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CRS Report for Congress

Congressional Research Service ~ The Library of Congress

Memorandum

June 29, 1998

TO: Honorable Ernest J. Istook. Jr.
Attention: Dr. William A. Duncan

FROM: Henry Cohen
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SUBJECT: Constitutionality of Draft Bill to Require Federally Funded Schools and Libraries to Block Minors' Access to Computer Obscenity

This memorandum is furnished in response to your request for an analysis of the constitutionality of a discussion draft bill titled the "Child Protection Act of 1998." This bill would require any elementary or secondary school or public library, that receives federal funds "for the acquisition or operation of any computer that is accessible to minors and that has access to the Internet," to "install software on that computer ... to prevent minors from obtaining access to any obscene information using that computer," and to "ensure that such software is operational whenever that computer is used by minors, except that such software's operation may be temporarily interrupted to permit a minor to have access to information that is not obscene or otherwise unprotected by the Constitution under the direct supervision of an adult . . . ."

The First Amendment provides: "Congress shall make no law ... abridging the freedom of speech, or of the press." In general, the First Amendment protects pornography, with this term being used to mean any erotic material conveyed in any medium, including the Internet. The Supreme Court, however, has held that the First Amendment does not protect two types of pornography: obscenity and

child pornography. Obscenity is, loosely, pornography that "depict[s] or describe [s] patently offensive 'hard core' sexual conduct."[1] More precisely, "obscenity" is defined by the Miller test, which asks:

> (a) whether the "average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[2]

The Supreme Court has indicated that the first two prongs of this test -- prurience and patent offensiveness -- are to be determined by community standards, but the third prong -- value -- is to be determined by a reasonableness standard.[3]

Child pornography is material that "*visually* depicts sexual conduct by children below a specified age."[4] It is unprotected by the First Amendment even when it is not legally obscene, ie., child pornography need not meet the *Miller* test to be banned.[5]

Because obscenity and child pornography are not protected by the First Amendment, they may be banned, even for adults. Congress has done so with respect to both, and in recent years has amended the relevant statutes to include transmission of obscenity and child pornography by computer.[6] The draft bill, then, by requiring software "designed to prevent minors from obtaining access to obscene information," would restrict only material that is already illegal and that, under the Constitution, may be made illegal.

Under the draft bill, if the head of a federal agency believes that a recipient of funds is not blocking obscene material, then he may withhold further payments under the relevant program or activity, issue a complaint to compel compliance through a cease and desist order, or enter into a compliance agreement with the recipient. The draft bill does not define "obscene material," so, in determining whether a recipient has failed to block such material, the courts will likely use the Supreme Court's definition in the *Miller* test, applying the standards of the school or library's community in considering the first two prongs of the test.

The only thing to add is that the applicability of community standards to obscenity posted on the Internet may be in the process of changing. When someone posts material on the Internet, he makes it available, simultaneously, to all communities in the world where a computer can be plugged in. Therefore, as the Supreme Court has noted, "the 'community standards' criterion as applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message."[7] This is because, if the community most likely to be offended brought a successful obscenity prosecution, the defendant would effectively be precluded from posting the material at all. As this would result, in effect, in a

single national standard rather than in community standards, it suggests that, at least with respect to the Internet, the Court will replace the community standards criterion.[8]

Logically speaking. community standards could continue to apply under the draft bill, as a determination under the draft bill that a particular posting was obscene in a particular community would not affect the person who posts the material; it would affect only the school or library that failed to block it. However, if the Supreme Court revises its definition of obscenity, then, presumably, the courts will interpret the draft bill to conform to the new definition.

In conclusion, because the draft bill would apply only to obscenity, which is not protected by the First Amendment, it would be constitutional. This is not to imply that it would necessarily be unconstitutional if it applied to protected material. Congress may, to some extent, constitutionally limit minors' access to protected material.[9] In addition, Congress may, to some extent, discriminate on the basis of the content of protected speech in choosing what speech to fund, even where it could not do so by directly proscribing it.[10]

Please let us know if we may provide additional information.

Henry Cohen
Legislative Attorney

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1 Miller v. California, 413 U.S. 15, 27 (1973).

2 *Id.* at 24 (citation omitted).

3 Pope v. Illinois, 481 U.S. 497 (1987).

4 New York v. Ferber. 458 U.S. 747, 764 (1982) (emphasis in original).

5 In *Ferber*, the Court noted that a trier of fact "need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material need not be considered as a whole." 458 U.S. at 764.

6 18 U.S.C. §§ 1465, 2252, 2252A.

7 Reno v. American Civil Liberties Union, 117 S.Ct., 2329, 2347 (1997).

8 An exception might be where the defendant makes material available only to subscribers whose address he knows, as, in such cases, the defendant, in effect, "sends" the material only to specific communities, whose standards would apply in determining whether the material is obscene. See, United States v. Thomas, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 74 (1996).

9 *See, Reno, supra* note 7.

10 National Endowment for the Arts v. Finley, No. 97-371 (U.S. June 25, 1998).