"Indecent" And "Patently Offensive" Under The Communications Decency Act Of 1996

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In a resounding affirmation of First Amendment rights, six federal judges in five opinions in three cases[1] have determined that there is a likelihood that the plaintiffs will prevail on their claims that portions of the Communications Decency Act of 1996 ("CDA"), Title V of the Telecommunications Act of 1996 ("TCA"),[2] are unconstitutional, setting the stage for a direct review by the United States Supreme Court.

On February 8, 1996, President Clinton signed the TCA into law. On the same day, the American Civil Liberties Union ("ACLU") and others filed an action in the Eastern District of Pennsylvania and moved for a temporary restraining order 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, or 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..."

On February 15, 1996, Judge Ronald Buckwalter granted a limited temporary restraining order finding that 47 U.S.C. §223(a)(1)(B)(ii) was "unconstitutionally vague in the use of the undefined term, 'indecent.'" 1996 WL 65464, at *2. On the same day, pursuant to §561(a) of the CDA,[3] Judge Dolores Sloviter, Chief Judge of the Third Circuit, convened a three-judge District Court that included herself, Judge Buckwalter and Judge Stewart Dalzell, also of the Eastern District of Pennsylvania.

Shortly thereafter, the American Library Association ("ALA") and others filed a similar action in the Eastern District of Pennsylvania and Judge Sloviter convened the same three-judge court. The actions were then consolidated, the parties were afforded expedited discovery, and the court conducted consolidated evidentiary hearings.

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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 in new §223(e) of 47 U.S.C., which provides, among other things, 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 June 11, 1996 decision[4] that was hailed by Bill Gates, Microsoft's Chairman and CEO, as "a great victory for anyone who cares about freedom of expression or the future of the Internet,"[5] the court concluded that the plaintiffs were entitled to a preliminary injunction because they had established a reasonable probability of success that the Patently Offensive provision was unconstitutional and that the Indecency provision was unconstitutional to the extent that it reaches "indecency" (but not to the extent that it reaches obscenity or child pornography). 1996 WL 311865, at *27.

The court's 123 paragraph Findings of Fact describe in rich detail the creation of the Internet and the development of cyberspace; how individuals access and methods to communicate over the Internet; content on the Internet including the availability of sexually explicit material; and available technology to restrict access to unwanted material. The court noted that "unlike traditional media, the barriers to entry as a speaker on the Internet do not differ significantly from the barriers to entry as a listener...The Internet is therefore a unique and wholly new medium of worldwide human communication." *Id.* at *20.

The views of the court were expressed in three separate opinions. First, Judge Sloviter found that because the CDA is patently a government-imposed content-based restriction on speech entitled to constitutional protection, it was subject to strict scrutiny, and would only be upheld if it was justified by a compelling government interest and narrowly tailored to effectuate that interest. *Id.* at *29.

Although Judge Sloviter acknowledged that there was a "compelling government interest to shield a substantial number of minors from some of the online material that motivated Congress to enact the CDA," id. at *32, she noted that the plaintiffs had introduced "ample evidence that the challenged provisions, if not enjoined, would have a chilling effect on their free expression" and that "the public interest weighs in favor of having access to a free flow of constitutionally protected speech." *Id.* at *29.

Significant to Judge Sloviter's opinion was the court's finding that it was "either technologically impossible or economically prohibitive for many of the plaintiffs to comply with the CDA without seriously impeding their posting of online material which adults have a constitutional right to access." *Id.* at *32. As a result, Judge Sloviter found that content providers would have to reduce the level of communication to that which was appropriate for children in order to be protected from criminal prosecution and that "[t]his would effect a complete ban even for adults of some expression, albeit 'indecent,' to which they are constitutionally entitled." *Id.*

Judge Sloviter also determined that the Government's reliance on the statutory defenses did not constitute a "narrow tailoring" because no content provider, "whether an individual, nonprofit corporation, or even a large publicly held corporation, is likely to willingly subject itself to prosecution for a miscalculation of the prevalent community standards or for an error in judgment as to what is indecent." *Id.* at *34. Accordingly, Judge Sloviter concluded that the challenged provisions were "facially invalid under both the First and Fifth Amendments." *Id.* at *37.

Judge Buckwalter agreed with Judge Sloviter that current technology was inadequate to provide a "safe harbor" to most speakers on the Internet, that the terms "indecent" and "patently offensive" were so vague as to violate the First and Fifth Amendments, and that "indecent" and "patently offensive" speech had the full protection of the First Amendment. *Id.* at *37.

Although Judge Dalzell did not believe that "indecent" and "patently offensive" were unconstitutionally vague, he agreed with Judge Buckwalter that "the Government's promise not to enforce the plain reach of the law could not salvage its overbreadth." *Id.* at *46. Judge Dalzell determined that "the disruptive effect of the CDA on Internet communication, as well as the CDA's broad reach into protected speech, not only rendered the [CDA] unconstitutional, but also would render unconstitutional any regulation of protected speech on this new medium." *Id.* at *47. Judge Dalzell concluded by stating: "As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion." *Id.* at *63.

Shea v. Reno, pending in the Southern District of New York, was also filed on February 8, 1996. There, the plaintiff, a publisher/owner of an electronic "newspaper," challenged §223(d) as unconstitutionally vague and overbroad. On July 29, 1996, a three judge court,[6] based upon many of the same findings made in *ACLU/ALA*, concluded that although §223(d) was not unconstitutionally vague, it was unconstitutionally overbroad because it would serve as a ban on constitutionally protected "indecent" communication between adults.[7] The court determined that there was "no persuasive evidence that a substantial proportion of Internet content providers can make available material potentially within the scope of the CDA without fear of prosecution and criminal liability," 1996 WL 421439, at *30, and that current technology provides no feasible means for most content providers to avail themselves of the statutory affirmative defenses.

On July 1, 1996, the Attorney General and the Department of Justice filed a Notice of Appeal to the Supreme Court from the opinion and order entered in *ACLU/ALA* pursuant to §561(b) of the CDA.[8] Given the extensive findings of fact and the thorough analyses in *ACLU/ALA* and in *Shea*, the Government will face an uphill battle before the Supreme Court.

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[1] ACLU v. Reno, *No. Civ. A. 96-963 (E.D. Pa.)*, American Library Association v. U.S. Dept. of Justice, *No. Civ. A. 96-1458 (E.D. Pa.)*, *and* Shea v. Reno, *No. 96 Civ. 0976(DLC)(S.D.N.Y.). The first two cases were consolidated.*

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

[3] §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.

[4] *1996 WL 311865 (E.D.Pa.)*("ACLU/ALA").

[5] *Microsoft Magazine, Volume 3, Issue 4, August/September 1996 at 54.*

[6] *Judge Jose A. Cabranes, Second Circuit, and Judges Leonard B. Sand and Denise Cote, Southern District of New York. The Court's opinion was written by Judge Cabranes.*

[7] *1996 WL 421439 (S.D.N.Y.)*("Shea").

[8] *§561(b) of the CDA provides that an order of the three-judge court under §561(a) holding that any provision of the CDA is unconstitutional "shall be reviewable as a matter of right by direct appeal to the Supreme Court."*