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COPA Appellate Argument Drill – Class Exercise

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Bryce Pilz

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COPA Appellate Argument Drill

As you have read, the Child Online Protection Act of 1998 (“COPA”) criminalizes material “harmful to minors” that is transmitted over the World Wide Web for commercial purposes. Whether material is “harmful to minors” is determined under general “community standards.” Offenders can be protected from liability if they require people accessing adult content on their website to enter data or credit card verification information.

In 2004, the Supreme Court upheld the preliminary injunction against COPA. The Court also remanded the case to the District Court for a full trial on the issue of whether COPA should be permanently struck down because it violated the First Amendment. In March 2007, the District Court held a trial and made numerous factual findings concerning the alternative of filtering technology. The District Court ruled that COPA violated the First Amendment in part because filtering technology was a more effective and less restrictive alternative to COPA’s criminal provisions.

Now, right here in this class room, the Appellate Court will address the Government’s appeal of the District Court’s ruling. Specifically, the Government is appealing the District Court’s finding that filtering is more effective and less restrictive than COPA. The ACLU obviously supports the District Court’s finding.

To make matters even more exciting, the American Library Association has also filed a motion with the Appellate Court challenging the notion that filtering should be an acceptable practice. Recall from your reading this week that in 2003, the Supreme Court upheld the Children’s Internet Protection Act (“CIPA”), which required libraries and schools that receive federal funding for Internet Access to use filtering technology in order to continue to receive federal funding. The Supreme Court held that CIPA was a permissible regulation of expression.

The hearing will involve six individuals:

- A three-judge panel will hear the arguments in this case (by way of directing questions to the attorneys). Because the Appellate Court has heard earlier arguments concerning COPA, and its predecessor the CDA, each of the judges may come to the hearing with some pre-conceived beliefs.
- A lawyer for the Department of Justice will argue for the Government in support of COPA, and specifically challenge the notion that filtering is more effective and less restrictive than COPA.
- An ACLU lawyer will argue against COPA, specifically arguing that filtering is more effective and less restrictive than COPA.
- An ALA lawyer will argue against filtering as an accepted practice, contending that there are alternatives to filtering that are more effective and less restrictive.

You will be assigned to a group to prepare one of the six roles for the hearing. Your group will select one member to take part in the hearing. You will be granted one very short “time out” to consult with your group once the hearing begins. Your group will have roughly 20 minutes to prepare. After a short period of time, I will visit each group to answer any questions.

Good luck and have fun!

District Court's Factual Findings

Effectiveness of COPA:

- COPA only pertains to U.S. websites. Studies show that 56% of websites with material harmful to minors are hosted outside U.S.
- Research shows that a significant number of websites providing obscene content would move outside the U.S. if COPA took effect.
- Studies indicate that using data or credit cards to limit minor access to particular websites is currently ineffective due to minors being able to obtain such data or credit cards from adults.

Restrictiveness of COPA:

- There are documented examples of non-harmful material that would fall under the criminal provisions of COPA.
- A substantial number of adults will not enter their credit card information online out of fear of having the number stolen.
- A substantial number of adults will not enter personal information online out of fear of either losing anonymity or having the information mis-used.
- At least some adults will not enter verification information simply because of the time it takes.
- Community standard" concerning material for minors differ significantly across the U.S.

Effectiveness of Filtering:

- 54% of parents use filtering technology now.
- Today, on average, filters are capable of blocking 95% of sexually explicit material, when used.
- Filtering is becoming more prevalent: there has been a 65% increase in the use of filtering from a prior study done four years ago.
- Studies have shown the reason why many parents opt not to use filtering is that they don't need it because they actively monitor their children's access to the Internet.
- Filters can be installed via CD or Internet download. They can also be provided by ISP's or can be run on a server at a business, library, or school environment.
- Most ISP's offer filtering products, which can be simply activated through the ISP site. Many ISP's offer filters for free (for example, AOL). Even non-AOL subscribers can use AOL's filter for free.

- Non-ISP filtering products vary in cost, ranging from approximately \$20-60 (with most offering money back guarantees or free trial periods).
- An AOL study found that 85% of parents are highly satisfied with their AOL Parental Controls products.
- Dynamic filters are becoming more proficient. Dynamic filters use artificial intelligence to monitor information when it is requested (as compared to simply having a “black list” of sites to be blocked).
- Studies show that it is generally difficult for children to bypass the filters (password protected and other technical protections).
- San Francisco has a city ordinance banning the filtering of Internet content on adult and teen public access computers.
- Filtering technology filters material hosted anywhere in the world.

Restrictiveness of Filtering:

- With today’s technology, there are instances where filters block an entire site or page even though only a portion of that site or page is offensive.
- More affluent communities are likely to have residents that have other options for accessing the Internet besides the library or school. Conversely, poorer communities have residents that rely on the local library or school for Internet access.
- A study looking at 3 leading filtering products only found over-blocking in 4-11% of the cases, depending on the product and the level of filter protection applied.
- Installing and setting up a filtering product will typically take the typical computer user no more than 10-15 minutes.
- A study of schools suggests that most school administrators feel that the inexact science of filtering is a reasonable trade-off for greater peace of mind.
- Filters can be easily turned off by parents in order to allow an adult to have free access to all of the Web.
- While filtering has become more accurate, there are still documented instances of over-blocking with all current technologies.
- Studies suggest instances of selective-blocking occur (e.g., blocking of sites related to a particular political belief).
- There is no requirement that filtering companies disclose their methodologies, political biases, or even the lists of sites blocked.
- Since CIPA was enacted, many libraries have elected to forego federal funds for library access.

Other Alternatives to Filtering:

- Libraries can also regulate Web access through Acceptable Use policies, Internet use logs, and supervision by library staff.
- Small-scale studies indicate success in limiting the negative impact of minors accessing harmful conduct through any of Internet outreach education, acceptable use policies, Internet use logs, and supervision. The success is compounded when these programs are used in conjunction with one another. There is difficulty in gathering data through larger studies because the effects of programs like Internet outreach take place far after the education takes place. There are also limited quantitative ways to determine whether harmful material is still being accessed by the minors.

Government

In general, you want to demonstrate that COPA is just as effective and no more restrictive than filtering technology. You should point to all factual findings of the District Court suggesting faults with filtering. Although you should work as a group to formulate your own arguments, you might want to consider the following thoughts:

- The Government can use a belt and suspenders approach and use both COPA and promote filtering. It doesn't have to be one or the other. (Or does it?)
- Even assuming filtering technology works perfectly to restrict minors access to harmful material, what else needs to happen? (Government promotion of filters; filtering technology needs to be affordable; parents need to be trained; technology needs to be upgraded and maintained).
- Would promoting the effective use of data or credit card verification systems depend on the same initiatives? If so, how can filtering be more effective?
- A large percentage of homes don't use filters now.
- Despite nearly a decade to improve, filtering technology still filters permissible material.
- Internet is being made available in more and more locations that can't be controlled – phones, terminals in public places, etc. Even parents that want to use filters cannot install filters on all locations by which their children may access the Internet.
- Filters necessarily reflect the views of the designer, which may or may not align with those of the local community. A community standards approach that criminalizes conduct that deviates from that standard is more effective, and less restrictive.
- The government's enforcement against sites "harmful to minors" (as judged by a community standards test) will not discriminate based on political or ideological beliefs. Anyone charged with a crime will have access to a jury trial where the jury can decide whether "community standards" were violated. Filtering has a disparate impact on poorer citizens and can be unfairly administered.

ACLU

In general, you want to rely on the factual findings from the District Court suggesting that filtering is more effective and less restrictive than the COPA provisions. You don't need filtering to be perfect, you just need to show that it is better and less invasive than what COPA would require (criminal penalties against U.S.-hosted sites unless those sites use data or credit card verification). Although you should work as a group to formulate your own arguments, you might want to consider the following thoughts:

- Compare the 95% effectiveness of filtering to the (at most) 56% effectiveness of COPA (only pertains to U.S.-hosted sites). Note that more harmful sites will move off-shore once COPA would take effect.
- Point to facts showing the steady and substantial improvement in filtering (less over or under-blocking). Filtering is also becoming easier and cheaper to install.
- Point to the steady increase in the use of filtering in homes.
- The fact that some people choose not to use filtering is exactly why it is less restrictive than COPA. It puts the choice in the hands of the people, rather than the government.
- Point out the fact that filtering in public locations has been expressly sanctioned by the Supreme Court – the Supreme Court has ruled that requiring filtering technology in federally-funded locations like some public libraries is constitutional.
- Point to the facts showing that filters can be easily obtained and installed.
- Suggest whether or not the “community standards” approach to deciding which material is “harmful to minors” may not work in the context of the Internet.

ALA

In general, while you do not support COPA, you do not want filtering to become an accepted practice. You would like the Court to find that there are other alternatives that are more effective and less restrictive than both filtering and COPA. These alternatives include data or credit card authorization (without the associated criminal penalties of COPA), Authorized Use terms, supervision, and Internet use logs.

- You might want to focus on one or two of the above alternatives and try to explain why that could be just as effective as filtering, and far less invasive.
- Point out that filtering laws have a disproportionate impact the schools most reliant on federal funding, and therefore stuck with complying with filtering-requirement laws like CIPA, are in the poorest areas where local residents can only access the Internet at public schools or libraries.
- Point to the numerous documented instances of over-blocking.
- Allowing librarian's to disable a filtering device (as provided by CIPA) is not an effective solution. First, libraries are already understaffed and librarians may not have the time to address all disabling requests. Second, because a librarian will be busy, a person seeking to access a filtered site may not want to ask the librarian to disable the filter. Third, a person could be embarrassed from asking the librarian to disable the filter even if the material he or she seeks to access is innocent. Fourth, the popularity of the Internet is largely due to the ability to readily and easily access a wide range of information very quickly. You negatively change that environment when you require an Internet user to take extra steps to access a certain set of sites.
- Library filtering is more akin to purchasing an encyclopedia and cutting out pages you find objectionable than it is to electing not to acquire certain books. The laws would not allow this because the library already possesses the information, but is then depriving the public of access to the information.
- Point out that it is well known that many filtering companies represent certain ideological views. Worse yet, there's no requirement for filtering companies to disclose their methodologies, ideologies, or political biases... or even their lists of blocked sites.
- San Francisco has a city ordinance banning the filtering of Internet content on adult and teen public access computers. So, filtering laws force these libraries to miss out on federal funds.
- Many libraries have elected to forego federal funds for library access (choosing instead to allow their patrons to freely research topics like breast cancer, sexually transmitted diseases, and even Super Bowl XXX.)

Judge #1

(Anti-COPA, Pro-filter)

In general, you want to ask questions to elicit facts that support your position that filtering is more effective and less restrictive than the COPA provisions (criminal penalties for U.S.-hosted sites providing harmful material unless data or credit card verification is used). You also want to ask questions challenging the attorneys advocating positions contrary to your views. For example, you will want to:

- challenge the Government attorney's position that COPA is better than filtering;
- challenge the ALA attorney's attempts to attack filtering; and
- draw out of the ACLU attorney facts supporting the effectiveness of filtering.

While you should review the District Court's findings of fact to formulate your own strategy and questions, below are a couple of examples. You should also make sure you or your fellow judges allow attorneys to respond to points made by an opposing attorney.

Government Attorney:

COPA doesn't have any impact on foreign-hosted sites, correct? Aren't all of these sites with obscene material going to simply move off-shore. Couldn't we eventually end up with 100% of these sites outside the U.S., in which case COPA would be 0% effective?

Does the "community standards" test work in the context of the Internet? What is the "community?"

ACLU Attorney:

Is there data that compares the effectiveness of filtering technology versus the COPA provisions?

If I don't want my computer to be filtered, are there ways to disable the filtering technology if I'm a parent?

ALA Attorney:

Isn't the case that filtering of the Internet in a library is no different than a librarians' book selection, which we allow?

CIPA allows librarians to disable the filter upon request from an adult, so how can this be restrictive in any way? It seem pretty flexible to me.

Judge #2

(Anti-COPA, Anti-filter)

In general, you want to ask questions to elicit facts that support your position that there are alternatives to both COPA and filtering that are just as effective and less restrictive. You also want to ask questions challenging the attorneys advocating positions contrary to your views. For example, you will want to:

- challenge the Government attorney's position that COPA is better than filtering;
- draw from the ALA attorney facts supporting the short-comings of both COPA and filtering; and
- challenge the ACLU attorney's position that filtering is a sufficient alternative to COPA.

While you should review the District Court's findings of fact to formulate your own strategy and questions, below are a couple of examples. You should also make sure you or your fellow judges allow attorneys to respond to points made by an opposing attorney.

Government Attorney:

If you are relying on parents to keep data or credit cards from their kids so that their kids can't access harmful content on the Internet, why isn't it just as realistic to expect parents to keep their kids off of harmful Internet sites.

Aren't you substituting the Government's judgment for that of the parents, and is that what we're supposed to do in this country?

ACLU Attorney:

Does filtering impact all communities the same? If not, why isn't that a huge problem that prevents filtering from being a suitable alternative.

If we are supposed to find the least restrictive alternative, isn't it the case that adult supervision is the best way to prevent minors from abusing the Internet?

Can you tell me who are the people writing the filtering technology, and whether they can keep their personal beliefs from impacting the design of their technology?

ALA Attorney:

Even if the owner wanted to, could every computer be equipped with filtering technology?

Is it realistic to expect adults to approach a librarian and ask them to turn off the filtering technology at a library computer?

Doesn't this significantly alter the way people enjoy using the Internet?

Judge #3

(Pro-COPA)

In general, you want to ask questions to elicit facts that support the position that the COPA provisions (criminal penalties for U.S.-hosted sites providing harmful material unless data or credit card verification is used) are just as effective and no less restrictive than the other alternatives like filtering. You also want to ask questions challenging the attorneys advocating positions contrary to your views. For example, you will want to:

- draw from the Government attorney facts that show the relative strengths of COPA;
- draw from the ALA attorney facts showing the short-comings of filtering, but test the arguments proposing other alternatives besides COPA; and
- attack the ACLU attorneys arguments in favor of filtering.

While you should review the District Court's findings of fact to formulate your own strategy and questions, below are a couple of examples. You should also make sure you or your fellow judges allow attorneys to respond to points made by an opposing attorney.

Government Attorney:

What percentage of homes don't use filtering as of today?

Is there anything that stops people from using filtering even if COPA is enacted?

Aren't there problems with all of these alternatives to COPA? Is there any solution that is 100% sure to stop minors from access harmful content on the Internet yet not restrict access to permissible content?

Is requiring an adult to enter data or credit card verification information any more restrictive than requiring the adult to disable a filtering device?

COPA won't require libraries or schools to spend money on any extra technology, will it? And it won't require them to decide whether or not to accept federal funds.

ACLU Attorney:

In all of those homes where filtering is not being used today, it's not all by choice, right? In fact, there are probably many homes that have never even heard of filtering, right? In those homes, without COPA, what is the deterrent for harmful websites streaming into that home?

Rather than impose requirements on Internet users across the board, or libraries, why not put the requirements on the website operators in that areas – and isn't that what COPA does?

ALA Attorney:

If adult supervision worked, we wouldn't be here, right? Is it realistic to expect that with the problems in today's homes the Government should just sit on its hands and let an unsupervised child surf the Web with un-fettered access to harmful material?

Are there really any documented complaints from librarians about kids accessing harmful content in a library such that we should require libraries to purchase filtering technology?

Who should we trust more to monitor the scope of ideas and expression available to patrons in a library – the trained librarian, or the designer of filtering technology that we don't even know?