Fall 2002

Regulation of Speech on the Internet: Fourth Time's the Charm

Tanessa Cabe

VOLUME XI FALL 2002 NUMBER 1

STUDENT NOTE

REGULATION OF SPEECH ON THE INTERNET: FOURTH TIME'S THE CHARM?

Tanessa Cabe

I. INTRODUCTION: THE INTERNET GENERATION COMES OF AGE

As the first generation of children who were raised on the Internet comes of age and enters the workforce, the use of the Internet in schools as preparation for entering such a workforce is tantamount to mandatory. The Internet is wildly unregulated, however, and can be used by children as a tool to find everything from United States history to pornography. Protecting children from upsetting and potentially harmful access to pornography and cyber-predators is a major concern of parents, educators and legislators.

Legislators have attempted to regulate Internet content that may be harmful to children through four major pieces of legislation: (1) the Communications Decency Act (CDA),[1] (2) the Child Pornography Prevention Act (CPPA),[2] (3) the Child Online Protection Act (COPA),[3] and, most recently, (4) the Children's Internet Protection Act (CIPA).[4] Some state legislatures have demanded that Internet Service Providers (ISPs) block certain designated sites altogether.[5] Federal attempts to regulate speech on the Internet have been

[1] 47 U.S.C. § 230 (1996).

[2] 18 U.S.C. § 2252 (1996).

[3] 14 U.S.C. § 1401 (1998).

[4] 17 U.S.C. § 1701: The Children's Internet Protection Act (CIPA) conditions federal E-rate funding on installation of filtering technologies in public schools and libraries

vigorously challenged. The Supreme Court has heard a large number of Internet cases and struck down several Federal statutes.

The most current attempt at regulation, the Children's Internet Protection Act (CIPA), conditions federal "E-rate" funding for schools and libraries upon installation of Internet blocking and filtering systems. The Federal Communications Commission's (FCC's) E-rate program provides money toward the cost of telecommunications services and equipment to public and private schools and libraries.[6] Depending on economic need and rural location, grants range from 20% to 90% of the cost of installing Internet capability in schools. CIPA requires that schools and libraries receiving these funds place blocking and filtering software on their Internet service.

Blocking and filtering software comes with its own set of ethical and logistical problems. Blocking systems are technologically flawed in that they both over-block and under-block as technology has not fully evolved to facilitate refined filtering. The software is fallible and easily bypassed by clever children. Programs quickly become obsolete and require constant maintenance and review.

Blocking also puts parents and educators in the difficult position of having to choose between over-blocking their children's access to web sites and risking exposure to potentially harmful Internet sites and usage. Possibly more upsetting is the fact that determination of what is harmful is often made not by parents, teachers, communities or even legislators. Instead, "acceptable" web sites are determined by the software providers themselves.[7] Cyber Patrol, for example, refuses to divulge a list of sites their software automatically blocks. *Consumer Reports* suggests that some people feel that refusal to divulge lists is indicative of a software provider making moral or political judgments about which Internet sites are appropriate for children.[8]

Ideally, the responsibility to censor should be left to the parents, schools

---

[6] 47 U.S.C. § 254 (h).

[7] Consumer Reports, "Digital Chaperones for Kids: Which Internet Filters Protect the Best? Which Get in the Way?" http://www.consumerreports.org/Special/ConsumerInterest/Reports/0103fil0.html, (last visited March 18, 2001).

[8] *Id.*

and communities rather than to software providers. This system of self-regulation would more closely parallel current computer use at home and school. Further, it teaches children that the Internet is a tool of infinite possibilities, to be used with caution and responsibility. Keeping regulation in the hands of parents, teachers, and the community ensures that the Internet is not "dumbed down" to a child's level of understanding.

II. BACKGROUND: SUPREME COURT TREATMENT OF REGULATION OF SPEECH IN NEW FORMS OF MEDIA

The First Amendment of the United States Constitution states: "Congress shall make no law...abridging the freedom of speech...or of the press".[9] Pinpointing exactly what the Framers of the Constitution meant by this Amendment and how it applies to legislation today continues to challenge the Supreme Court. This is especially true as technology continues to evolve and produce new forms of media such as the Internet.

In 1931, the Supreme Court addressed freedom of the press in *Near v. Minnesota.*[10] In *Near*, the Supreme Court held that there could be no prior restraint on publication holding that "charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication."[11] The Supreme Court noted that if the publication was libelous or defamatory, the victim could then seek remedy through defamation damages.[12]

As new forms of media became readily accessible to the general public, the Supreme Court has been charged with defining the extent of First Amendment protection of speech in the new forms of communication. In *Red Lion Broadcasting v. FCC*, the Supreme Court held that the FCC was allowed to interfere with the content of broadcast speech due to the scarcity of the radio spectrum.[13] Interference with content included

---

[9] U.S Const. Amend. I.

[10] *Near v. Minnesota*, 283 U.S. 697 (1931).

[11] *Id.* at 722.

[12] *Id.* at 722.

[13] *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).

"indecency regulation." *Red Lion* has not been overruled and remnants of its "scarcity doctrine" can be found in *Pacifica v. FCC* as a justification for regulation.[14]

In *Pacifica,* the Supreme Court held that broadcasting was a unique and pervasive medium that possesses the capability of thrusting its message onto unwilling adults and was particularly accessible to children.[15] As a result, broadcasting received less protection under the First Amendment than print media and regulation of it was evaluated under an intermediate scrutiny instead of strict scrutiny analysis.[16] Intermediate scrutiny means that as long as Congress has narrowly tailored legislation substantially related to an important governmental interest, then broadcast speech may be regulated as to time, place and manner.[17]

The Supreme Court continued to examine the extent of First Amendment protection on new media through the *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* case.[18] In *Denver Area,* the Court found that regulation of content on cable television was unconstitutional because less intrusive means were available to protect children and unwilling viewers from being subjected to questionable material.[19] Blocking technology was available, for example, in the form of the V-chip[20] and lock-boxes enabling parents and others to censor cable television themselves.[21]

The first Supreme Court decision regarding regulation of speech on the

---

[14] *Pacifica v. FCC*, 438 U.S. 726, 749 (1978).

[15] *Id.*

[16] Under strict scrutiny analysis, legislation must be narrowly tailored to achieve a compelling governmental interest. *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

[17] *Pacifica,* 438 U.S. at 749 (1978).

[18] *Denver Area Educational Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727 (1996).

[19] *Id.*

[20] Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996). The V-Chip or Violence Chip is a computer chip installed in televisions, which allows for blocking of shows with violence or profanity.

[21] *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. at 758.

Internet came in 1997 with *Reno v. ACLU,* as discussed in Section A(1) below.[22]

III. ANALYSIS

Courts should continue to refrain from allowing regulation of the Internet until effective blocking techniques evolve to a point at which they will become more effective. Mandatory censorship of speech and expression on the Internet should be found unconstitutional as an infringement of the First Amendment's Freedom of Speech. Recent attempts at censorship legislation have been found to be overbroad and not narrowly tailored. Further, legislatively mandated blocking software and ratings systems are inconsistent ways of protecting children from Internet porn and predators. They are over-inclusive, under-effective and penetrable by children.

Courts will most likely continue to decline to regulate content on the Internet heavily as long as the potential for blocking systems and self-censorship remains a viable option.

A. Constitutional Limitations On Internet Speech

1. *Reno v. ACLU*

The Supreme Court first invalidated Internet speech regulation in *Reno v. ACLU.*[23] There, the Court found attempts to regulate speech on the Internet through the Communications Decency Act to be unconstitutional.

The Court held that the Internet was not like broadcasting, because it was not patently pervasive[24] and was not easily accessible to children.[25] The Internet did not "thrust" itself into homes like radio and television, because it was

---

[22] *Reno v. ACLU,* 521 U.S. 844 (1997).

[23] *Id.*

[24] "Patently pervasive" means offensive speech that thrust itself into the home uninvited like broadcast.

[25] *Reno* is seemingly already outdated as many children now have access to computers with Internet service in their homes. Additionally, Internet service is often accessible with the push of a single button rendering access to the Internet simpler and easier than turning on a television.

necessary to go through several steps in order to go on line. One had to purchase a computer, obtain an Internet Service Provider ("ISP"), find a modem, and, in most cases, access the Internet with a password. As a result, the Internet and its intermediate scrutiny analysis do not apply. Instead, the Court found that speech on the Internet should be evaluated under standards similar to print media and deserves strict scrutiny analysis. Legislators must have a compelling reason to regulate the Internet and legislation must be narrowly tailored.[26]

There is little debate that the government's reason for regulating the Internet is compelling: the protection of children is a national and international concern. The chief debate is whether the legislation is narrowly tailored to achieve that goal without infringing on the rights of adult speech on the Internet. The Supreme Court has stayed relatively faithful to its analysis in both *Reno*[27] and *Denver*[28], and has struck down subsequent attempts to regulate speech on the Internet due to vagueness.[29]Repeatedly, legislation has been found not to be narrowly tailored and has been struck down.

2. Ashcroft v. ACLU

On May 13, 2002, in *Ashcroft v. ACLU*, the Supreme Court remanded the Child Online Protection Act (COPA) to the Third Circuit to determine if COPA's use of "community standards" to determine what is "harmful to minors" renders the statute as a whole overly broad or vague.[30] The Government is enjoined from enforcing COPA until the lower courts take further action.[31]

The drafters of COPA tried to create legislation that was narrower than the Communications Decency Act (CDA) by targeting speech and expression on the Internet that is "harmful to minors." CDA was extremely broad and tried to

---

[26] *See generally, Reno v. ACLU*, 521 U.S. 844 (1997).

[27] *Id.*

[28] *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

[29] *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

[30] *Id.*

[31] *Id.*

criminalize all material on the Internet that was indecent. The Supreme Court remanded the statute to the lower court to determine if the language in COPA was still too vague and to determine if Congress was unsuccessful in its attempt to narrowly tailor its definition of harmful speech. This action by the Court evinced continuing concern for narrowness of language in statutes related to regulating the Internet. The language in COPA, which includes subjective terms, like "harmful to minors," is an example of overly broad legislation that likely will eventually be invalidated by the Supreme Court.

3. *Ashcroft v. Free Speech Coalition*

Another example of an overly broad legislative attempt to regulate the Internet is the Child Pornography Prevention Act (CPPA). Recently, in *Ashcroft v. Free Speech Coalition,* the Court struck down CPPA for being vague and far-reaching.[32] On April 16, 2002, in a 6-3 ruling, the Court struck down CPPA for using overly broad language. Also at issue was causation; the government failed to show a nexus between computer-generated pornography and the exploitation of real children.

CPPA banned virtual child pornography depicting children engaged in sex acts on the Internet. It was not necessary that the depictions be real: images were criminal if they were computer-generated or if a young-looking adult was involved in the pornography. The statute outlawed "any visual depiction . . ." that "is, or appears to be, of a minor engaging in sexually explicit conduct."[33]

While obscenity and child pornography are categorically denied First Amendment protection, the language in CPPA sought to regulate "sexually explicit" speech, a type of speech protected by the Constitution. In *Reno v. ACLU,* the Court had rejected legislation that included overly broad language restricting content on the Internet other than obscenity and child pornography.[34] In keeping true to this precedent, the Court was correct to demand more narrowly tailored language.

---

[32] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

[33] 18 U.S.C. § 2256 (8) (B).

[34] *Reno v. ACLU*, 521 U.S. 844 (1997).

4. American Library Association v. United States

The latest attempt by Congress to regulate speech on the Internet was the Children's Internet Protection Act (CIPA). On May 31, 2002, a three-judge panel struck down portions of CIPA saying that it was impossible for libraries to install filters that would neither underblock nor overblock speech. The complainants in *American Library Association v. United States* advocated the constitutional rights of poor people who did not have access to computers at home and who relied on libraries and schools for Internet access.[35] They were concerned that if blocking were installed on Internet systems in the libraries, the Internet would be reduced to a level useful only to children.[36] Many sites that are useful and not offensive to adults would have been inaccessible (NOW site, Planned Parenthood site, AIDS quilt site).[37]

The *Multnomah* Complaint states that CIPA imposed an impossible constitutional requirement on libraries by insisting on technology to block only speech that is unprotected by the Constitution.[38] It is difficult for "E-rate" funding recipients to effectively filter unprotected speech from the Internet.[39] The Complaint further states that by forcing libraries to install technology, CIPA would have suppressed "ideas and viewpoints that are constitutionally protected from reaching willing patrons.[C]IPA thus impose[d] a prior restraint on protected speech in violation of the Constitution."[40]

The District Court found that CIPA was overbroad and unconstitutional because it would have mandated blocking of substantial amounts of

---

[35] *American Library Association v. United States.*, 201 F.Supp. 2d 401 (E.D.Pa. 2002).

[36] *Id.*

[37] How To Disable Your Blocking Software, *available at*, www.peacefire.org (last visited on March 26, 2001).

[38] *Multnomah v. United States*, 2001 U.S. Dist. LEXIS (March 26, 2001). (*Multnomah v. United States* was combined with *American Libraries Association v. United States*, 201 F.Supp. 2d 401 (E.D.Pa. 2002).

[39] American Libraries Association, 201 F. Supp.2d at 11

[40] *Id.* at 3.

constitutionally protected speech.[41] Also, the court found that blocking systems required in CIPA would not protect children from disabling the systems themselves and that filtering was not a consistently effective means of protection.[42] The District Court found that less restrictive means of protecting children through Internet-related harm can be found through enforcement of Internet use policies, parental consent, privacy screens, recessed monitors, and placement of unfiltered Internet terminals outside of sight lines.[43]

B. Limitations Of Blocking And Filtering

As technology stands now, blocking and filtering identifiable Internet web sites seems to be the only way to protect children from accessing sites that may be harmful to them and from preventing cyber-predators from accessing children. The decision to block raises two questions. Is blocking effective? Who will decide what content should be blocked and from which children?

Although blocking technologies are continually being updated and are in constant development, they generally are fraught with problems. Blocking systems have been known to overblock important educational material because web sites contained key "trigger" words. The software also underblocks by allowing potentially harmful sites to slip through to unwilling Internet users. Additionally, filtering or blocking software blocks legitimate sites based on moral or political judgments made by the software authors and others.[44] Censorship watchdog groups are constantly adding new sites to their list of questionably blocked material. Sites for the AIDS Quilt and for The National Organization for Women (NOW) have been recently blocked.[45] The AIDS Quilt

---

[41] *Id.* at 40.

[42] *Id.*

[43] *Id.*

[44] Consumer Reports, Digital Chaperones for Kids: Which Internet Filters Protect the Best? Which Get in the Way?, available at, http://consumerreports.org/Special/ConsumerInterest/Reports/0103fil0.html, (last visited November 24, 2002) (last visited March 18, 2001)

[45] Blocked Site of the Day, available at, www.peacefire.org, (last visited November 24, 2002).www.peacefire.org "Blocked Site of the Day".

site contains statistics about the spread of AIDS.[46] NOW's site included references to the word "lesbian."[47]

Blocking software companies consider their lists of sites to be proprietary and will not disclose the lists to customers. Schools and libraries using current technologies are unaware of what is actually being blocked and they have little control over the list.[48]

Children are technologically and politically savvy and are fully aware of ways to disable blocking both at school and at home. Kids regularly post rogue web sites on the Internet and include instructions on how to de-activate software, as well as giving children information about their constitutional right to freedom of speech.[49] Censorship watchdog groups also freely provide information to kids on how to de-activate blocking and filtering, advertising that "it's not a crime to be smarter than your parents."[50]

C. The European Union Model: Self Regulation

The decision of whether to regulate the Internet in the interests of protecting children is an international as well as a U.S. concern. The European Union (EU) has devoted quite a bit of time and legislation to the issue.[51] The European Commission has recommended that the European Council refrain from

[46]

legislation that censors the Internet, and instead promotes self-regulation.[52]

The European Commission, reporting on the situation at the request of the EU, published a report saying that their goals were to promote industry self-regulation and content monitoring schemes.[53] They recommend a strategy that puts the responsibility for regulating the Internet into the hands of software developers.[54] The recommended strategy is threefold:

1. Promote industry self-regulation and content monitoring schemes.

2. Encourage the industry to provide filtering tools and ratings systems which allow parents or teachers to select content appropriate for children in their care while allowing adults to decide what legal content they wish to access and which take account of linguistic and cultural diversity.

3. Increase awareness of services provided by industry users, in particular parents, teachers and children, so that they can better understand and take advantage of the Internet.[55]

With the exception of the ratings scheme, the EU plan is a very useful template for the United States to use in drafting future Internet legislation. The ratings plan is unrealistic and should be exempted because the Internet is too vast to ever have all its sites rated in a consistent and reliable manner in the foreseeable future. However, the EU's plan to encourage industry self-regulation and to increase media literacy programs for parents, teachers and children is an excellent way to preserve free speech on the Internet while facilitating Congress' goal of protecting children from the harm that stems from the Internet.

---

[52] Safer Internet Action Plan, *available at* http://europa.eu.int/information_society/programmes/iap/index_en.htm, (last visited November 24, 2002).

[53] Council of Europe, European Forum on Harmful and Illegal Cyber Content, *available at* http://www.coe.int/t/e/cyberforum/, (last visited November 24, 2002).

[54] *Id.*

[55] *Id.*

IV. CONCLUSION: United States Model Based On European Union

The United States could adopt a strategy modeled on the European Union approach and push for legislation that will give industries incentives to develop more effective blocking software. By keeping the choice of what and if to regulate in the hands of teachers, parents, and communities, children will be able to attain the maximum benefit from the Internet within community standards of decency, appropriateness and usefulness. Although this will be difficult to accomplish, moral and political judgments about appropriate content should be made by consumers through software that allows blocking software content to be specifically identified. This type of software may not be available at present but consumers at least should have access to software "blocked sites" lists so that they can decide if they agree with the sites automatically blocked by their software.

Perhaps the United States should continue to pressure technology developers to hone their blocking capabilities to make them more efficient and to more accurately reflect the needs of the community. Congress should develop legislation that promotes the accurate screening of speech truly harmful to minors, or is not constitutionally protected. Industry responsibility can be directly and indirectly affected through legislation that encourages education for parents and teachers about blocking, rating, and filtering.

Congress should direct its efforts toward industry adoption of blocking systems and toward education campaigns on Internet ethics and literacy, instead of spending their time and taxpayers dollars with futile attempts at restricting speech on the Internet through overly broad legislation.