

## ADDITIONAL DEVELOPMENTS—CYBERLAW

### *FIRTH V. STATE OF NEW YORK*

*98 N.Y.2d 365 (2002)*

The Court of Appeals of New York affirmed a summary judgment ruling holding that an unrelated modification to an unrelated portion of a website does not constitute a republication of an alleged defamatory article for the purposes of the statute of limitations.

Firth was employed by the Department of Environmental Conservation. In December 1996, the Office of the State Inspector General issued a report criticizing Firth's management style. On the same day, the State Education Department posted an executive summary of the report on its website, with links to the full text of the report. Although subsequent minor modifications were made to the website, no changes were made to the text of the executive summary or the report. Firth filed suit for defamation in March 1998, which was beyond the one-year statute of limitations for defamation running from the initial posting of the report on the Internet. Firth, however, claimed that each viewing of the website ("hit"), or each modification to the overall website, constituted a new publication that re-triggered the statute of limitations. The Court of Claims rejected this argument and granted summary judgment to the State. The Appellate Division affirmed.

The Court of Appeals of New York affirmed the lower courts' ruling. In rejecting Firth's argument that Internet publication should not be subject to the "single publication rule" applicable to mass media, the court stated that the same justifications for adopting the rule in mass media exist in Internet publications, namely, reducing the exposure of publishers to stale claims, multiplicity of suits and harassment actions. In responding to Firth's republication by modification argument, the court pointed out that the republication exception to the "single publication rule," where a republication re-triggers the statute of limitations, is that the subsequent publication is intended to and actually reaches a new audience. In the present case, the website was not modified to reach a new audience. The court reasoned that a rule applying the republication exception under these circumstances would discourage the placement of information on the Internet. Therefore, the court held that an unrelated modification of a website does not constitute a republication of the defamatory communication itself.

However, as the court noted, Firth did not raise the claim, and the court did not answer the question whether the State effectively republished the report by posting an additional link to it on a different website.

*FISCHER V. MT. OLIVE LUTHERAN CHURCH, INC.*

*207 F. Supp. 2d 914 (W.D. Wis. 2002)*

The United States District Court for the Western District of Wisconsin declined to grant summary judgment to an employer who intercepted and listened to an employee's allegedly homosexual telephone conversation and then retained a consultant who correctly guessed the employee's Hotmail password, which the employer used to access the employee's account without his authorization.

Mt. Olive Lutheran Church employed Fischer as a youth minister to provide counseling services to minors and adults. One day defendants Salzman and Janiszewski, two church employees, accidentally intercepted Fischer's telephone call and then listened at length to the allegedly homosexual phone conversation. Fischer's telephone call was made in a room in the church that defendant Connor, the pastor at the church, instructed Fischer to use when making personal calls or in any situation where he needed privacy. Defendants Salzman and Janiszewski were concerned about the effects of Fischer's improper behavior on the youth that he was supposed to counsel. Defendant Connor then hired a computer consultant who correctly guessed Fischer's Hotmail password so Mt. Olive could investigate Fischer's email correspondence. The church eventually terminated Fischer's employment. Fischer brought action alleging violation of the Electronic Communications Privacy Act (ECPA) and the Electronic Communications Storage Act (ECSA), among others. Defendants moved for summary judgment.

In examining Fischer's ECPA claim, the court determined that Fischer's alleged homosexual phone conversation might be personal in nature, and thus not part of his counseling duty. Therefore, it was outside the scope of the ECPA, making a grant of summary judgment improper. In coming to this conclusion, the court primarily relied on *Watkins v. Berry & Co.*, 704 F.2d 577 (11th Cir. 1983), where the presiding court held that if the intercepted call is a business call, then the employer's monitoring of it is in the ordinary course of business. With regard to personal calls however, such monitoring is probably not in the ordinary course of business. Defendant's' summary judgment motion on the ECPA claim was therefore denied.

The court then turned to Fischer's ECSA claim. The court found that Fischer's emails were still on the remote server when they were obtained by defendant Connor, which is distinguishable from situations like the one in *Fraser v. Nationwide Mutual Insurance Co.*, 35 F. Supp. 2d 623 (E.D. Pa. 2001) where a district court concluded that accessing emails after they had been downloaded to a local hard drive did not violate the ECSA. The court determined that Congress intended the ECSA to cover the exact situation in this case. In addition, it is disputed whether defendant Connor changed the password to Fischer's Hotmail account, denying him access to the account. Defendants' summary judgment motion on the ECSA claims was therefore also denied.

***ASHCROFT V. THE FREE SPEECH COALITION****535 U.S. 234 (2002)*

The Free Speech Coalition (“Coalition”), a California trade association for the adult entertainment industry, challenged the constitutionality of the Child Pornography Prevention Act of 1996 (“CPPA”). Resolving a circuit split, the Supreme Court affirmed a Ninth Circuit decision reversing the district court’s grant of summary judgment to the government.

Unlike earlier anti-child pornography statutes, the CPPA targeted any visual depiction “that is, or appears to be, of a minor engaging in sexually explicit conduct,” even if the production of the images required the use of no actual children. The language covered both computer generated images and images produced by more traditional means. The statute also prohibited sexually explicit material that was “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.”

Although Coalition members did not use children in their publications, their activities could be covered under the broad language of the CPPA. The Court held that the provision restricting images that “appear to depict” children engaging in sexual conduct improperly neglected the obscenity standard articulated in *Miller v. California*, 413 U.S. 15 (1973), and consequently risked banning lawful speech in addition to unlawful speech. In rejecting the government’s argument that the CPPA protects children from indirect harms, the Court stated that the government cannot ban speech fit for adults simply because it may fall into the hands of children. Additionally, the Court pointed out that the statute’s “conveys the impression” language requires little judgment of the content. Instead, the statute prohibits possession of materials described or pandered as child pornography by someone earlier in the distribution chain. In short, the court held that the CPPA was “substantially overbroad and in violation of the First Amendment.”

Underlying the district court decision was the concern that “computer-generated pictures are often indistinguishable from photographic images of actual children.” The concurring and dissenting opinions also considered the implications of the sophisticated technological generation of “virtual child pornography.” For example, Justice Thomas in his concurring opinion noted that “technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children.”

## *ASHCROFT V. AMERICAN CIVIL LIBERTIES UNION*

*535 U.S. 564 (2002)*

The Supreme Court held that the application of the “contemporary community standards” test, as set forth in *Miller v. California*, 413 U.S. 15 (1973), by itself did not render the Child Online Protection Act (“COPA”) unconstitutional.

Congress enacted COPA in response to the Court’s 1998 holding in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). The Court held in *Reno* that the Communications Decency Act of 1996 (“CDA”) in prohibiting transmission of obscene or indecent messages to minors unconstitutionally prevented adults from accessing a substantial amount of lawful speech over the Internet (including the World Wide Web, e-mail, and chat rooms). COPA narrowed the CDA’s prohibitions to include only knowing transmission via the Web for commercial purposes of material that is harmful to minors.

The American Civil Liberties Union, on behalf of respondents who operate commercial Web sites, challenged the constitutionality of COPA, alleging that it, like the CDA, restricted adult access to lawful speech. The district court held that COPA was likely to fail a close scrutiny on First Amendment grounds and enjoined enforcement of COPA. The Third Circuit affirmed, holding that COPA’s use of “community standards” to identify material that is harmful to minors on the Web rendered the statute overbroad. Addressing only the “community standards” issue, the Supreme Court vacated the Third Circuit’s opinion. However, the Court did not conduct a thorough analysis of the constitutionality of COPA and decided to allow the Third Circuit to first examine the issues.

The Court emphasized that COPA, following *Miller*, also uses the “serious value” and “prurient value” prong, in addition to the “community standards” prong. The Court concluded that these two additional requirements, which were absent in CDA, limited the reach of COPA as compared to CDA. Relying primarily on *Hamling v. United States*, 418 U.S. 87 (1974), and *Sabre Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989), the Court held that when the scope of an obscenity statute’s coverage is sufficiently narrowed by the *Miller* test, requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment. The Court refused to alter the standard because of the unique characteristics of the Internet, and required the publishers to use an appropriate medium to target their desired communities.

Justices O’Connor and Breyer delivered partially concurring opinions recommending the adoption of a national standard rather than local community standards for testing material’s harmfulness to children. Justice Stevens dissented, noting that one community’s prohibition would eliminate the offending material from the entire Internet.

***AMERICAN LIBRARY ASSOCIATION V. UNITED STATES****201 F. Supp. 2d 401 (E.D. Penn. 2002)*

A three-judge panel for the Eastern District of Pennsylvania held the Children's Internet Protection Act ("CIPA") unconstitutional.

Congress enacted CIPA in 2001 to control Internet access in public libraries to obscenity, child pornography, and other material harmful to children. CIPA conditioned libraries' receipt of federal funds for Internet-related services on certification by libraries applying for the funds that Internet software filters had been installed on all Internet access terminals within the library.

Library associations, libraries, and library patrons challenged the constitutionality of CIPA on the ground that the statute would unlawfully induce libraries to violate the First Amendment in order to receive the government subsidy. Internet filters, alleged the plaintiffs, were inherently unreliable tools for effectively filtering and blocking the kinds of inappropriate content specified by CIPA. Consequently, libraries who installed filters in compliance with the statutory condition would unavoidably block Web sites containing protected expression and would therefore violate the First Amendment.

Finding credible evidence that the leading commercial filters suffer from substantial underblocking and overblocking, the district court agreed with the plaintiffs. The court concluded that the statute's requirement that public libraries use anti-pornography filtering on their public access to the Internet is not narrowly tailored to address the library's legitimate interests to protect children. Overblocking in particular prevented public access to substantial amounts of constitutionally protected speech. In addition, the court found that less restrictive means, such as Internet use policies, exist to prevent patrons from accessing illegal speech.

The court produced an expansive opinion detailing the operation of the Internet and the World Wide Web, Internet search engines and filtering technology, library collection development policies, and government subsidies to public library Internet access. The Supreme Court noted probable jurisdiction in November 2002 and will hear the case in March 2003.

***ALS SCAN, INC. v. DIGITAL SERVICE CONSULTANTS, INC.***  
*293 F.3d 707 (4th Cir. 2002)*

The Fourth Circuit ruled on whether the defendant, a Georgia-based Internet Service Provider (ISP), subjected itself to personal jurisdiction in Maryland by enabling a website owner to publish photographs on the Internet, which allegedly infringed plaintiff Maryland corporation's copyrights.

ALS Scan (ALS), a Maryland corporation, brought an action for copyright infringement against Digital Service Consultants (Digital), a Georgia corporation, and Digital's customers, Robert Wilkins and Alternative Products. ALS creates and markets adult photographs of female models for distribution on the Internet. ALS claimed that Alternative Products appropriated hundreds of ALS' copyrighted photographs and placed them on its websites, using them to generate revenue through membership fees and advertising. ALS alleged that Digital enabled Alternative Products to publish ALS' photographs by providing Alternative Products the service needed to maintain its websites. Digital filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(2) for lack of personal jurisdiction, which the district court granted. The court found that it had neither specific nor general jurisdiction over Digital. ALS appealed.

The Fourth Circuit affirmed. The court found that granting a State unlimited judicial power over every citizen in each other State who uses the Internet would violate traditional due process and limit State sovereignty principles. Instead, the court stated, the inquiry turned on whether Digital had sufficient minimum contacts in Maryland to support specific or general jurisdiction. For specific jurisdiction, the court adapted the rule in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997): a State may, consistent with the due process clause, exercise judicial power over a person outside the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. Under this standard, a person who simply puts information on the Internet does not subject himself to jurisdiction in each State where people can retrieve it. Digital's activity was, at most, passive. It did not purposely direct communication to or transact business in Maryland and therefore did not subject itself to specific jurisdiction.

For general jurisdiction, the threshold of minimum contacts is significantly higher than that for specific jurisdiction. Since Digital did not engage in activity in Maryland, any contacts, although possibly numerous and repeated, occurred when people in Maryland accessed Digital's website. These contacts did not add up to the quality of contacts necessary for a State to have jurisdiction over a person for all purposes. The court concluded that something more than these facts is needed to establish general jurisdiction in Internet cases, but declined to decide what "something more" is because ALS had not shown any other activities or contacts in Maryland.