pornography. Many legislatures saw a need for legislation to respond to the vicissitudes of new technology. Between 1995 and 2002, nearly two dozen states considered bills that would control in some fashion access to Internet pornography. More than a dozen states enacted them.

Closely resembling federal law, state laws break down into two broad categories. In the first and broadest, the laws forbid the access by minors to what the laws usually call "harmful materials"—verbal and visual information that includes, but is not necessarily limited to, pornography. Sometimes these laws target "indecent" material; for example, Oklahoma and New York law each criminalize the transmission of indecent materials to minors.

Most state laws on transmission of indecent materials target exposure in public schools and libraries. Their remedy is to require, and in at least one case merely recommend, that these facilities install so-called Internet filtering software on their computers. At least six states have passed such laws: Arizona, Kentucky, Michigan, Minnesota, South Carolina, and Tennessee. Twenty more states were considering such legislation in 2001-2002.

Like federal law, a second category of state law targets virtual child pornography. Aggressively defining this new category of criminal offense, these laws treat so-called virtual porn as severely as actual photography of minors. In the mid-1990s, for instance, both Kansas and Montana expanded their existing statutes to prohibit transmission and possession of such images, while other states such as Missouri and Minnesota enacted new laws.

In early court challenges, much more sweeping state cyber porn laws failed to pass constitutional tests in three states. In *American Library Association v. Pataki* (1997), a federal judge blocked enforcement of a New York statute prohibiting online indecency that had been modeled on the federal Communications Decency Act, ruling that it violated the Constitution's Commerce Clause. In *ACLU v. Johnson* (1998), a federal district judge ruled on First Amendment grounds that New Mexico could not enforce a law criminalizing the online dissemination of any expression that involves nudity or sexual content. And in another victory for First Amendment advocates, a federal judge blocked Michigan's 1999 law criminalizing online communications

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deemed harmful to minors in *Cyberspace v. Engler* (1999).

Like ongoing litigation over federal laws, the battle over state cyber porn law is far from over. Many legislatures are looking expectantly to the Supreme Court's 2002 decision on Internet filters before pursuing further legislation of their own. And still other states are trying new strategies, including more aggressive legislation that would put pressure on Internet service providers (ISPs) to supervise their customers: under a new Pennsylvania law enacted in 2002, owners and operators of ISPs will be responsible for blocking access to child pornography with high fines and prison sentences for violators. Ongoing action and controversy is likely in this area of law for the foreseeable future.

Additional Resources

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Organizations

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