Update

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First Amendment Rights and the Internet

Supreme Court Finds Communications Decency Act Unconstitutional: Full Free Speech Rights Given Green Light on Internet

In a historic first decision addressing the boundaries of free speech in cyberspace, the Supreme Court, on June 26, 1997, ruled that the Communications Decency Act of 1996 ("CDA"), which criminalized the transmission of "indecent" or "patently offensive" material on the Internet if such material could be viewed by a minor, violated the First Amendment's guarantee of freedom of speech. This decision was a big victory for academic freedom and free exchange of ideas and is essential to the vitality of higher education.

What is the Communications Decency Act?

The CDA was signed into law by President Clinton on February 8, 1996 as part of the expansive Telecommunications Act of 1996. The CDA prohibited both the "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age, as well as the "knowing" sending or displaying of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" to a person under 18 years of age. The CDA carried significant criminal penalties. Violators would have been charged as felons and could have faced two year prison sentences and/or $250,000.00 fines. The CDA also contained a unique provision which guaranteed an expedited review of any legal challenge. By its terms, the CDA provided that a three judge panel of an appropriate federal district should hear the legal challenge in the first instance with possible direct review by the Supreme Court.

The Legal Challenge

Clearly, the drafters of the CDA were aware that a legal challenge was likely and the many plaintiffs opposing the new law filed suit in federal district court in Philadelphia on the very day that the CDA became law. The plaintiffs included education and cyberspace rights groups as well as Internet service providers. In the case now commonly referred to as *Reno v. ACLU*, the plaintiffs sought a declaration that the statute was an unconstitutional abridgment of free speech. Eight days after the CDA's passage, the district court granted the plaintiffs a temporary restraining order and then, on June 12, 1996, a three judge panel of the district court (Chief Judge Delores K. Sloviter and Judges Stewart Dalzell and Ronald L. Buckwalter) entered a preliminary injunction effectively blocking enforcement of the CDA. Each of the judges wrote a separate opinion but the judgment of the court was unanimous that the CDA violated important rights protected by the First and Fifth Amendments.

The district court's judgment followed five days of live witness testimony, the submission of documentary evidence, and over 400 detailed stipulations about the structure and function of the Internet as well as

the wide variety of on-line communications. In a ringing endorsement of Internet free speech rights, District Judge Dalzell wrote:

If the goal of our First Amendment jurisprudence is the "individual dignity and choice" that arises from "putting the decision as to what views shall be voiced largely into the hands of each of us," then we should be especially vigilant in preventing content-based regulation of a medium that every minute allows individual citizens actually to make those decisions. Any content-based regulation of the Internet no matter how benign the purposes, could burn the global village to roast the pig."

The Department of Justice sought Supreme Court review of the district court's decision. The Supreme Court granted review and, in a 7 to 2 ruling, affirmed the judgment of the district court. Justice John Paul Stevens writing for the majority which included Justices Scalia, Kennedy, Souter, Thomas, Ginsberg and Breyer, borrowed the metaphor used by District Judge Dalzell and proclaimed, "The CDA casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community." The forty page Supreme Court majority opinion recognized the "legitimacy and importance of the Congressional goal of protecting children from harmful materials" but agreed with the district court that "the statute abridges the freedom of speech protected by the First Amendment." The Court held that:

Text of American Library Association Resolution

RESOLUTION ON THE USE OF FILTERING SOFTWARE IN LIBRARIES

WHEREAS, on June 26, 1997, the United States Supreme Court issued a sweeping re-affirmation of core First Amendment principals and held that communications over the Internet deserved the highest level of Constitutional protection; and

WHEREAS, The Court's most fundamental holding is that communications on the Internet deserve the same level of Constitutional protection as books, magazines, newspapers, and speakers on a street corner soapbox. The Court found that the Internet "constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers," and that "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox"; and

WHEREAS, For libraries, the most critical holding of the Supreme Court is that libraries that make content available on the Internet can continue to do so with same "Constitutional protection that apply to the books on libraries' shelves; and

WHEREAS, The Court's conclusion that "the vast democratic fora of the Internet" merit full constitutional protection will serve to protect libraries that provide their patrons with access to the Internet; and

WHEREAS, The Court recognized the importance of enabling individuals to receive speech from the entire world and to speak to the entire world. Libraries provide those opportunities to many who would not otherwise have them; and

WHEREAS, The Supreme Court's decision will protect that access; and

WHEREAS, the use in libraries of software filters which block Constitutionally protected speech is inconsistent with the United States Constitution and federal law and may lead to legal exposure for the library and its governing authorities; now, therefore, be it

RESOLVED, That the American Library Association affirms that the use of filtering software by libraries to block access to constitutionally protected speech violates the Library Bill of Rights.

[t]he CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

The Court was particularly concerned that the CDA did not define the terms "indecent" and "patently offensive" and

concluded that such omissions raised "special" First Amendment concerns because of their obvious effect on free speech. The Court was further bothered that the law omitted "any requirement" that "patently offensive" material lack socially redeeming value. That particular frailty of the CDA was noted by the education community as an obvious impediment to the free exchange of ideas about art, literature, sexuality, and other subjects.

In any challenge to content-based restrictions on speech, federal courts are obliged to consider whether there are less restrictive alternatives than those proposed in the legislation. In *Reno v. ACLU*, the Supreme Court recognized that while "screening" or "filtering" technology has not been perfected and is not yet in wide circulation, it is still more effective than government regulation. The Supreme Court agreed with the district court's finding that "currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing material which the parents believe are inappropriate will soon be widely available." This screening software, such as *Net Nanny* or *Surf Watch*, searches Internet addresses for keywords that are linked with adult sites and places a block on access to such sites.

The Supreme Court was troubled by the position staked out by the government for a number of reasons. The majority opinion rejected the government's primary argument in support of the CDA's constitutionality — that broadcast content regulations apply to the Internet. Essentially, it found that special factors that have been found to justify regulation of the broadcast medium were not present in the cyberspace medium. Therefore, there was no basis from previous cases for qualifying the amount of First Amendment scrutiny that should be applied to the Internet.

The Court also rejected the government's argument that Internet growth was suffering because of the unfettered transmission of indecent material. To the contrary, the Court found that the dramatic expansion of this new forum contradicted the factual basis underlying the contention that the unregulated availability of "indecent" and "patently offensive" material is driving people away from the Internet.

The Supreme Court's rejection of the CDA has also been hailed as a victory for privacy advocates who argued against the statute's requirement that Internet users "verify the age and identity of all potential recipients of 'indecent' material." The Court did not disturb the district court's finding that there "is no effective way to determine who is accessing material through e-mail, mail exploders, news groups or chat rooms." But technological considerations aside, a verification provision would have destroyed the anonymity that many see as one of the Internet's greatest assets.

What Does the Future Hold?

While free speech proponents have celebrated the Supreme Court's decision, there is real concern that Congress has not given up on trying to place limitations on Internet users' communications. After the Court's decision, Senator Dan Coats (R-IN), a principal co-sponsor of the CDA announced his intention to "construct new legislation that will pass constitutional muster." Senator Patty Murray (D-WA) has also promised to propose legislation aimed at protecting child Internet users. Senator Murray has favored the "filtering and blocking" approach noted by the Court and would support criminal penalties for activities such as exploiting child-safe chat rooms. It should be noted the federal government has not cornered the market on legislating the use of the Internet. More than a dozen state legislatures are presently considering the adoption of Internet decency laws.

Meanwhile, President Clinton remains committed to finding, as he sees it, a balance between unfettered indecent speech on the Internet and the right of children to be free from sexually explicit and inappropriate material on-line. On the day the Supreme Court decision was handed down, the White House offered a promise to:

. . . convene industry leaders and groups representing teachers, parents and librarians. We can and must develop a solution for the In-

ternet that is as powerful for the computer as the v-chip will be for the television, and that protects children in ways that are consistent with America's free speech values. With the right technology and ratings systems—we can help ensure that our children don't end up in the red light districts of cyberspace.

The Clinton administration has advocated the rapid development and use of screening technologies and ratings systems. One such rating system, the Platform for Internet Content Selection (PICS), was established by the World Wide Web Consortium to permit Web publishers to designate Web sites as "adult only" or inappropriate for children.

There is consensus among constitutional observers that the Supreme Court's decision in *Reno v. ACLU* confirms that indecent or patently offensive speech on the Internet is entitled to the same First Amendment protection long accorded books and magazines. However, time will surely tell whether continuing legislative efforts to circumscribe "cyberspeech" can survive the strict scrutiny of the Supreme Court.

Conclusion

It is important for the higher education community to remain vigilant for attempts to place limits on cyberspeech since such limitations inevitably impinge on academic freedom as well.

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