

THE CHILDREN'S INTERNET PROTECTION ACT AND OTHER INTERNET-RELATED ISSUES

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I. CHILDREN'S INTERNET PROTECTION ACT (ACIPA@), Public Law No. 106-554

A. Introduction

1. Amends the Communication Act of 1934, 47 U.S.C. "151 et seq.; the Elementary and Secondary Education Act of 1965, 20 U.S.C. "6801 et seq.; and the Museum and Library Services Act, 20 U.S.C. '9134(b).
2. CIPA requires schools and libraries that receive specified federal funding to certify that they have in place an Internet Safety Policy that includes monitoring the use of Internet access by children and implementation of technology that will filter out objectionable content.
3. CIPA was signed into law by President Clinton on December 21, 2000, and took effect on April 20, 2001.

B. Who Must Comply

Only those schools or libraries that receive discounted rates for telecommunications services under the E-Rate Program of the Communications Act of 1934, or receive funding through the Elementary and Secondary Education Act of 1965 or the Museum and Library Services Act in order to purchase computers used to access the Internet or to pay for direct costs associated with accessing the Internet, must comply with CIPA.

C. Internet Safety Policy

1. An Internet Safety Policy must include provisions or procedures to:
 - a. Prevent both minors and adults, via technology protection measures (i.e. filtering/site blocking software), from gaining Internet access to visual depictions that are obscene or child pornography;
 - b. Prevent minors, via technology protection measures (i.e. filtering/site blocking software), from gaining Internet access to visual depictions that are harmful to minors;
 - c. Address issues related to access by minors to inappropriate matter;
 - d. Monitor the on-line activities of minors;
 - e. Address issues related to the safety and security of minors using e-mail, chat rooms, and other electronic communication;
 - f. Hinder unauthorized access (i.e. hacking) and other unauthorized on-line activities by minors; and

- g. Prevent unauthorized disclosure, use, and dissemination of personal information regarding minors.
2. The Internet Safety Policy must apply to all school and library computers that have Internet access, even those that are not accessible to the public.
3. Prior to adopting an Internet Safety Policy, the school or library must provide reasonable public notice and hold at least one public hearing on the proposed policy.
4. Each Internet Safety Policy adopted must be made available to the FCC.

D. Definitions

1. "Minor" - an individual who is under age 17.
2. "Obscene" - the test/definition for obscenity is:
 - 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.
3. "Child Pornography"
 - a. The federal child pornography statute defines child pornography as any visual depiction of a minor under 18 years old engaging in sexually explicit conduct, which includes actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area.
 - b. The statute's definition includes not only actual depictions of sexually explicit conduct involving minors, but also images that appear to be minors engaging in sexually explicit conduct.
4. "Harmful to Minors" means any 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 genitals; and
 - c. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.
5. "Inappropriate for Minors"
 - a. Determination regarding inappropriate matter for minors shall be made by school board, local educational agency, library, or other authority responsible for making determination.
 - b. No agency or instrumentality of the United States may establish criteria for making the determination that material is inappropriate, review the determination of the local authority, or consider the criteria in

the administration of the discounts.

E. Technology Protection Measures

1. CIPA does not require use of specific filtering software. Rather, CIPA requires the school or library seek ing funds to certify that it is using blocking or filtering technology that blocks or filters Internet access to visual depictions of the type specified in CIPA.
2. E-rate discounts may not be used to fund technology protection measures.
3. Disabling Technology Protection Measures

CIPA provides that an administrator, supervisor, or other authorized person may disable filtering or blocking technology "to enable access for bona fide research or other lawful purposes."

4. If an Internet Safety Policy uses over-broad technology protection measures which block legitimate and constitutionally protected material, such policy can be vulnerable to a constitutional challenge.

F. Timeline

1. In order to be in compliance with CIPA for the funding year beginning July 1, 2001, schools and libraries must certify by October 28, 2001, that they have the required policies and technology measures in place, or that they are undertaking such actions, including any necessary procurement procedures, to put them in place for the following funding year.
2. Filtering technology must be in place and functioning by July 1, 2002.

G. Failure to Comply

1. Failure to comply with CIPA results in ineligibility for the funding program.
2. Where it is found that a funded school or library is not in compliance, the funding agency shall cease funding and give notice to the school or library indicating it should be brought into compliance.
3. With regard to E-rate only, where it is found that a funded school or library is not in compliance, the school or library may be liable to reimburse the FCC for the funds received for that funding year.

H. Constitutional Challenge to CIPA

1. On March 20, 2001, the ACLU, the ALA, and a collection of other plaintiffs filed suit in the Federal Eastern District Court of Pennsylvania challenging the constitutionality of CIPA.
2. CIPA calls for expedited legal review and that the suit be heard by a three-judge federal district court panel.
3. Any appeal of this decision shall be reviewable directly to the Supreme Court.

II. CHILDREN'S ONLINE PRIVACY PROTECTION ACT ("COPPA"), 15 U.S.C. "6501 - 6506"

A. Introduction

1. COPPA requires commercial website operators to get parental consent before collecting any personal information from children under 13.
2. COPPA was signed into law on October 21, 1998, and took effect on April 21, 2000.

B. Who Must Comply

1. Internet services providers who:
 - (a) operate a commercial web site or an online service directed to children under 13 that collects personal information from such children; or
 - (b) operate a general audience web site and have actual knowledge that they are collecting personal information from children under age 13.
2. To determine whether a web site is directed to children, the Federal Trade Commission (FTC) considers several factors, including:
 - a. Subject matter;
 - b. Visual or audio content;
 - c. Age of models on the site;
 - d. Language;
 - e. Whether advertising on the site is directed towards children;
 - f. Information regarding the age of the actual or intended audience; and
 - g. Whether the site uses animated characters or other child-oriented features.
3. An operator is deemed to have actual knowledge that it is collecting personal information from children under 13 if:
 - a. It uses forms that require the individual to input his or her age;
 - b. It learns the child's grade in school; or
 - c. It asks "age identifying" questions.
4. To determine whether an entity is an "operator" with respect to information collected at a site, the FTC will consider:
 - a. Who owns and controls the information;
 - b. Who pays for the maintenance and collection of the information;
 - c. What the pre-existing contractual relationships are in connection with the information; and
 - d. What role the web site plays in maintaining or collecting the information.
5. Not only does COPPA affect site operators who collect information, it also affects site operators who do not collect personal information but solely maintain such information. Thus, COPPA could affect web sites that already have personal information about children but do not do any further collection, or web sites that purchase databases of personal information that they know is about children.

C. Protected Information

1. Not all information that a web site may collect is deemed to fall under COPPA. The Act only refers to personal information, which is defined as individually identifiable information about an individual collected online, such as:
 - a. Full name;
 - b. Home address;
 - c. E-mail address;
 - d. Telephone number;
 - e. Social security number; and

f. Any identifier that permits physical or online contact of a specific individual.

2. COPPA also covers other information that is tied to individually identifiable information, such as:
 - a. Hobbies;
 - b. Interests; and
 - c. Information collected through cookies or other types of tracking mechanisms.
- D. COPPA Requirements
1. Privacy Notice
 - a. An operator must post a link to a notice of its information practices on the home page of its web site or online service and at each area where it collects personal information from children.
 - b. The link to the privacy notice must be clear and prominent.
 - i. Operators may want to use a larger font size or a different color type on a contrasting background to make it stand out.
 - ii. A link in small print at the bottom of the page, or a link that is indistinguishable from other links on the site, is not considered clear and prominent.
 - c. The notice must be clearly written and understandable, and should not include any unrelated or confusing materials. It must state the following information:
 - i. The name and contact information (i.e. address, telephone number, e-mail address) of all operators collecting or maintaining children's personal information through the web site or online service;
 - ii. The types of personal information collected from children (i.e. name, address, e-mail address, hobbies, etc.) and how the information is collected (i.e. directly from the child or passively through cookies);
 - iii. How the operator uses the personal information (i.e. marketing, notifying contest winners, allowing the child to make information publicly available through a chat room);
 - iv. Whether the operator discloses information collected from children to third parties. If so, the operator must disclose the kind of business in which the third party is engaged, the general purpose for which the information is used, and whether the third party has agreed to maintain the confidentiality and security of the information;
 - v. That the parent has the option to agree to the collection and use of the child's information without consenting to the disclosure of the information to third parties;
 - vi. That the operator may not require a child to disclose more information than is reasonably necessary to participate in an activity as a condition of participation; and
 - vii. That the parent can review the child's personal information, ask to have it deleted, and refuse to allow any further collection or use of the child's information.
 2. Direct Notice to Parents
 - a. An operator must also provide notice to parents containing the same information included in the privacy notice on the web site.
 - b. Such notice must be written clearly and understandably, and must not contain any unrelated or confusing

ing information.

- c. An operator may use any one of a number of methods to notify a parent, including sending an e-mail message to the parent or a notice by postal mail.
3. Parental Consent
 - a. Prior to the collection, use, or disclosure of a child's personal information, the operator must obtain verifiable consent from such child's parents.
 - b. The consent required is a truly informed consent, and thus requires the disclosure by the site operator of information such as the operator's interest in collecting the data, the personal information being collected, the planned use of the data, whether the site offers interactive activities such as chat rooms, and whether the site plans to distribute any of the information to third parties.
 - c. Until April 21, 2002, the acceptable means of obtaining parental consent depends on whether the information is to be used internally or externally.
 - i. For information that is to be used internally (i.e. for marketing purposes), operators may obtain parental consent via e-mail so long as additional steps are taken to ensure that the consent is coming from the parents (i.e. confirmatory e-mail or letter to the parent).
 - ii. If the site intends to pass the information to third parties, COPPA requires more reliable methods of consent, such as use of a credit card, digital signature, e-mail accompanied by a personal identifier, signed facsimile, or signed letter via regular mail.
 - iii. In October 2001, the FTC will seek public comment to determine whether technology has progressed and whether secure electronic methods for obtaining verifiable parental consent are widely available and affordable. In April 2002, if more reliable methods of consent do exist, the FTC has the option of requiring those methods for all consent requirements under COPPA.
 4. An operator is required to send a new notice and request for consent to parents if there are material changes in the collection, use, or disclosure practices to which the parent had previously agreed.
 5. COPPA also requires that parents have the opportunity to review all information about their child that has been collected, be able to refuse further collection of information, and be able to request that any collected information be deleted. In turn, the operator may terminate any service provided to the child, but only if the information at issue is reasonably necessary for the child's participation in that activity.

E. Exceptions to Parental Consent Requirement

1. Parental consent is not required when:
 - a. An operator collects a child's or parent's e-mail to provide notice and seek consent;
 - b. An operator collects an e-mail address to respond to a one-time request from a child and then deletes it;
 - c. An operator collects an e-mail address to respond more than once to a specific request, if the operator notifies the parent that it is communicating regularly with the child and gives the parent the opportunity to stop the communication before sending or delivering a second communication to the child; and

- d. An operator collects a child's name or online contact information to protect the safety of the child who is participating on the site, if the operator notifies the parent and gives the parent the opportunity to prevent further use of the information.

F. Safe Harbor Provision

1. COPPA provides a safe harbor provision that will allow industry groups or individuals to create self-regulatory programs.
2. Such programs must include independent monitoring and disciplinary procedures, and must be submitted to the FTC for approval.
3. The FTC will publish the program and seek public comment in considering whether to approve the program.
4. An operator's compliance with an FTC-approved self-regulatory program will generally serve as a safe harbor in any enforcement action for violations of COPPA.

G. COPPA's Effect on Educators

1. COPPA allows teachers to give the required consent on parents' behalf.
2. Although COPPA allows teachers to give students consent to release personal information, it does not require teachers to do so.
3. COPPA does not require teachers to get parents' permission to give consent on parents' behalf.
4. School districts should adopt policies regarding the authority of teachers to consent to a student's release of personal information.

H. Failure to Comply

1. A site operator who fails to comply with COPPA is subject to civil penalties and the possibility of injunctive relief to cure such abuses.
2. The FTC or state Attorney Generals may bring an action under COPPA.
3. COPPA states that a violation of its requirements will be treated as a violation of the rules defining an unfair or deceptive act or practice.

III. INTERNET SPEECH AND THE FIRST AMENDMENT RIGHTS OF PUBLIC SCHOOL STUDENTS

- A. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).
U.S. Supreme Court ruled that the Internet was a fully-protected method of communication more akin to print than to broadcast, and thus deserves the highest level of First Amendment protection.
- B. Supreme Court Precedent Involving Student Speech Outside of the Internet Context
 1. **Tinker v. Des Moines Independent Community School District**, 393 U.S. 503 (1969).
 - a. Facts

- i. A group of students planned to wear black armbands to school to protest the Vietnam War.
 - ii. School authorities learned of the planned action and adopted a rule banning the wearing of such arm bands.
 - iii. Plaintiff and four other students wore their armbands to school and the school acted quickly to suspend them.
- b. Results
- i. The Court established for the first time that a public school building was not off-limits to free speech rights by stating "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."
 - ii. The Court imposed a significant burden on the school to justify punishment of speech by demonstrating "that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."
 - iii. It was not constitutionally adequate for the school to rely on "undifferentiated fear or apprehension of disturbance." Instead the school needed evidence that such disruption had occurred or was highly likely to occur.

2. Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).

- a. Facts
- i. A high school student was disciplined for a speech he gave nominating a classmate who was a candidate for student government.
 - ii. The speech was delivered at an official high school assembly in front of 600 students who ranged in age from fourteen to eighteen, included deliberate sexual innuendo, and provoked a wide range of reactions from those in the audience.
 - iii. The day after the assembly, Fraser was notified that he had violated a school disciplinary rule that prohibited conduct which materially and substantially interferes with the educational process.
- b. Results
- i. The Court stressed the need to "prepare pupils for citizenship in the Republic. . . It must inculcate the habits and manners of civility."
 - ii. The Court further stated that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." One of the distinctions between adults and children stressed by the Court was the legitimacy of protecting minors from exposure to vulgar language.
 - iii. The Court concluded that "schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct."

3. Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

a. Facts

- i. An assistant school principal pulled two student articles from the school newspaper. One article dealt with teen pregnancy and the other addressed teens' reactions to divorce.

b. Results

- i. In upholding the school's censorship decision, the Court first considered the possibility that the newspaper might be a public forum, thereby limiting the school's ability to control the content of the paper.
- ii. According to the Court, "school facilities may be deemed to be public forums only if school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public . . . or by some segment of the public, such as student organizations."
- iii. Examining the school's policy toward its newspaper, the Court concluded that the newspaper had not been intended for indiscriminate use by its students and was, therefore, not a public forum. Instead, the school's intent was to create "a supervised learning experience for journalism students."
- iv. The Court allowed school officials much greater control over such school-sponsored speech "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."
- v. The Court stressed that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."

C. School Discipline of Students for Internet Use

1. O'Brien v. Westlake City Schools Board of Education, No. 1:98 CV 647 (E.D. Ohio 1998)

a. Facts

- i. Plaintiff created a website that contained several unflattering remarks about his band teacher, including "He is an overweight middle-aged man who doesn't like to get haircuts"; "He likes to involve himself in everything you do, demands that band be your number one priority, and favors people who kiss his ass"; "He often thinks that problems are caused by certain students and/or groups of students and no one else."
- ii. After school officials used school computers to access the material, an assistant school principal determined that Plaintiff violated a student conduct handbook rule which provided "a student shall not physically assault, threaten to assault, vandalize, damage, or attempt to damage the property of a school employee or his/her family or demonstrate physical, written or verbal disrespect/threat."
- iii. Plaintiff was suspended from school for ten days. As a result of the suspension, Plaintiff's grades were reduced.

b. Results

- i. Plaintiff filed a complaint, along with a motion for a temporary restraining order, arguing that school offi

cials did not have the authority to regulate students' non-threatening speech that was created off campus. "It would be different if Plaintiff hurled obscenities at his teacher face-to-face on school grounds in front of other teachers. But here, defendants are punishing Plaintiff because he criticized his teacher off campus and the teacher found out about it."

- ii. The judge granted the temporary restraining order, requiring school officials to "forthwith restore him as a student in good standing."
- iii. School officials settled with Plaintiff by agreeing to pay him \$30,000.00, expunging the suspension from his record, and writing a letter of apology.

2. Beussink v. Woodland R-IV School District, 30 F.Supp.2d 1175 (E.D. Mo. 1998).

a. Facts

- i. Plaintiff created a web page on his own computer at his home. The web page was highly critical of the school administration and included vulgar language in his opinions of teachers and the principal.
- ii. Plaintiff did not display the site to students at school. Rather, a friend of his found out about the site when she used his home computer. Plaintiff's friend became angry at him, and in order to retaliate against him, she accessed the site at school and showed it to the school's computer teacher. The computer teacher went to the principal and together they viewed the site on a computer in the school's computer lab.
- iii. After viewing the site, the principal immediately made the decision to suspend Plaintiff.

b. Results

- i. In considering whether Plaintiff was likely to succeed on the merits of his case, the court relied on the Supreme Court's decision in Tinker.
- ii. Using the Tinker standard of material and substantial interference, the court found that the principal had made the decision to discipline Plaintiff immediately after viewing his web site solely as a result of his offense at its content and not because there had been any material disruption resulting from the web site or because the principal had a reasonable basis for fearing such disruption.
- iii. According to the court, "disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under Tinker."
- iv. The court also appeared to classify the speech as fully protected speech despite its use of foul language, a category of speech courts have permitted schools to sanction. The court characterized Plaintiff's speech as "provocative and challenging" and, therefore, "most in need of the protections of the First Amendment."
- v. The judge noted that "The public interest is not only served by allowing Beussink's message to be free from censure, but also by giving the students at [Beussink's school] this opportunity to see the protections of the United States Constitution and the Bill of Rights at work."

3. Emmett v. Kent School District No. 415, 92 F.Supp.2d 1088 (W.D. Wash. 2000)

a. Facts

- i. Plaintiff posted a web page on the Internet from his home entitled the "Unofficial Kentlake High Home Page" and included a disclaimer that the site was not sponsored by the school and was for entertainment purposes only.
- ii. The web page contained mock obituaries of two of Plaintiff's friends, and a place for visitors to vote on who would die next. The obituaries became the topic of discussion at school among students, faculty, and administrators.
- iii. Although Plaintiff immediately removed his site from the Internet, the principal placed him on emergency expulsion for harassment, intimidation, disruption to the educational environment and copyright violations.

b. Results

- i. The court began its analysis with a discussion of the Tinker case. It distinguished Plaintiff's case from the school assembly speech at issue in Fraser and the school-sponsored speech at issue in Kuhlmeier. The court stated that Plaintiff's web site was not produced in connection with any class or school project. "Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school's supervision or control."
- ii. The judge even acknowledged that content on a student web page can indicate a student's "violent indications." However, the judge noted that the school officials failed to present any evidence that the mock obituaries and voting on the web site were intended to threaten anyone or manifest any violent tendencies whatsoever.
- iii. The school district later settled the dispute by agreeing to pay one dollar and attorneys fees, and remove the suspension from Plaintiff's record.

4. Beidler v. North Thurston School District No. 3, No. 99-2-00236-6 (Wash. Super. Ct. 2000)

a. Facts

- i. Plaintiff created a web page which parodied the assistant principal at his school. The site showed the assistant principal participating in Nazi book burning, drinking beer, and spray painting graffiti on a wall.
- ii. The principal placed Plaintiff on emergency expulsion. The principal stated that he found the website to be personally appalling, and mentioned that some teachers said they felt uncomfortable about having Plaintiff in their classes due to the content of his web site.

b. Results

- i. Plaintiff contended that his case was remarkably similar to Beussink, and argued that the school district has no authority to police students' off campus or Internet speech.
- ii. The court granted summary judgment to Plaintiff on his First Amendment claims, noting that the First Amendment rights of public school students remain constant even in the age of the Internet. "Today the First Amendment protects student speech to the same extent as in 1979 or 1969, when the U.S. Supreme Court decided Tinker."
- iii. The court reasoned that, even if school officials had authority to regulate Internet speech, Plaintiff's speech did not cause a substantial disruption under the Tinker standard.
- iv. The court also rejected the argument that Fraser empowered the school to regulate Plaintiff's vulgar

and offensive speech. "Fraser might provide support for disciplining Beidler if the defendants could show that the circumstances of his speech were in any way analogous to the circumstances in Fraser."

5. J.S. v. Bethlehem Area School District, 757 A.2d 412 (Pa. Commw. 2000)

a. Facts

- i. Plaintiff, an eighth-grade student, created a web site on his home computer that made numerous derogatory comments about his algebra teacher, the school principal, and others. The site contained such vulgar comments as "She's a bitch"; "Why Should She Die?"; "Take a look at the diagram and the reasons I gave, then give me \$20.00 to help pay for the hitman."
- ii. The principal and teacher considered some of the material on the site to be threats and called law enforcement officials. Plaintiff voluntarily removed the site one week after the principal learned of it.
- iii. Although Plaintiff went unpunished for the remainder of the school year, over the summer school officials commenced expulsion hearings and voted to permanently expel Plaintiff. Plaintiff appealed the school board's expulsion determination.

b. Results

- i. A three-judge panel ruled two to one in favor of the school board's expulsion.
- ii. The majority applied a Tinker analysis, citing cases establishing that schools can punish students for off campus expressive conduct. "It is evident that the courts have allowed school officials to discipline students for conduct occurring off of school premises where it is established that the conduct materially and substantially interferes with the educational process," the majority wrote.
- iii. The majority determined that Plaintiff's web site "materially disrupted the learning environment." It noted that students discussed the website while at school and at school-sponsored activities.
- iv. The majority also justified the school officials' actions because the teacher ridiculed on the web site considered the site a threat and was thus unable to finish the school year and took a medical leave of absence the following year.
- v. This case is currently being appealed to the state supreme court.