

***MAYER, BROWN, ROWE & MAW LLP'S***  
***SUPREME COURT DOCKET REPORT***  
**OCTOBER TERM, 2003 – NUMBER 2**

Today the Supreme Court granted certiorari in two cases of potential interest to the business community. Amicus briefs in support of the petitioners are due on Friday, November 28, 2003, and amicus briefs in support of the respondents are due on Friday, January 2, 2004. Any questions about these cases should be directed to Miriam Nemetz (202-263-3253) or Craig Canetti (202-263-3276) in our Washington office.

**1. *Child Online Protection Act — First Amendment.*** The Child Online Protection Act (“COPA” or “the Act”) establishes civil and criminal penalties for knowing use of the World Wide Web to make “any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors.” 47 U.S.C. § 231(a)(1). The Supreme Court granted certiorari in *Ashcroft v. ACLU*, No. 03-218, to determine whether COPA violates the First Amendment.

COPA was enacted after the Supreme Court held that the Communications Decency Act (“CDA”) — Congress’s prior effort to limit children’s access to sexually explicit material on the Web — violated the First Amendment. *Reno v. ACLU*, 521 U.S. 844 (1997). Responding to the Court’s concerns about the CDA’s breadth, Congress limited COPA’s scope in three ways. First, COPA applies only to materials posted on the Web, and does not apply to chat rooms, e-mail, or newsgroups. 47 U.S.C. § 231(a)(1). Second, COPA limits its scope to individuals or entities “engaged in the business of making such communications,” meaning that the person “devotes time, attention, or labor to such activities, as a regular course of such person’s trade or business, with the objective of earning a profit as a result of such activities.” *Id.* at § 231(e)(2). Third, material is considered “harmful to minors” under COPA only if (1) “the average person, applying *contemporary community standards*, would find, taking the material *as a whole* and *with respect to minors*, is designed to appeal to \* \* \* the prurient interest”; (2) it “depicts \* \* \*, in a manner patently offensive *with respect to minors*, an actual or simulated sexual act or sexual contact, \* \* \* or a lewd exhibition of the genitals or post pubescent female breast”; and (3) “taken *as a whole*, [it] lacks serious literary, artistic, political, or scientific value for *minors*.” *Id.* at § 231(e)(6) (emphases added).

Five weeks before the Act was to go into effect, the ACLU, along with individuals and entities that publish information on the World Wide Web (collectively “the ACLU”), filed a lawsuit challenging COPA’s constitutionality in the United States District Court for the Eastern District of Pennsylvania. The district court granted a preliminary injunction barring enforcement of the Act, ruling that COPA was unlikely to withstand the strict scrutiny analysis applicable to content-based regulations because (1) it was not narrowly tailored to serve the compelling

interest at stake, and (2) it did not provide the least restrictive means of advancing that interest. *ACLU v. Reno*, 31 F. Supp. 2d 473, 496-497 (1999).

The Third Circuit affirmed, but on different grounds. *ACLU v. Reno*, 217 F.3d 162 (2000). Given the absence of geographic restrictions on access to the Internet, the court of appeals concluded that COPA's reliance on "community standards" to identify harmful material would subject all publishers to the standards of the most puritanical communities, and thus would impose an "overreaching burden and restriction" on protected speech. *Id.* at 179-181.

The Supreme Court vacated the decision. *Ashcroft v. ACLU*, 535 U.S. 564 (2002). A majority of the Justices agreed that "COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." *Id.* at 585 (emphasis in original). However, no discussion of how to measure "community standards" for Internet content could garner five votes. Furthermore, the Court did not "express any view as to whether \* \* \* the statute is unconstitutionally vague, or whether the District Court correctly concluded that the statute likely will not survive strict scrutiny analysis once adjudication of the case is completed below." *Id.* at 585-586.

On remand, the Third Circuit again held the Act unconstitutional. *Ashcroft v. ACLU*, 322 F.3d 240 (2003). According to the court of appeals, the statute failed strict scrutiny because, in several respects, it was neither narrowly tailored to serve the state's interests nor represented the least restrictive means of advancing that interest. Among other things, the court observed that the statute does not limit the term "minor" in any way, thus forcing web publishers to consider the impact of their material on children ranging from infants to seventeen-year-old adolescents. *Id.* at 253-255. The court expressed concern that the Act, although requiring material to be judged "as a whole," nonetheless would allow isolated web pages or pictures to be evaluated outside their context. *Id.* at 252-253. The court also concluded that the term "commercial purposes" was insufficiently narrow because the Act would affect publishers who post any harmful material, "even if they do not make a profit from such material itself or do not post such material as the principal part of their business," as well as "persons who sell advertising space on their otherwise noncommercial Web sites." *Id.* at 256.

The court rejected the argument that the Act's inclusion of affirmative defenses, which shield publishers who restrict access by requiring use of a credit card, digital certificate of age, or comparable measure (*see* 47 U.S.C. § 231(c)(1)), served to tailor COPA narrowly, because it concluded that these measures would also limit adult access to restricted content. *Id.* at 258-260. Finally, the court held that COPA is not the least restrictive means of advancing the government's interest in protecting minors, given the availability of various blocking and filtering technologies. *Id.* at 265.

The court also held that the Act was "substantially overbroad in that it places significant burdens on Web publishers' communication of speech that is constitutionally protected as to adults and adults' ability to access such speech." *Id.* at 266. The court's continued belief that all

Web publishers would be subject to the standards of the most conservative communities contributed to its finding of overbreadth. *Id.* at 270.

This case is of immediate significance to all businesses that make available on the Internet content that might be considered “harmful to minors” under COPA — including, for example, health networks, poetry and visual arts sites, and online magazines. The Supreme Court’s decision also may establish precedent significant in future cases to all types of publishers and broadcasters.

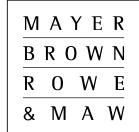
**2. Subject Matter Jurisdiction — Diversity of Citizenship — Exceptions to “Time-of-Filing” Rule.** Article III, section 2 of the U.S. Constitution extends the judicial power of the federal courts to suits in which there is complete diversity of citizenship among the parties to the action, *i.e.*, suits between citizens of different states, or between a state (or a citizen thereof) and a foreign state (or a citizen thereof). Ordinarily, complete diversity must exist at the time the suit is filed in order to establish federal jurisdiction. The Supreme Court granted certiorari in *Atlas Global Group, L.P. v. Grupo Dataflux*, No. 02-1689, to decide whether a suit that has proceeded to a jury verdict must be dismissed when there existed no diversity of citizenship at the time suit was filed, but a unilateral business transaction by the plaintiff created diversity before trial began.

Atlas Global Group, L.P. (“Atlas Global”) sued Grupo Dataflux (“Dataflux”) in federal district court asserting claims for breach of contract and quantum meruit. Jurisdiction was predicated solely, and erroneously, upon the parties’ alleged diversity of citizenship. At the time the complaint was filed, Atlas Global’s partnership consisted of five members, two of which were citizens of Mexico. Because the Supreme Court has held that a partnership is a citizen of each jurisdiction in which its individual partners are citizens, Atlas Global therefore was a citizen of Mexico when it filed its complaint, as was the defendant, Dataflux. Despite the absence of diversity, the case proceeded in the district court for three years. Then, shortly before trial, Atlas Global completed a business transaction that removed its two Mexican partners, thereby creating complete diversity between the parties.

Trial was held on the breach of contract claim, and the jury returned a verdict in favor of Atlas Global. Before the court entered judgment on the verdict, Dataflux moved for the first time to dismiss the case on the ground that diversity jurisdiction did not exist when the complaint was filed. The district court granted the motion and denied Atlas Global’s motion to alter or amend the judgment.

A divided panel of the Fifth Circuit reversed, holding that an action need not be dismissed for lack of diversity when, “before the verdict is rendered, or a ruling is issued, the jurisdictional defect is cured.” 312 F.3d 168, 174 (2002). In so holding, the court created a third exception to the “time-of-filing” rule for diversity jurisdiction. Previously, in *Newman-Green, Inc. v. Alfonso-Larrain*, 490 U.S. 826 (1989), the Supreme Court held that a federal court may, under Federal Rule of Civil Procedure 21, dismiss a dispensable non-diverse party from a case in order to perfect diversity jurisdiction. And in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), the Supreme Court held that it was not necessary to vacate the judgment of a district court that had

## *Supreme Court Docket Report*



failed to remand a case that was improperly removed on diversity grounds when complete diversity was established before the trial commenced. The Fifth Circuit held that its exception serves the very same principles on which the Supreme Court had grounded the prior exceptions to the “time-of-filing” rule — namely, promotion of judicial economy and of finality.

The Fifth Circuit’s decision creates a split among the federal courts of appeals. While the Fifth Circuit interprets *Newman-Green* and *Caterpillar* broadly to allow for additional exceptions to the time-of-filing rule where considerations of judicial economy and finality are promoted thereby, the District of Columbia Circuit has held that those considerations “are insufficient [outside of the removal context] to warrant a departure \* \* \* from the bright-line rule that citizenship and domicile must be determined as of the time a complaint is filed.” See *Saadeh v. Farouki*, 107 F.3d 52, 57 (D.C. Cir. 1997).

Because the Fifth Circuit’s exception permits a plaintiff unilaterally to rectify defects in diversity jurisdiction, this case is important to all businesses that litigate in federal court.

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On October 6, 2003, the Supreme Court requested the views of the Solicitor General in the following case of interest to the business community:

*3M Co. v. LePage’s, Inc.*, No. 01-1865: The question presented is whether the court of appeals correctly rejected the legal theory that no conduct by a monopolist that sells its product above cost – no matter how exclusionary the conduct – can constitute monopolization in violation of Section 2 of the Sherman Act. Mayer, Brown, Rowe & Maw LLP represents the respondent.

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