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The Constitutionality of the Communications Decency Act: Censorship on the Internet

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{1} On March 21, a special three-judge federal court panel in Philadelphia began hearing testimony in a proceeding to determine the constitutionality of the Communications Decency Act ("CDA"). [1] The statute, enacted as part of the Telecommunications Act of 1996, [2] criminalizes the transmission of "indecent" and "patently offensive" material via the Internet in a manner that makes it available to minors. Judicial review of the CDA is destined to result in a landmark Supreme Court decision defining, for the first time, the applicability of the First Amendment to emerging interactive communications media. As the courts begin to grapple with this complex issue, three distinct areas will need to be examined: the technical feasibility of regulating online speech; the jurisdictional limitations of such regulatory actions; and the difficulty of defining "indecency" in a global, interactive medium.

I. Technical Feasibility

{2} Much of the testimony in the Philadelphia proceeding [3] is directed toward the technical aspects of the Internet and computer-mediated communications. The process of educating the court on the intricacies of cyberspace included the first demonstration of the Internet and the World Wide Web ever presented in open court. An understanding of the technology is crucial, as it will enable the court to determine whether any online content provider can realistically comply with the CDA. Indeed, it was Congress' lack of this technical knowledge that led to the enactment of a statutory scheme that bears little resemblance to the reality of how information is distributed on the Internet. The statute's legislative history reveals that the CDA grew out of an effort to "update" existing telephone "dial-a-porn" laws to

make them applicable to the computer environment. No hearings were held, and Congress clearly misunderstood the nature of the Internet and employed faulty analogies to other forms of media.

{3} The distinguishing characteristic of online communications is that the end-user must specifically seek a particular piece of information. Unlike television or radio, which is "broadcast" to all users simultaneously, the Internet is a universe of information that is available for the taking when and if a particular user chooses to access it. In this way, the medium is far more analogous to a library. Just as a librarian can not be expected to determine the age and identity of all patrons accessing a particular book in the library's collection, the provider of online information cannot be expected to police the usage of his or her online offerings. To impose such a requirement would, as CDA opponents note, result in reducing the content of online material to only that which is suitable for children.

{4} Censorship proponents counter this proposition by asserting that technological means *could* be developed that would enable online content providers to identify potential users and thereby determine their ages. Indeed, the legislation, if allowed to stand, would require the development of such "identity" technologies. To avoid potential criminal liability under the "indecency" provision, information providers would, in effect, be required to verify the identities and ages of all recipients of material that might be deemed inappropriate for children. The new statutory regime would thus result in the creation of "registration records" for tens of thousands of Internet sites, containing detailed descriptions of information accessed by particular recipients. These records would be accessible to law enforcement agencies and prosecutors investigating alleged violations of the statute. [4] Such a system would constitute a gross violation of Americans' rights to access information privately and anonymously.

{5} Less than a year ago, the Supreme Court upheld the right to anonymous speech in *McIntyre v. Ohio Elections Commission*. [5] The Court's rationale in that case applies with even greater force to the Internet "indecency" provisions. The Court noted that: "the decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible . . ." [6] "Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation -- and their ideas from suppression -- at the hand of an intolerant society." [7]

{6} Whether the millions of individuals visiting sites on the Internet are seeking information on teenage pregnancy, AIDS and other sexually transmitted diseases, classic works of literature or avant-garde poetry, they enjoy a Constitutional right to do so privately and anonymously. The CDA seeks to destroy that right. The technological means to comply with the statute, through identifying individual users, does not currently exist. To require the development and deployment of such technology would render the Internet the most highly regulated form of communications the world has ever seen, and one that would surely run counter to the principles of the First Amendmernt and a democratic society.

II. Jurisdictional Limitations

{7} One of the most glaring flaws in the logic underlying the CDA is in the drafters' failure to recognize the global nature of the Internet. Even assuming that technological means of compliance could be developed and found to be constitutionally permissible, the statute would only influence the practices of content providers physically situated within the United States. Foreign providers, or even U.S. interests who elect to move their operations off-shore, would be immune from prosecution.

{8} Such territorial realities, of course, apply to all legislative attempts to regulate behavior in a given

jurisdiction. But in the context of the Internet, this reality will unquestionably defeat the legislative intent to regulate the content available to users within the United States. As the judicial panel in Philadelphia learned during its online tutorial, a given web page can contain links to sites located in the United States and those located abroad. A user can access information physically stored in Amsterdam or Bangkok as easily as data stored in his or her hometown. For this reason, governmental attempts to regulate content in the electronic realm bear little resemblance to similar efforts undertaken in other contexts. The Federal Communications Commission can effectively regulate the content carried by broadcast outlets located in the United States. Likewise, the Customs Service can control the importation of obscene printed material across our borders. Because it knows no similar physical limitations, the Internet cannot be regulated effectively at the source of online information.

{9} Does this mean that there is no means for controlling the content of material potentially available to users within the United States? Not at all. Software currently exists that enables the user to block or screen particular Websites, newsgroups, or other areas they don't wish to access. Parents, for instance, can determine the types of content they deem appropriate for their children. This approach, in the opinion of most experts, is the only effective means for creating a "child- friendly" online experience. The CDA approach, on the other hand, will chill the free speech rights of Americans while doing little to remove inappropriate material from the reach of minors.

III. The Difficulty of Defining "Indecency"

{10} Assuming, for the sake of argument, that the technological and jurisdictional barriers could be overcome, the courts must finally address the question of what sorts of information are "indecent" and "patently offensive," such that their transmission should constitute a criminal offense. While the constitutional intricacies of this question are of such complexity that they go beyond the scope of this brief discussion, a few relevant points can be raised. First, it must be recognized that the CDA criminalizes the transmission of far more than obscenity. The legislation's proponents frequently cite examples of "child pornography" and "obscene material" that can be found on the Internet. But they fail to acknowledge that the distribution of such material is already illegal under existing federal obscenity law. [8] Indeed, several high-profile cases during the year prior to the enactment of the CDA, demonstrate that law enforcement authorities possess adequate tools to investigate and prosecute in such cases. The CDA addresses material that falls within the vague category of "indecent" and "patently offensive."

{11} In *FCC v. Pacifica Foundation*, [9] the Supreme Court held the so - called "seven dirty words" to be "indecent" and thus subject to regulation in the context of broadcast media. The Court's analysis focused on the "pervasive" nature of that medium and the fact that listeners or viewers are "assaulted" by the content broadcast on radio or television. As Justice Powell observed, "broadcasting -- unlike most other forms of communication -- comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds." As previously noted, interactive computer communications do not "assault" users -- particular information is specifically sought and accessed. The difference in these media can best be understood by examining the facts in *Pacifica*. The FCC action occurred after a father complained that he was listening to the radio with his young son and the "dirty words" were suddenly broadcast with warning. It is difficult to imagine a similar "assault" on the Internet.

{12} If one were to analogize the Internet to another medium, the world of printed publications seems far more apt than does the world of broadcast. Yet the First Amendment clearly would not countenance the criminalization of "indecent" or "patently offensive" speech in books or newspapers. This is because the

terms are inherently vague and invite government regulation of unpopular forms of expression in the absence of a compelling governmental interest. If the First Amendment means anything, it is that the government should not be in the business of regulating speech -- under threat of incarceration -- that some might find "indecent" or "offensive." Such determinations are properly made by the individual and, specifically in the context of the issue the CDA seeks to address, the parent.

IV. Conclusion

{13} For the reasons outlined above, it is likely that the courts will find the Communications Decency Act to be violative of the First Amendment. Does this mean that we will be left with no method of ensuring that children do not have ready access to inappropriate material online? Of course not. As mentioned, software solutions currently exist that can empower parents to tailor the online experience they feel is appropriate for their children. This is an area of technology that is rapidly expanding and is likely to provide even greater controls in the near future. There is another possible approach. If, as the censorship advocates say, parents want their children to experience online communications but worry about the adult-oriented content they might encounter, there ought to be a substantial market for alternative services. How about "Families Online," a closed system where content is strictly regulated and parents can opt out of Usenet or World Wide Web access. Or perhaps the service could provide "filtered" Internet access, permitting connections to only those areas that have been pre-approved by the system's administrators. Interestingly, these are the very techniques that the censorship advocates would like to impose on the *entire* Internet. They're free to create such an oasis of their own, but why should the entire global communications network be reduced to the level of what they find "appropriate" under threat of prosecution?

{14} Such an approach would be consistent with the way the First Amendment is supposed to work. You don't ask the government to censor speech that you find offensive; you create an alternative.

ENDNOTES

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[1] The Communications Decency Act is available as part of the Telecommunications Act of 1996 at ftp://ftp.loc.gov/pub/thomas/c104/s652.enr.txt.

[2] The Telecommunications Act of 1996 is available at ftp://ftp.loc.gov/pub/thomas/c104/s652.enr.txt.

[3] The challenge was filed in the United States District Court, Eastern District of Pennsylvania. More informaion on the suit is available at http://www.epic.org/free_speech/censorship/lawsuit/.

[4] The practical effect would be for the CDA to give access to these records.

[5] McIntyre v. Ohio Elections Commission, 115 S. Ct. 1511 (1995), http://cpsr.org/cpsr/free_speech/mcintyre.txt.

[6] *Id.*

[7] "It is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Hohe v. Casey,* 868 F.2d 69, 72-73 (3d Cir. 1989).

[8] 18 U.S.C. § 1462 and 1465; U.S. v. Thomas, 1996 FED App. 0032P (6th Cir.), http://www.epic.org/free_speech/censorship/us_v_thomas.html.

[9] FCC v. Pacifica Foundation, 438 U.S. 726 (1978), http://www.epic.org/free_speech/pacifica.txt.