

[US] A Second US Court Issues a Preliminary Injunction Against Enforcement of the Communications Decency Act

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*L. Fredrik Cederqvist
Communications Media Center at the New York Law School*

On 29 July 1996, a US District Court in New York became the second court (for the first court decision see IRIS 1996-7: 7) to order a preliminary injunction against enforcement of section 223 of the Communications Decency Act ("CDA") since the CDA was enacted on 8 February of this year (see IRIS 1996-3: 7-10). Adopted to protect minors using on-line computer services, section 223(d) prohibits transmission to a person under 18 years of age, or making available to a person under 18 years of age, sexually explicit material that is patently offensive as measured by contemporary community standards. Violators are subject to criminal penalties of up to a two-year prison sentence and fines up to \$250,000.

In *Shea v. Reno* , the court addressed two issues: (1) whether the CDA impinges on free speech rights for vagueness so that the ordinary citizen would not be afforded adequate notice whether his conduct fell under the purview of the statute, and (2) whether the CDA targets a broader category of speech than necessary and constitutes a ban on constitutionally protected speech between adults. The court found that the statute appropriately distinguished which speech was covered by the statute by referring explicitly to the definition of indecency used by the FCC, which has been construed by the courts for other forms of media. However, the court ruled that the statute would prevent adults from engaging in constitutionally protected speech.

The court explained that characteristics of the Internet dictate that once material is placed on-line the original speaker generally has little control over who gains access to that material. Thus, in order to assure that children do not gain access to indecent material, the speaker would necessarily have to limit such speech to adults as well. The Government conceded this to be the case, but argued that two defenses provided elsewhere in the CDA would adequately protect on-line content providers from prosecution under the statute. First, section 223(e)(5)(A) provides protection to a person that takes "good faith, reasonable, effective, and appropriate actions" to restrict or prevent access by minors using any method which is feasible under available technology. Second, section 223(e)(5)(B) provides protection to a person that restricts access to materials by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

The court found that neither defence provided adequate protection to individuals against prosecution under the CDA. The court noted that the "good faith" defence does not protect a speaker where no technology exists to prevent minors from gaining access to indent materials. Indeed, the government stated that the use of available technology would only constitute "substantial evidence" that a speaker had taken actions necessary to keep indecent materials from minors. The court also noted that available technologies prevent minors from receiving materials intended exclusively for adults only with cooperation from parties other than the speaker. Thus, the use of adult access codes, for example, can't adequately assure the original speaker that minors will not receive a particular message.

Shea v. Reno, United States District Court for the Southern District of New York, 29 July 1996, 930 F. Supp. 916.

