DePaul University
University Libraries

DePaul Journal of Art, Technology & Intellectual Property Law

Volume 4
Issue 2 *Spring/Summer 1994*

Article 11

Action for Children's Television v. FCC (ACT III), 11 F.3D 170 (D.C. Cir. 1993)

William M. Sweetnam

Action for Children's Television v. FCC (ACT III),

11 F.3D 170 (D.C. CIR. 1993).

Introduction

Petitioners, a group of broadcasters, authors, program suppliers, listeners, and viewers challenged a Federal Communications Commission ban restricting broadcasts of "indecent" material within the hours of 6 a.m. to midnight. The District Court for the District of Columbia held that this ban violated the Free Speech Clause of the First Amendment. Although the court conceded that the government had a compelling interest in protecting children against indecent material, the ban was not sufficiently narrow to achieve that interest.

Facts

Federal law has prohibited the broadcasting of "indecent" material since the enactment of the Radio Act of 1927.[1] Then, the concept of "indecent" was related to "the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[2] Today, the FCC defines "indecency" as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[3]

In *Action for Children's Television v. FCC* ("ACT I"),[4] the court struck down the narrowing of the safe harbor period (hours during which broadcasting of indecent material is permitted) to midnight through 6 a.m. The court based its decision, in part, on the fact that the Commission had not explained its expansion of the definition of "children" (whom the safe harbor rules are intended to protect) from below-12 years of age to include adolescents between 12 and 17 years of age. Furthermore, the Commission had only estimated "the number of teens in the total . . . audience," without adducing any specific audience data for "specific . . . stations" that allegedly placed children at risk of exposure to indecent material.[5]

In *Action for Children's Television v. FCC* ("ACT II),[6] a 24-hour ban on

1. 18 U.S.C. § 1464. *See* Radio Act of 1927, Pub.L. No. 69-632, § 29, 44 Stat. 1162, 1172-73; FCC v. Pacifica Found., 438 U.S. 726, 735-38, (1978) (discussing statutory history of indecency regulation).

2. Pacifica Found., 56 F.C.C.2d 94, 98 (1975), quoted in Pacifica, 438 U.S. at 731-32.

3. 1993 Order, 8 F.C.C.R. at 704-5 Par. 4 n. 10.

4. 852 F.2d 1332 (D.C. Cir. 1988).

5. *Id.* at 1341 (emphasis in original).

6. 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 1281, 117 L.Ed.2d 507

broadcasting of indecent material was struck down.[7] The court in reaching its decision interpreted ACT I as requiring that some safe harbor for broadcasting indecent material be maintained, noting that even "Congress itself" could not totally ban indecent speech.[8]

After the decision in ACT II, Congress passed the Telecommunications Act of 1992[9], which required the Commission to ban the broadcast of indecent material from 6 a.m. to midnight, but allow public broadcast stations that go off the air at or before midnight an additional two hours (between 10 p.m. and midnight) during which to broadcast such material. This appeal resulted.

The FCC ("FCC" or "Commission") set forth three goals to justify the 6 a.m. to midnight ban: (i) "ensuring that parents have an opportunity to supervise their children's listening and viewing of over-the-air broadcasts," (ii) "ensuring the well being of minors" regardless of parental supervision, and (iii) protecting "the right of all members of the public to be free of indecent material in the privacy of their homes."[10] The court rejected the third interest, protecting the general public, as insufficient to support a restriction on the broadcasting of constitutionally protected "indecent" material. The court accepted as compelling the first two interests in protecting the welfare of children but found that the ban was not narrowly tailored to advance these interests and to meet constitutional standards.

Legal Analysis

The court began by noting that indecent speech is protected by the First Amendment[11], and that government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[12]

The government argued that the 6 a.m. to midnight ban promotes its compelling interest in protecting the privacy of one's home, regardless of age. Because of the inherently intrusive nature of broadcasting, the government submitted that it can restrict the broadcast of indecent material to the hours when most people are asleep.

In response to the government's argument, the court held that there is no generalized government interest in protecting adults from indecent speech, citing the First Amendment principle "that debate on public issues should be uninhibited, robust, and wide-open."[13] The court noted that, excepting obscenity, "'[the

---

(1992).

7. *Id.* at 1510.

8. *Id.* at 1509.

9. Pub.L. No. 102-356, 106 Stat. 949 ("Telecommunications Act").

10. *In re* Enforcement of Prohibitions Against Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704, 705-706 Par. 10, 14 (1993) ("1993 Order").

11. *See ACT II*, 932 F.2d at 1509; *ACT I*, 852 F.2d at 1340.

12. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126, (1989). *See* Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 540, (1980); *ACT II*, 932 F.2d at 1509; *ACT I*, 852 F.2d at 1343 n. 18.

13. New York Times v. Sullivan, 376 U.S. 254, 270, (1964). *Accord* Hustler Magazine v. Falwell,

Supreme Court] ha[s] consistently held that the fact that protected speech may be offensive to some does not justify its suppression.'"[14] The court added that a captive audience rationale is inapplicable to indecent broadcasts, insofar as "the radio [and television] can be turned off."[15] Since the asserted interest in protecting adults does not apply when children are not in that audience, the court assumed that the purpose of the ban is to protect only children. Therefore, the generalized privacy rationale was rejected.

Next, the court addressed the interests relating to children that were advanced by the Commission in support of the 6 a.m. to midnight ban: (i) an interest in helping parents supervise their children, and (ii) an independent interest in shielding children from exposure to indecent material regardless of parental supervision. Although it acknowledged the compelling government interest in protecting children, the court rejected the 6 a.m. to midnight ban as not narrowly tailored to meet constitutional standards.

With respect to the government's interest in the protection of children, the court held that where constitutionally protected speech is restricted, the government must demonstrate that the restriction is narrowly tailored to advance the asserted compelling interest.[16] This means that the government can "[c]hannel []" programming in order to "protect unsupervised children" but only so long as it remains "sensitive to the First Amendment interests of broadcasters, adults, and parents."[17] The court held that the means chosen by the government to advance its interest in the protection of children were not the least restrictive,[18] insofar as it did not properly weigh the First Amendment rights of viewers and listeners.

The court noted that there was no evidence suggesting that the effectiveness of parental supervision is related to time of day or night, or that the midnight to 6 a.m. safe harbor was tailored to assist parents in supervising their children's viewing or listening. If the purpose of the ban is to assist parents in supervising their children, a 3:00 a.m. to 3:30 a.m. safe harbor would be even more effective, as children are sure to be asleep.

In the alternative, the government argued that it has a compelling interest in shielding all minors, regardless of age, from exposure to indecent material. The court rejected this rationale, because "the grounds for restricting a minor's First Amendment rights (here as listener or viewer) fade as the minor matures." "In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors."[19] Although children, unlike adults, may be unable to avoid harmful

---

485 U.S. 46, 55-56, (1988).

14. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71, (1983) (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 701, (1977)).

15. Packer Corp. v. Utah, 285 U.S. 105, 110, (1932) (unanimous). *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 302, (year) (plurality) (quoting same).

16. *Sable*, 492 U.S. at 126-31; *ACT II*, 932 F.2d at 1509; *ACT I*, 852 F.2d at 1343-44.

17. *ACT I*, 852 F.2d at 1340 & n. 12.

18. *See Sable*, 492 U.S. at 126.

19. Erznoznik v. City of Jacksonville, 422 U.S. 205, 214, (1975) (footnote and citations omitted).

speech, "the capacity for choice does not remain dormant throughout childhood until appearing ex nihilo upon the arrival of a person's 18th birthday." Therefore, the court concluded, the government must consider "the expanding First Amendment interests of maturing minors" when suppressing constitutionally protected material. As the government's interest in protecting children from indecent speech varies in importance with age, "[t]he government must adduce data which permits a more finely tuned trade-off between adults' First Amendment rights [and this interest] . . . ."

Furthermore, the court found that there was no evidence that the 6 a.m. to midnight ban was narrowly tailored to avoid infringement on the First Amendment rights of adult listeners and viewers. The 6 a.m. "stretch[es] all but the hours most listeners [and viewers—young and old alike—are asleep," and allows adults to see and hear only material that is fit for children.[20]

Conclusion

The court concluded that although there is a compelling government interest in helping parents supervise their children and in protecting the well-being of children, the FCC's ban on constitutionally protected indecent material during the hours of 6 a.m. to midnight is not sufficiently narrow to advance these interests without violating the First Amendment.

William M. Sweetnam

See Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, (1969); Carey v. Population Servs. Int'l, 431 U.S. 678, 692 n. 14, (1977) (plurality) ("minors are entitled to constitutional protection for freedom of speech" (citing Tinker, 393 U.S. at in between U.S. at 503)).

20. *ACT I*, 852 F.2d at 1335. *See* id. at 1341 (citing Butler v. Michigan, 352 U.S. 380, 383, (1957)).