

## Children's Internet Protection Act (CIPA) Legal Definitions of Child Pornography, Obscenity and "Harmful to Minors"\*

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### Legal Definitions

#### Child Pornography

Constitution (per U.S. Supreme Court): "Child pornography" is a category of speech that is not protected by the First Amendment. *New York v. Ferber*, 458 U.S. 747 (1982).

#### Federal Child Pornography

##### Summary

CIPA refers to the federal legal definition of "child pornography" at 18 U.S.C. § 2256. The definition has changed a number of times over the past several years, with its latest incarnation as of April 30, 2003, when President George W. Bush signed the PROTECT Act. The Act implements the Amber Alert communication system. It also redefined "child pornography."

In 2003, child pornography includes not only images of real children, but also computer images that are indistinguishable from real children engaging in sexually explicit conduct.

"Indistinguishable" is defined such that an "ordinary person" viewing the image would conclude that it is of an actual minor engaged in sexually explicit conduct.

The following images are not child pornography: drawings, cartoons, sculptures or paintings depicting minors or adults. Images of actual adults that look like minors are also excluded.

**NOTE: Although CIPA allows libraries and schools to disable filters for bona fide research or other lawful purposes, there is no bona fide research or lawful purpose to view child pornography.<sup>2</sup>**

#### Recent Past

Before the enactment of the April 2003 PROTECT Act, the definition of "child pornography" came from the 1996 Child Pornography Prevention Act, (CPPA). The 1996 law defined child pornography to include images that *appeared* to portray a minor though produced without the use of an actual child. The interpretation of the definition of child pornography per the CPPA differed in different federal circuits, and in 2002, the Supreme Court struck down that definition as a violation of the First Amendment. (*Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)). The Court wrote that Congress could not constitutionally premise legislation on "the desirability of controlling a person's private thoughts." *Id.* at 253. Even The Court observed that laws that prohibit child pornography produced with actual children are constitutional because they target the "production of the work, not the content." *Id.* at 249. Could child pornography whet the appetites of pedophiles and harm more children in the future? The Court said no, "[t]he

government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future date.'" *Id.* at 253.

Child Pornography Defined In 18 U.S.C. § 2256 (2003) (CIPA references this section)

§ 2256. Definitions for chapter

For the purposes of this chapter [18 USCS §§ 2251 et seq.], the term--

- (1) "minor" means any person under the age of eighteen years;
- (2) (A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated--
  - (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
  - (ii) bestiality;
  - (iii) masturbation;
  - (iv) sadistic or masochistic abuse; or
  - (v) lascivious exhibition of the genitals or pubic area of any person;(B) For purposes of subsection 8(B) of this section, "sexually explicit conduct" means--
  - (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;
  - (ii) graphic or lascivious simulated;
    - (I) bestiality;
    - (II) masturbation; or
    - (III) sadistic or masochistic abuse; or
  - (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person;
- (3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;
- (4) "organization" means a person other than an individual;
- (5) "visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image;
- (6) "computer" has the meaning given that term in section 1030 of this title;
- (7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;
- (8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--
  - (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
  - (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
  - (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.
- (9) "identifiable minor"--
  - (A) means a person--
    - (i) (I) who was a minor at the time the visual depiction was created, adapted, or modified; or
    - (II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and
    - (ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and
  - (B) shall not be construed to require proof of the actual identity of the identifiable minor.
- (10) "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and
- (11) the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

## Obscenity

CIPA refers to the federal legal definition of "obscenity" at 18 U.S.C. § 1460.<sup>3</sup> I thought I was crazy when I looked up the code, because I didn't find a definition there. Then I read the Congressional Research Service's analysis of CIPA by Henry Cohen (Legislative Attorney, American Law Division, Library of Congress), and felt a little better. I'm not crazy, Congress is. Cohen writes: "[CIPA defines] 'obscene' to have the meaning given such term in 18 U.S.C. § 1460, but that section does not define 'obscene.'" Cohen writes that in the absence of a statutory definition, the courts will likely apply the Miller test.<sup>4</sup>

### Miller Test of Obscenity

The Miller test comes from the U.S. Supreme Court's 1973 decision in *Miller v. California*. It creates a three-part test to determine if an item is obscene. All three parts must be satisfied. Note: Most pornography does not meet this test, and is not legally obscene. The test asks:

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

*Miller v. California*, 413 U.S. 15, 24 (1973).

The first two prongs of the *Miller* test -- prurient interest and patent offensiveness -- are issues of fact for a jury to determine, applying contemporary community standards. The third prong, serious value, is not determined by a given community or state, but is instead a reasonableness standard. (*Pope v. Illinois*, 481 U.S. 497, 500 (1987)).

The Constitutional definition of obscenity was further narrowed by the Supreme Court in 1985, when it wrote that an item was not obscene if it provoked only normal healthy sexual desires. To be obscene, material must predominantly appeal to a shameful or morbid interest in nudity, sex or excretions. (*Brockett v. Spokane Arcades*, 472 U.S. 491, 498 (1985)).

In practice, prosecuting obscenity cases is very tough. As Kathleen Sullivan (now dean of Stanford Law School) has said, "The first two parts of the Miller test are incoherent: to put it crudely, they require the audience to be turned on and grossed out at the same time."<sup>5</sup>

The adult industry has a growing number of web pages that offer legal information regarding Internet distribution: "If you can prove that the content on your adult website has some literary, artistic, political, or scientific value, the criminal charges against you might be dismissed.... In light of this, you might want to consider displaying or linking to content that has something other than masturbatory value such as information about health care issues in the adult entertainment industry, safe sex information, a discussion of fetishes, or political links to other websites." <http://www.adultweblaw.com/laws/obscene.htm> (visited August 22, 2003.)

Websites that have sexually oriented content generally have a warning that asks the user to verify not only that they are over 18, and also that they are following the laws of their state. Since the federal definition refers to state law, a site may be legally permissible in California and illegal in another state such as Tennessee.<sup>6</sup>

Attorney General John Ashcroft plans to increase federal obscenity prosecutions, which have been practically nonexistent in over a decade. Concerned Women for America has tracked federal obscenity prosecutions from 2001 to June 2003. According to its Chief Counsel Jan LaRue, the few cases the group has found involve "only the most deviant, extreme fetish-type material including excretory and rape porn. As long as obscenity enforcement bar remains this

high, it will have no impact on the scores of major companies offering 'mainstream' hard core porn."<sup>2</sup>

On August 27, 2003, the stepped-up efforts to prosecute obscenity by the Department of Justice was signaled by the arraignment of Rob Zicari and Janet Romano of Extreme Associates. Zicari and Romano face a 10-count indictment alleging violations of federal obscenity laws, based on films that feature graphic scenes of women being spat upon, raped and murdered.

### **"Harmful to Minors"**

"Harmful to Minors" laws in the past have been state based. The Children's Online Protection Act would have created a federal "Harmful to Minors law," but it has been enjoined [that means the law is not in effect] by the courts. (ACLU v. Ashcroft, 322 F.3d 240, 2003 U.S. App. LEXIS 4152 (3d Cir. Pa. 2003)). The Justice Department is appealing this decision to the Supreme Court.

CIPA is the first law in effect with a federal definition of "Harmful to Minors." It defines "material that is harmful to minors" as:

HARMFUL TO MINORS -- The term "harmful to minors" means any picture, image, graphic image file, or other visual depiction that --

(A) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

(B) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

(3) SEXUAL ACT; SEXUAL CONTACT. --The terms "sexual act" and "sexual contact" have the meanings given such terms in section 2246 of title 18, United States Code.

[Note: 18 U.S.C. § 2246 (2003)

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person]