

Drawing the Line on Internet Pornography

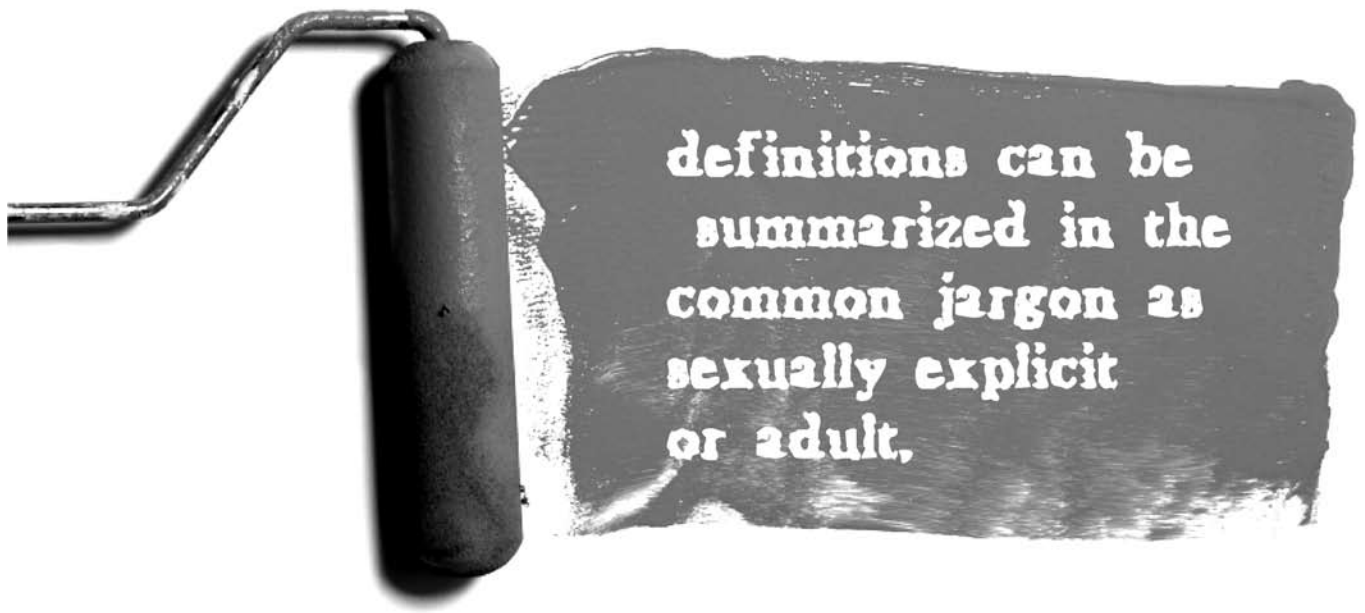
Much of the debate about regulating pornography has focused on how to draw the line between acceptable and unacceptable content. But, “definitions” is a diversionary argument.

In the first Supreme Court appeal of the Children’s Online Protection Act (COPA), the Court upheld the sole issue of the using a community standard in the definition of “harmful for minors.” See *Ashcroft v. ACLU*, 535 U.S. 564, 586 (2002). The COPA definition was taken from the Court’s prior rulings in *Griswald v. New York*, 390 U.S. 629 (1968), and *Miller v. California*, 413 U.S. 15 (1973). Besides the COPA definition, Congress has enacted, and the courts have upheld, the definition of “sexually explicit conduct” used in various federal statutes with minor variations (*see, e.g.*, 42 U.S.C. § 13031(c)(5), 18 U.S.C. § 2256(2)(A), 15 U.S.C. § 7704(9), 18 U.S.C. § 3509(a)(9)). Even the trade organization for the porn industry cites the § 13031(c)(5) definition of what images that it will not include in advertisements submitted for its newsletter (see <http://mediakit.xbiz.com/print.htm>”).

Of particular interest is the recent COPA case on remand from the Supreme Court to the Eastern District of Pennsylvania, in *ACLU v. Gonzales*, 478 F.Supp.2d 775 (2007). The court freely uses the term “sexually explicit,” as well as “adult” and sometimes “harmful to minors,” to describe the material covered by COPA’s definitions and the material Congress intended to protect minors from accessing. In the first paragraph, the court uses “sexually explicit materials” twice,¹ and he uses it in his “Conclusions.”² His Findings of Fact, Section E, is titled, “Sexually Explicit Materials Available on the Web.”³ In that section alone, he uses “sexually explicit” with “material,” “Web pages,” and “sites” dozens of times. He summarizes the experts’ reports filed in the

ICPA uses the definition of “Harmful for Minors” from COPA, and adds, in the first prong, “sexually explicit conduct,” from 42 U.S.C. § 13031(c)(5). This addition further clarifies the scope of the COPA definition (if this were even necessary) and picks up the term commonly used to describe such content. Thus, material that is Harmful for Minors under ICPA is any communication that the average adult, applying a contemporary community standard, would find, taking the Communication as a whole,

- i. is designed to appeal to, or is designed to pander to, the prurient interest, or describes or depicts Sexually Explicit Conduct;



case by describing their findings in terms of “sexually explicit” or “adult” material. Since these findings of fact were used by the court as evidence regarding the reach and applicability of COPA, this judge, as well as his allowed experts, must have believed that the COPA definitions are easily identifiable and thus can be the basis for precise numerical studies. Moreover, his repeated use of these terms in every context shows that the COPA definitions can be summarized in the common jargon as “sexually explicit” or “adult.” The argument that we cannot as a society define what we mean by pornography or “Harmful to Minors” is, as the *Gonzales* opinion shows, is no longer credible.

- ii. depicts, describes, or represents, in a manner patently offensive with respect to Minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
- iii. taken as a whole, lacks serious literary, artistic, political, or scientific value for Minors.

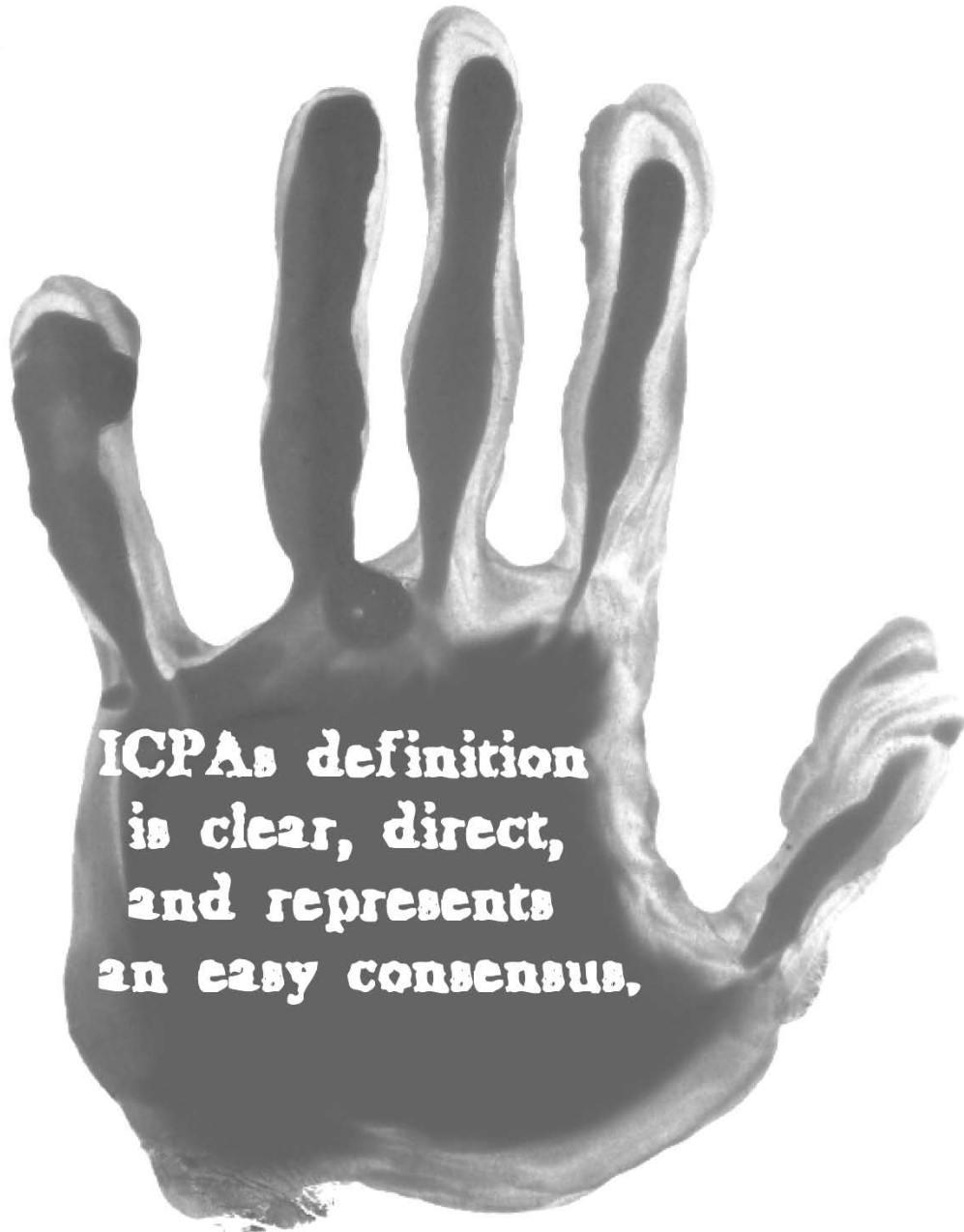
This definition incorporates the second and third prong of the Supreme Court’s *Miller* test. It varies by measuring the *Miller* test based not on the interests of adults but on the interests of minors (defined as those under age 17 and over age 14), as does the definitions used in *Ginsberg* and COPA. Further, the definition varies from *Miller* and COPA by including within its

1 413 U.S. at 777.
 2 *Id.* at 820.
 3 *Id.* at 788 et seq.

scope material that describes or depicts “Sexually Explicit Conduct.” This phrase is defined to incorporate the meaning given “Sexually Explicit Conduct” in 42 U.S.C. § 13031(c)(5). This definition is quite specific and provides clear notice of the kind of material that would violate the first prong of the test.

ICPA’s definition is clear, direct, and represents an easy consensus. If the definition were really the issue,

the statute could pick up the definition of “indecent” for television broadcasting, movie and TV ratings from the U.S. and other countries, or a variety of other definitions society has accepted and understood for decades. Even if we were limited to the Supreme Court’s definition of “Obscene,” there is plenty of that on the Internet and it is pouring into our homes. ICPA would be worth passing just to facilitate enforcement against obscenity.



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Where to Draw the Line?

There are several widely accepted “lines” that we use everyday to help us determine whether or not content is appropriate for our children or not:

	Movie Ratings	Television Ratings	Video Game Ratings	Music Rating	Pornography
<p>Widely accepted to be appropriate for minors.</p> <p>↑</p>	<p>G</p> <p>PG</p> <p>PG-13</p>	<p>TV Y</p> <p>TV Y7</p> <p>TV Y7 FV</p> <p>TV G</p> <p>TV PG</p> <p>TV 14</p>	<p>ESRB C</p> <p>ESRB E</p> <p>ESRB E10+</p> <p>ESRB T</p>		
<p>↓</p> <p>Widely accepted to be appropriate for adults only.</p>	<p>R</p> <p>NC-17</p>	<p>TV MA</p>	<p>ESRB M</p> <p>ESRB A</p>	<p>Parental Advisory Explicit Content</p>	<p>Nudity (Suggestive Themes)</p> <p>Softcore (Erotic Nudity)</p> <p>Hardcore (X-Rated or XXX)</p>
<p>Illegal content.</p>					<p>Obscenity</p>