

Appendix C: A Summary Review of the Law Governing Regulation of Pornography

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I. General Principles

A. What is Pornography?

The term “pornography” is a generic, not a legal term. It relates to a broad range of sexual materials, some of which are protected by the First Amendment and some of which are not.

As noted by the Supreme Court in *Miller v. California*, 413 U.S. 15, 18 n.2 (1973):

“Pornography derives from the Greek (harlot, and graphos, writing). The word now means 1: a description of prostitutes or prostitution 2. A depiction (as in a writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement.” Webster’s Third New International Dictionary [Unabridged 1969].

The 1986 Attorney General’s Commission on Pornography defined pornography as “Material that is predominately sexually explicit and intended primarily for the purpose of sexual arousal.”

B. Content-Based Restrictions of Certain Forms of Pornography

There are certain content-based categories of expression B including certain types of pornography B that have no First Amendment protection. These categories include “obscenity” and “child pornography” *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992). *And see Roth v. U.S.*, 354 U.S. 476 (1957) (Obscene speech has no protection); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography not protected.)

1. Obscenity

Miller v. California, 413 U.S. at 23, established a three-pronged test for determining whether a “work” (i.e., material or performance) is obscene and, therefore, unprotected by the First Amendment. To be obscene, a court must determine:

- That the average person, applying contemporary community standards, would find that the work, taken as a

whole, appeals to the prurient interest;

- That the work depicts or describes in a patently offensive way, as measured by contemporary community standards, sexual conduct specifically defined by the applicable law;
- That a reasonable person would find that the work, taken as a whole, lacks serious literary, artistic, political and scientific value.

Examples of “hard-core sexual conduct” that an obscenity law could include for regulation under the second prong of the test are patently offensive representations or descriptions of:

- Ultimate sexual acts, normal or perverted, actual or simulated;
- Masturbation, excretory functions and lewd exhibition of the genitals; and
- Sadism and masochism.

Id.

2. Child Pornography

Like obscenity, child pornography has no First Amendment protection. In *New York v. Ferber*, 458 U.S. 747 (1982), the Court upheld the constitutionality of New York’s statute that defined child pornography, in relevant part, as material depicting children (less than sixteen years of age) engaged in “sexual conduct.” “Sexual conduct” was defined as “actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sad-masochistic abuse, or lewd exhibition of the genitals.” *Id.* at 747.

Note that child pornography need not be legally obscene, as that standard was enunciated in *Miller*, to be proscribed. *Id.* at 764. Also, while the mere possession of obscene material in the home may not be proscribed, *see Stanley v. Georgia*, 394 U.S. 597, (1969) the government may proscribe the possession per se of child pornography. *Osborne v. Ohio*, 495 U.S. 103 (1990).

C. Other Forms of Pornography Subject to Regulation

Sexually oriented expression that does not amount to obscenity or child pornography generally is entitled to some degree of constitutional protection, although such protection may be diminished or evaporate entirely in a particular context.

1. Harmful to Minors

In *Ginsberg v. New York*, 390 U.S. 629 (1968) the Court held that material deemed “harmful to minors” is not entitled to First Amendment protection when distributed to minors. *Id.* at 642-643. The term “harmful to minors” is an adjustment of the definition of obscenity focusing on its impact to minors. *Id.* at 638.

Note, however, that under *Butler v. Michigan*, 352 U.S. 380 (1957), the government may not restrict adult access to material that is deemed unsuitable for children, and, generally, governmental efforts to limit adult access in order to protect minors have proven to be constitutionally problematic. See *Reno v. ACLU*, 521 U.S. 844 (1997) (invalidating federal Communications Decency Act of 1996 prohibiting transmission of “indecent” expression on the (Internet); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (1999) (invalidating Federal Telecommunications Act of 1996 requiring cable companies to fully scramble sexually-oriented programming).

2. Indecency

In *FCC v. Pacific Foundation*, 438 U.S. 726 (1978) the Court upheld the constitutionality of the FCC’s power to restrict “indecent broadcasting.” The case involved a scatological (the infamous “seven dirty words”) radio monologue by comedian George Carlin broadcast at 2 o’clock in the afternoon. The Court approved of the FCC’s definition of “indecent” as “language that describes, in terms patently offensive for exposure to children as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.” *Id.* at 731-732. The Court did not, however, support an absolute prohibition on “indecent” broadcasting since its holding was expressly conditioned on the fact that the Carlin broadcast occurred during the time of the day when children were likely to be in the audience. *Id.* at 749. Also, the Court has been careful in subsequent cases to narrowly limit the application of its holding in *Pacific*. See, e.g., *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) (holding that a ban under 47 U.S.C. § 223 on “indecent” interstate commercial telephone communications i.e., “dial-a-porn” violates the First Amendment).

3. Nude Dancing

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) the Court upheld as constitutional the use of a statute prohibiting public nudity. The law was used to ban nude dancing. In *City of Erie v. Pap’s A.M., TDA “Kandyland”*, 529 U.S. 277 (2000), the Court again upheld an ordinance banning persons from appearing in public in a “state of nudity” and used to ban female nude dancing. As the Court stated, “nude dancing . . . falls only within the outer ambit of the First Amendment’s protection.” *Id.* at 289.

4. Sexually Oriented Businesses (SOB’s)

SOB’s, also known as “adult businesses,” are subject to time, place, and manner regulations (as discussed below). See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theatre, Inc.*, 475 U.S. 41 (1986). While SOB’s are entitled to a degree of First Amendment protection the Court has upheld zoning restrictions against such property uses. *Id.* While the Court “will not tolerate the total suppression of erotic materials that arguably have some artistic value, it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate . . .” *Young*, 427 U.S. at 70. “[F]ew of us would march our sons and daughters off to war to preserve

the citizens right to see Specified Sexual Activities exhibited in the theaters of our choice.” *Id.*

II. Governmental Justifications for Pornography-Related Laws

A. Obscenity

1. In *Roth v. United States*, 354 U.S. 476 (1954)

In *Roth*, the Supreme Court answered for the first time the question “whether obscenity is utterance within the area of protected speech and press.” In holding that obscenity is “not within the area of constitutionality protected speech or press,” the *Roth* Court quoted from its earlier *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) decision:

“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . [S]uch utterances are of no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

2. Justice Harlan, concurring in *Roth*, 354 U.S. at 498, said:

“[E]ven assuming that pornography cannot be deemed ever to cause in an immediate sense, criminal . . . conduct, other interests within the proper cognizance of the state may be protected by the prohibition placed on such materials. The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards.”

3. *Paris Adult Theatre I. v. Slaton*, 413 U.S. 49, 56 (1973)

In *Paris*, the Supreme Court rejected the argument that government cannot regulate obscenity unless it has “scientific data” which “conclusively demonstrates” that “exposure to obscene material adversely affects men and women or their society.” The Court identified several valid governmental interests that justify a prohibition on obscenity:

a. “In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even if it is feasible to enforce effective safeguards against exposure to juveniles and to passersby . . . These include the interest of the public in the quality of life and total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.” *Id.* at 57-58.

b. “As Mr. Chief Justice Warren stated, there is a ‘right of the Nation and of the states to maintain a decent society.’” *Id.* at 59-60.

c. “Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature . . . could quite reasonably determine that such a connection does or might exist. In deciding *Roth*, this Court implicitly decided that a legislature could legitimately act on such a conclusion to protect the social interest in order and morality.” *Id.* at 60-61.

d. “The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.” *Id.* at 60.

D. Child Pornography

1. In *Ferber v. New York*, the Court stated:

“It is evident beyond the need for elaboration” that the government has a compelling interest in “safeguarding the physical and psychological well-being of a minor.” 458 U.S. at 756-57 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). Further, “[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.” *Id.* at 757 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)). “The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” *Id.* “The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children.” *Id.*

2. In *Osborne v. Ohio*, 495 U.S. at 111, the Court stated,

“that pedophiles use child pornography to seduce children into sexual activity.” “[E]ncouraging the destruction of these materials is . . . desirable because evidence suggests that pedophiles use child pornography to seduce children into sexual activity.” *Id.* “[A]ssuming for the sake of argument,” that there are any “First Amendment interest[s] in viewing and possessing child pornography . . . the interests underlying child pornography prohibitions far exceed the interest justifying” any claim to protected status. *Id.* at 108.

E. Sexually Oriented Businesses (SOB’s)

1. In *Young v. American Mini Theatres, Inc.*, 427 U.S. at 54-55 the Court stated:

[The city council found] that some uses of property are especially injurious to a neighborhood when they are concentrated in limited areas. The decision to add adult motion picture theaters and adult bookstores to the list of businesses which, apart from a special waiver could not be located within 1,000 feet to two other ‘regulated uses,’ was, in part, a

response to the significant growth in the number of such establishments. In the opinion of urban planners and real estate experts who supported the ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.

2. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 48, the Court stated:

“The ordinance by its terms is designed to prevent crime, protect the city’s retail trade, maintain property values, and generally ‘protect and preserve the quality of [the city’s] neighborhoods, commercial district, and the quality of urban life.’”

3. In connection with the AID’s epidemic The Attorney General’s Commission on Pornography Final Report, U.S. Department of Justice, 1986, pp. 1475-76, reported that:

“In addition to movie viewing, the booths also provide places for anonymous sexual relations . . . Sexual activity in the booths involves mostly males participating in sexual activities with one another. However, both heterosexual and homosexual men engage in these activities . . . The booth is sometimes equipped with a lock on the door. Many patrons intentionally leave the door unlocked. Some patrons look inside the booths in an attempt to find one already occupied. It is commonplace for a patron to enter an occupied booth, closed the door behind him, and make advances toward the occupant. He may grab the occupant’s genitals in an effort to invoke sexual activity or attempt to arrange a later sexual encounter. The sexual activities reported in peep show booths include masturbation, and anal intercourse, and fellatio. Inside the booths, the floors and walls are often wet and sticky with liquid or viscous substances, including semen, urine, feces, used prophylactics, gels, saliva or alcoholic beverages.”

F. Nude Dancing

In *Barnes*, 501 U.S. at 522, Justice Souter stated that nude dancing “encourages prostitution, increases sexual assaults and attracts criminal activity.”

III. Content-Neutral Restrictions: Regulation of SOB’s

A. Concept of “Content Neutrality” as it Relates to SOB Regulation

“Content based” statutes focus on, and generally proscribe, certain unlawful speech. For instance, they proscribe the distribution of obscene speech and the possession and dissemination of speech, which is child pornography. Such laws are based on objections to the “content” of the speech itself. It is unnecessary for the government to establish the harmful effects or consequences of such unlawful speech

Time, place, and manner regulation of SOB’s primarily is concerned with laws that are “content neutral.” Such laws focus on the negative secondary consequences or harmful effects, which

certain speech and speech related activities cause. These laws regulate the time, place, and manner of these activities in order to minimize or vitiate the harmful effects. They generally take the form of restrictive zoning regulations of so-called “adult” establishments, “peep show booth” laws, licensing and ownership requirements, and amortization of nonconforming “adult” uses. Typically, such laws attempt to address the problems associated with hard-core porn outlets and other related property uses.

See Time, Place, and Manner Regulation of Business Activity, B. Bull, A. Sears, Southwest Legal Press, Inc. (1990), Phoenix, Arizona.

1. Zoning Laws May Restrict the Location of SOB’s

“Adult” use zoning laws may prohibit the location of defined SOB’s near private residences, schools, playgrounds, or places of worship. Such businesses may also be prohibited from locating near other such regulated uses. These laws incidentally effect sexually explicit speech activities by restricting location. However, they pass constitutional muster because they are aimed at preventing urban blight, crime, and depression of property values (the secondary consequences of such establishments). The intent of these laws is not to proscribe pornography. Only the time, place, and manner of the activity are regulated. *See Young*, 427 U.S. at 57-61; *Renton*, 475 U.S. at 928-933.

B. *Young and Renton*

Two United States Supreme Court decisions are of paramount importance to time, place, and manner regulation: *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *City of Renton v. Playtime Theatre, Inc.*, 475 U.S. 41 (1986).

1. *Young*

In *Young*, the Supreme Court upheld the constitutionality of a Detroit zoning ordinance regulating the location of defined “adult” theatres by prohibiting them from locating within 1,000 feet of any two other regulated uses or within 500 feet of a residential area. A four-justice plurality found that the ordinance did not violate the First Amendment as an impermissible prior restraint, noting that a “city’s interest in attempting to preserve the quality of urban life is one that must be accorded high respect.” 427 U.S. at 71. In his oft-cited concurrence, Justice Powell focused on the interests of the city and the power to zone, noting the “zoning, when used to preserve the character of specific areas of a city, is perhaps ‘the most essential function performed by local government.’” 427 U.S. at 80 (Powell, J., concurring), quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974). Justice Powell analyzed the challenged ordinance under the four-part test of *United States v. O’Brien*, 391 U.S. 367 (1968), and found that the ordinance was clearly based on a substantial governmental interest and implicated “First Amendment concerns only incidentally and to a limited extent.” *Young*, 427 U.S. at 73.

2. Renton

In *Renton*, the Supreme Court again upheld the constitutionality of a city’s zoning ordinance against a First Amendment challenge. The challenged ordinance was designed to regulate “adult” uses by prohibiting them from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park or school. Because the ordinance did not prohibit “adult” theatres altogether, the Court analyzed the ordinance as a form of time, place and manner regulation. Content neutral “time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.” 475 U.S. at 47. The *Renton* ordinance, the Court stated, was aimed at the secondary effects of “adult” uses, and not at the content of the films shown, and was clearly based on a substantial interest in preventing crime, protecting retail trade and maintaining property values. The ordinance also was narrowly tailored to “affect only that category of theatres shown to produce the unwanted secondary effects.” *Id.* at 52. In response to the theater owner’s contention in *Renton* that the ordinance did not allow for reasonable alternative avenues of communication, the Court stated that “[i]n our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open an adult theater within the city.” *Id.* at 54. Because the ordinance left 520 acres or more than 5% of the entire land area of Renton available for ‘adult’ uses, the Court concluded that it fulfilled this requirement.” *Id.*

3. The O’Brien Test Applied to SOB Regulation

Regardless of a content neutral statute’s focus on the secondary effects of sexually oriented businesses, there is no doubt that its terms will have an incidental impact on expression that is protected by the First Amendment. *See, e.g., Young*, 427 U.S. at 61; *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981). Because of this impact, to pass constitutional muster, an ordinance must satisfy the four-part test of *United States v. O’Brien*, 391 U.S. 367 (1968). *See Renton*, 475 U.S. at 45; *Young*, 427 U.S. at 79 (Powell, J., concurring).

Under the *O’Brien* test, regulation is justified despite its impact on First Amendment interests “[1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *O’Brien*, 391 U.S. at 377. Incidental burdens on free expression may be analyzed under this test as time, place, and manner regulations. *Renton*, 475 U.S. at 45. The first three elements may be considered without reference to the specific requirements of a statute. A determination of whether a statute’s particular terms follow the least restrictive mean available must, however, be made independently by reviewing the particular features of a statute.

- a. Is the regulation within the power of the government?

The overwhelming majority of local governments today are vested with the police power which encompasses the power to enact a zoning and regulatory ordinance, therefore satisfying the first prong of *O'Brien*. See *Renton*, 475 U.S. at 44; *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (zoning may promote “family values [and] youth values”); *Berman v. Parker*, 348 U.S. 26, 33 (1954) (zoning may promote values that “are spiritual as well as physical, aesthetic as well as monetary”); *Stansberry v. Holmes*, 613 F. 2d 1285, 1288 (5th Cir. 1980), *cert. denied*, 449 U.S. 886 (“zoning provides one of the firmest and most basic of the rights of local control”).

b. Does the regulation further an important or substantial governmental interest?

The second prong of the *O'Brien* test requires that the ordinance “furthers an important or substantial governmental interest.” *O'Brien*, 391 U.S. at 377. Meeting this requirement is rarely a problem. The interests of local governments furthered by such ordinances include crime control, protection of property values, and prevention of urban blight. These concerns are both important and substantial. See *Young*, 427 U.S. at 79-80 (Powell, J., concurring), quoting *Village of Belle Terre v. Boraas*, 416 U.S. at 13.

c. Is the governmental interest unrelated to the suppression of free expression?

The third prong relates to the intent of the local legislative body. This examines whether “the governmental interest is unrelated to the suppression of free expression.” *O'Brien*, 391 U.S. at 377. This intent is generally garnered from reports or studies of the local planning commission, zoning administrator, or local council itself. It may also be found in the record and transcripts of local legislative hearings. It is essential that the intent of the legislative body in enacting the ordinance is not to ban so-called “adult” businesses. Rather the intent must focus on the secondary effects of such establishments, leaving alternative avenues open for expression of the genre, while lessening the effects such businesses have on the surrounding community.

d. Is the burden on speech no greater than is essential to the furtherance of the governmental interest?

The final prong of the *O'Brien* test requires a review of the specific regulations of a particular ordinance. It requires that the incidental restriction on First Amendment freedoms be no greater than is essential to further the governmental interest. *O'Brien*, 391 U.S. at 377. The courts will use this prong in determining whether an “adult” use zoning ordinance “unreasonably limit[s] alternative avenues of communication.” *Renton*, 475 U.S. at 47. Locational provisions of “adult” use zoning ordinances must be examined individually to determine compliance with this requirement.

4. *FW/PBS Inc. v. Dallas*: What is a “Prompt Judicial Review?”

After *Young* and *Renton*, the most important SOB decision is *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990). In *FW/PBS Inc.*, the city of Dallas adopted a comprehensive ordinance regulating

SOB's. The ordinance designated as an "adult motel" any motel offering a room for rent for a period less than 10 hours. The Court held this provision constitutional.

Most significantly, however, the Court struck down a provision of the ordinance permitting an indefinite delay of the issuance of a license, because it failed to guarantee "prompt judicial review" of a denial, suspension, or revocation of a license. In doing so the Court held that two safeguards as necessary in a licensing scheme (which were absent in the Dallas ordinance): (1) the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo must be maintained, and (2) there must be the possibility of "prompt judicial review in the event the license is erroneously denied. 493 U.S. at 228. Unfortunately, the Court was vague on what -- in its view-- constituted a "prompt judicial review."

In dismissing the recent the appeal in *City News and Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743 (2001) the Supreme Court avoided an opportunity to explain what it meant by "prompt judicial review" in *City News and Novelty, Inc.* After the Court granted certiorari in *FW/PBS*, the SOB closed its business and withdrew the license renewal application, thereby mooting the case.

The First, Second, Fifth, and Eleventh Circuits have held that mere prompt access to judicial review is enough to satisfy the *FW/PBS* standard. *MacDonald v. Safir*, 206 F.3d 183, 194 (2nd Cir. 2000); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 125601257 (11th Cir. 1999); *TK's Video Inc. v. Denton County, Tex.*, 24 F.3d 705, 709 (5th Cir. 1994). On the other hand, the Fourth, Sixth, and Ninth Circuits go further, requiring an actual prompt final judicial determination on the merits. *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-1102 (9th Cir. 1998); *11126 Baltimore Boulevard*, 58 F.3d 988, 999-1000 (4th Cir. 1995); *Chesapeake B & M, Inc. v. Harford County*, 58 F.3d 1005, 1012 (4th Cir. 1995). The Seventh Circuit dealt with the issue in *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), where it held that the state's common law writ of *certiorari* made available for review any ordinance suppressing protected speech and this is sufficient.

5. City of Los Angeles v. Alameda Books, Inc.: Secondary Effects Studies Revisited

On March 5, 2001, the Supreme Court granted *certiorari* in *City of Los Angeles v. Alameda Books, Inc.*, 121 S. Ct. 1223 (2001). As noted above, in *Renton* the Court stated that it was reasonable for a city to rely on harmful effects studies and experiences of other cities in regulating the location of its own SOB's. *Alameda Books* involves the adoption of a Los Angeles SOB ordinance that bans multiple SOB's from locating in a single building (a "multi-use" ban). The city relied on its own study that examined the effects of clustered (i.e., located in proximity to each other but not in the same building) SOB's, but did not study the effects of "multi-use" SOB's (i.e., multiple SOB's in the same building.) The issue before the Court is whether a city may ban "multi-use" SOB's based on a secondary effects rationale when it relies on a study that only examined the harmful effects caused by a clustering of several SOB's. This case will provide additional guidance on exactly what kind of secondary effects evidence is adequate to justify restrictions on "multi-use" SOB's. *See case below, Alameda Books v. City of Los Angeles*, 222 F.

3d 719 (9th Cir. 2000).

IV. Additional Developments

A. Library Porn Filters

The Children’s Internet Protection Act (“CIPA”), codified at Title 20 U.S.C. § 9134(f)(1)(B) and Title 47 U.S.C. § 254(h)(6)(C), limits the availability of federal funding used by public libraries to assist in obtaining and offering Internet access. Those limitations require funded libraries to screen out from public access Internet depictions of obscenity and child pornography for all users, and to screen out materials that are harmful to minors when minors are using such computers to access the Internet.

In two related suits, *American Library Association, Inc. v. United States* and *Multnomah County Public Library v. United States*, the American Library Association, several public libraries, several Library patrons, and producers of Web content challenged the constitutionality of the Children’s Internet Protection Act. The Act was held unconstitutional by the U.S. District Court for the Eastern District of Pennsylvania. The case is now making its way through the appeals process. *American Library Assoc. v. U.S.*, 201 F.Supp.2d 401 (E.D. Pa. May 31, 2002) *appeal filed*, 71 USLW 3177 (Sep 06, 2002)(NO. 02-361). Two provisions of the Act are the particular focus of the facial challenges presented in the suits.

Section 1712 of the Act limits funds available through the Library Services and Technology Act (“LSAT Act”). Only libraries that certify their compliance with the program of using “technology protection measures” to block access on the Internet to obscenity and child pornography and to block access for minors to materials that are deemed harmful to minors are eligible for LSAT Act funds. Section 1721 of the Act limits libraries’ access to “universal service” discounts (the so-called “e-rate”) to those libraries that certify their use of a “technology protection measure” to prevent access to any obscene materials or child pornography, and to prevent minors from accessing materials deemed harmful to minors.

B. Virtual Child Pornography

Virtual child pornography involves the creation of computer-generated images, often “morphed” from actual photographs, depicting children engaged in sexual conduct. These images are indistinguishable from actual photographs of real children. Because pedophiles use “virtual child pornography” to seduce children into sexual behavior, Congress enacted the Child Pornography Prevention Act of 1996 (CPPA), codified at 28 U.S.C. §§ 2251-2256. Although the First, Fourth, and Eleventh Circuits held CPPA constitutional, the Ninth Circuit struck it down in *Free Speech Coalition v. Reno*, 198 F. 3d 1083 (9th Cir. 1999). The Supreme Court granted review and in a 6-3 decision, it struck down on overbreadth grounds those portions of CPPA that prohibit material that “appears to be” or “conveys the impression” of a minor engaged in sexually explicit conduct. *Free Speech Coalition v. Ashcroft*, 122 S.Ct. 1389 (April 16, 2002)

C. Tortious Injury from Pornography on the Internet

The Communications Decency Act, (“CDA”), 47 U.S.C. § 230 grants immunity from tort liability to Internet Service Providers (“ISP’s”), in their capacity as “publisher or speaker” of any information - including any form of pornography - originating with a third party user of the service. Congress enacted the CDA to overturn the decision of the court in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995), which imposed liability on an ISP because it had unsuccessfully attempted to self-police the materials made available in its online services. Congress enacted the CDA to protect ISPs from imposition of liability resulting from good faith efforts to police pornography on their bulletin boards and chat rooms. The unintended consequence of the CDA was to remove any incentive for ISP’s to remove pornography from their services.

In *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001), *cert. denied* 121 S. Ct. 208, AOL knowingly allowed child pornography (videos of an eleven-year-old child) to be marketed on one of its chat rooms. The child victim’s family sued AOL for damages, and, as a result of the subsequent enactment of CDA, the case was dismissed. The Florida Court held that CDA’s immunity for ISP’s as “publishers” also extends to their role as “distributor.” Similarly *see*, *Zeran v. America Online, Inc.*, 129 F. 3d 327 (4th Cir. 1997). This is an issue likely to be revisited by other courts.