The Supreme Court Protects Free Speech On The Internet By Finding Provisions Of The Communications Decency Act Unconstitutional

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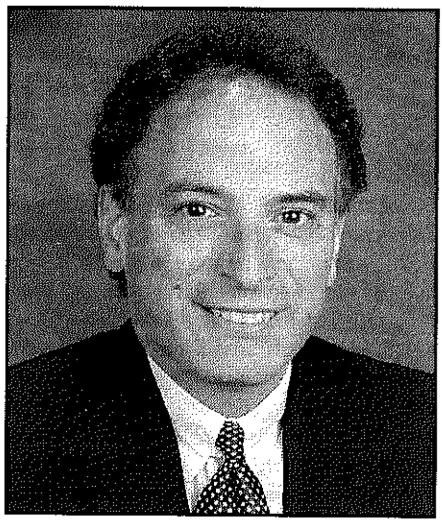

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On June 26, 1997, the U.S. Supreme Court affirmed the judgment of a three-judge district court that provisions of the Communications Decency Act of 1996 ("CDA"), making it a crime to send or display "indecent" or "patently offensive" material to minors over the Internet, abridged freedom of speech protected by the First Amendment and thus were unconstitutional. *Reno* v. *American Civil Liberties Union, et al.*, 117 S.Ct. 2329, 1997 WL 348012. The decision marked the Supreme Court's first effort to apply First Amendment jurisprudence to "a unique medium—known to its users as 'cyberspace'—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet." 117 S.Ct. at 2334-35.

Sixteen months earlier, on February 8, 1996, the very day that the CDA became the law as Title V of the Telecommunications Act of 1996,[1] the ACLU and various organizations and individuals associated with the computer and communications industries filed an action in the U.S. District Court for the Eastern District of Pennsylvania to enjoin two provisions of the CDA on First Amendment free speech and Fifth Amendment due process grounds. The "Indecency provision" (codified at 47 U.S.C. 223(a)(1)(B) and (a)(2)) subjects to criminal penalties anyone who uses a "telecommunications device," such as a modem, to make and transmit "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient...is under 18 years of age..." The "Patently Offensive provision" (codified at 47 U.S.C. §223(d)(1) and (d)(2)) subjects to the same criminal penalties anyone who uses "an interactive computer service," such as an online service that provides access to the Internet, "to send to a specific person or persons under 18 years of age," or "to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs..."

Shortly thereafter, the American Library Association and others filed a similar action in the Eastern District of Pennsylvania. Pursuant to §561 of the CDA,[2] Judge Dolores K. Sloviter, Chief Judge of the Third Circuit, convened a three-judge district court to hear both cases. The actions were then consolidated, the parties were afforded expedited discovery, and the court conducted evidentiary hearings over several days.[3]

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As part of its argument that the CDA passes constitutional muster, the Government relied upon the CDA's "safe harbor" defenses codified at 47 U.S.C. §§223(e)(1), (e)(5)(A) and (e)(5)(B), which provide that "[n]o person shall be held to have violated [the Indecency and Patently Offensive provisions] solely for providing access or connection to or from a facility, system or network," and that "[i]t is a defense to a prosecution" that a person has taken "reasonable, effective, and appropriate actions...to restrict or prevent access by minors...including any method which is feasible under available technology; or...has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."

In a lengthy opinion issued on June 11, 1996, the district court concluded that the plaintiffs were entitled to a preliminary injunction by demonstrating that §§223(a)(1)(B) and 223(a)(2) "are unconstitutional on their face to the extent that they reach indecency" and that §§223(d)(1) and 223(d)(2) "are unconstitutional on their face." *ACLU* v. *Reno*, 929 F.Supp. 824, 849 (E.D.Pa. 1996).[4]

On July 1, 1996, Attorney General Janet Reno and the U.S. Department of Justice filed a direct appeal to the U.S. Supreme Court as permitted by §561(b) of the CDA.

In a 7-2 decision, the Supreme Court, in an opinion authored by Justice Stevens, held that the Indecency and Patently Offensive provisions of the CDA abridged freedom of speech protected by the First Amendment. Although the Court noted that the CDA's vagueness was relevant to the First Amendment overbreadth inquiry, it concluded that the judgment of the three-judge district court "should be affirmed without reaching the Fifth Amendment issue." 117 S.Ct. at 2341.

The Court began its analysis by reviewing the Government's contention that the CDA was plainly constitutional under the Court's prior opinions. However, the Court found that its prior decisions "raise[d]—rather than relieve[d]—doubts concerning the constitutionality of the CDA." *Id.* Specifically, the Court determined that the CDA differs from laws/orders upheld in earlier cases, including that it does not allow parents to consent to their children's use of restricted materials; is not limited to commercial transactions; fails to provide any definition of "indecent" and omits any requirement that "patently offensive" material lack socially redeeming value; neither limits its broad categorical prohibitions to particular times nor bases them on an evaluation by an agency familiar with the medium's unique characteristics; is punitive; applies to a medium that, unlike radio, receives full First Amendment protection; and cannot be properly analyzed as a form of time, place, and manner regulation because it is a content-based blanket restriction on speech. Moreover, the Court noted that the special factors recognized in some of its cases as justifying regulation of the broadcast media—the history of government regulation of broadcasting, the scarcity of available frequencies at its inception, and its "invasive nature," are not present in cyberspace.

The Court also found that the use of the undefined terms "indecent" and "patently offensive" would provoke uncertainty among speakers about how the two standards related to each other and what they mean. Specifically, the Court noted that the vagueness of such a content-based regulation, coupled with its increased deterrent effect as a criminal statute, raised special First Amendment concerns because of its obvious chilling effect on free speech. Although the Court noted that the Government has an interest in protecting minors from potentially harmful materials, the Court found that the CDA presents a greater threat of censoring speech that falls outside the statute's scope and could unquestionably silence some speakers whose messages would be entitled to constitutional protection.

The Court rejected a wide variety of arguments asserted by the Government for sustaining the CDA's affirmative prohibitions. The Court found the contention that the CDA is constitutional because it leaves open ample "alternative channels" of communication to be unpersuasive because the CDA regulates speech on the basis of its content, so that a "time, place, and manner" analysis is inapplicable. In addition, the assertion that the CDA's "knowledge" and "specific person" requirements significantly restrict its permissible application to communications to persons the sender knows to be under 18 was found to be untenable, given that most Internet forums are open to anyone. Moreover, the Court noted that there is no textual support for the Government's assertion that material having scientific, educational, or other redeeming social value will necessarily fall outside the CDA's prohibitions.

The Court also concluded that the §223(e)(5) defenses did not constitute the sort of "narrow tailoring" that would save the CDA. The Government acknowledged that proposed screening software does not currently exist, and, even if it did, there would be no way of knowing whether a potential recipient would actually block the encoded material. The Government also failed to prove that §223(b)(5)'s verification defense would significantly reduce the CDA's heavy burden on adult speech. The Court noted that although such verification is actually being used by some commercial providers of sexually explicit material, the district court's Findings indicated that it is not economically feasible for most noncommercial speakers.[5]

In a separate opinion, Justice O'Connor, with whom Chief Justice Rehnquist joined, concurred in part and dissented in part. Justice O'Connor found that the "display" portion of the Patently Offensive provision could not pass muster because a speaker cannot be reasonably assured that the speech he displays will reach only adults and because it is impossible to confine speech to an "adult zone." Thus, Justice O'Connor determined, the only way for the speaker to avoid liability is to refrain completely from using "indecent" speech. Accordingly, Justice O'Connor concluded that this forced silence impinges on the First Amendment right of adults to make or obtain this speech. As a result, the adult population on the Internet would be reduced to reading only what is fit for children.

On the other hand, Justice O'Connor found that the Indecency provision and "specific person" portion of the Patently Offensive provision were not unconstitutional in all of their applications. Justice O'Connor would have found both provisions constitutional as applied to a conversation involving only an adult and one or more minors or when an adult or minor converse by themselves or with other minors in a chat room. Justice O'Connor noted, however, that when a minor enters a chat room otherwise occupied by adults, the CDA requires the adults in the room to stop using "indecent" speech. In Justice O'Connor's opinion, because the rights of adults are infringed by the Indecency provision and the "specific person" portion of the Patently Offensive provision as applied to communications involving more than one adult, she would have invalidated those provisions of the CDA only to that extent.

Despite its defense of the CDA before the Supreme Court, the Clinton Administration is now calling for industry self-regulation rather than a legislative solution to the problem of content unsuitable for minors browsing cyberspace, asserting that unnecessary regulation or censorship could cripple the growth and diversity of the Internet.

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[1] *Pub. L. No. 104-104, §502, 110 Stat. 56, 133-35 (1996). The CDA is codified at 47 U.S.C. §223(a) to (h).*

[2] *§561(a) of the CDA provides that "any civil action challenging the constitutionality, on its face" of any provision of the CDA "shall be heard by a district court of 3 judges convened pursuant to" 28 U.S.C. §2284.*

[3] *Plaintiffs did not challenge the CDA to the extent that it covers obscenity or child pornography, which were already proscribed before the CDA.*

[4] *The first 69 paragraphs of the district court's 123 paragraph Findings of Fact were derived from a stipulation of the parties. Those Findings describe in rich detail the creation of the Internet and the development of cyberspace.*

[5] *Because obscene speech may be banned totally, and §223(a)'s restriction of "obscene" material enjoys a textual manifestation separate from that for "indecent" material, the Court severed the term "or indecent" from the statute, leaving the rest of §223(a) standing.*

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