

SUPREME COURT STRIKES DOWN DECENCY ACT IN DEFENSE OF INTERNET "CHAOS"

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From the September '97 issue of WWWiz Magazine
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As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion...just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects.

"Dalzell, D.J., U.S. District Court, Eastern District of Pennsylvania.

In late June of this year, the United States Supreme Court upheld the decision of a Pennsylvania federal court finding the Communications Decency Act of 1996 (CDA) unconstitutional. In so doing, the Court freed Internet content providers from exposure to civil and criminal liability for transmission of "indecent" material. The decision marks the demise of the government's attempt to regulate the content of adult material on the Web, shifting the burden to parental supervision as the primary means of shielding children from pornography. The decision also reveals the judiciary's perspective on the social role of the Internet as a colossal medium for free speech.

The Communications Decency Act of 1996

In 1996, Congress passed and the President signed the CDA in a firestorm of controversy. The new law resulted in a constitutional challenge by the ACLU in the case of ACLU v. Reno, filed in the United States District Court, Eastern District of Pennsylvania. The CDA called for strict civil and criminal liability of fines and up to two years in prison for anyone who:

...uses an interactive computer service to send [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 regardless of whether the user of such service placed the call or initiated the communication. [emphasis added]

By way of explanation, the law classifies sexually oriented material as either "obscene" or "indecent." Obscene expression falls outside the scope of the First Amendment protection altogether. The distinction between the two is far from bright. Supreme Court Justice Potter Stewart once defined obscenity as: "I know it when I see it." Obscenity has been more precisely defined by the courts as material that, according to contemporary community standards, appeals to the "prurient" interest of the average person and depicts sexual conduct that is patently offensive and lacks serious literary,

artistic, political or scientific value. The ill-fated "Decency" Act attempted to restrict the transmission of material that was less offensive than "obscene," but merely "indecent" by using a definition the Supreme Court found to be unconstitutionally vague and overbroad.

The Supreme Court's Reasoning

Paramount to an accurate and fair decision is the Court's understanding of what the Internet really is. After all, only recently have issues involving the Internet, and the Web in particular, been posed to our system of jurisprudence which, in the case of the Supreme Court, is occupied by members of prior generations appointed for life. The Supreme Court's orientation toward our new free speech medium is refreshingly forward-looking. As the Court understands the Internet:

The Internet is an international network of interconnected computers...[which] now enables tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is a unique and wholly new medium of worldwide human communication...Taken together, these tools constitute 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...tens of thousands of users are engaging in conversations on a huge range of subjects. It is no exaggeration to conclude that the content of the Internet is as diverse as human thought.

Given its factual understanding of cyberspace, the Supreme Court applied our relatively ancient standards of First Amendment free speech to the CDA in the context of a "never-ending worldwide conversation." The Supreme Court found that the CDA was so vague and overbroad that it violated the First Amendment. The CDA on the one hand used the term "indecent," while on the other hand speaking of material that is "offensive by contemporary community standards," language previously used to define "obscene" material. Inasmuch as the CDA defined neither term, the Court found that the difference in language would provoke uncertainty among speakers about how the two standards relate to each other, and just what they mean. The Court cited further examples of cyberspace discussions pertaining to birth control, homosexuality, and prison rape as being possible violations of the CDA.

The Court concluded that the CDA was not sufficiently narrowly tailored to the Congressional goal of protecting minors from potentially harmful material. The Court cited the severity of criminal sanctions as possibly causing some speakers to remain silent, rather than risking the communication of unlawful words, ideas and images. The Court therefore found that for reasons of both vagueness and overbreadth, the CDA was an unlawful infringement of the First Amendment. The Court's decision has given us an historic first glimpse of its orientation toward the Internet. The decision clearly accords the Internet free speech protection that is at least as potent, perhaps more so, than that accorded more traditional media.

The Court's Comments on Age Verification Systems

The Government's primary defense focused on the CDA's "safe harbor" provisions that allowed adult content providers to escape civil and criminal liability for taking "good faith, reasonable, effective and appropriate actions" to avoid exposure to minors. The Government cited age verification systems that

use "tagging," and adult verification systems. The Supreme Court dismissed the systems as inadequate defenses to liability because they were neither "effective," nor economically feasible for most noncommercial speakers on the Internet.

The Court accepted the factual finding that the "tagging" system was merely an ethereal technological proposal that does not yet exist. The Government argued that providers of adult material could encode indecent communications that identify themselves as such upon delivery. Recipients could block reception with appropriate software. The Court further recognized that the "tagging" proposal was impractical because every parent in America could not be expected to be screening for "tags" to identify and block out the offensive material. Accordingly, the "effective" aspect of the CDA's safe harbor was illusory.

Likewise, the Court was not impressed with adult verification systems as a means of protecting minors from adult material. The Supreme Court adopted the factual finding of the lower court that there is "no effective way to determine the identity or age of a user." Credit card verification and adult passwords do not assure that the user is indeed an adult. The Court also adopted the factual finding that an adult password requirement would impose significant financial burdens on noncommercial sites because screening systems would be beyond their commercial reach, and verification systems would discourage users from accessing their sites.

The Chaos of Free Speech Prevails

In the final analysis, the Supreme Court's first opinion addressing free speech issues on the Internet is encouraging. The concept of a "worldwide conversation" and the "chaos" of unfettered speech protected by the First Amendment bodes well for the future. The Supreme Court has appropriately shifted the responsibility for protecting minors from adult material providers to parents, as a trade-off against inhibiting the free flow of expression on the Internet. In response to the Government's argument that striking down the CDA would adversely affect the growth of the Internet, the Court appropriately concluded:

The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.