[US] Supreme Court Declares Internet Decency Act Unconstitutional

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

On 26 June 1997, the United States Supreme Court ("Court") struck down as unconstitutional sections 223(a)(1)(B) and 223(a)(2) as well as 223(d)(1) and 223(d)(2) of the Communications Decency Act of 1996 ("CDA"), which was enacted by Congress to restrict indecent, sexually oriented materials from being displayed to minors over the Internet. The decision in Reno v. ACLU was the first time the Court considered free speech rights in cyberspace (see IRIS 1996-7: 7).

Section 223(a) prohibits the transmission of obscene or indecent material on the Internet where there is knowledge that the recipient of the communication is under 18 years of age. Section 223(d) prohibits transmission to a person under 18 years of age, or making available to a person under 18 years of age, 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 USD 250,000.

The Court distinguished the CDA from cases in which it had previously upheld limitations on indecent speech. The Court noted that broadcasting, which carries an extensive history of regulation, was far more likely to result in accidental exposure to indecent materials absent such regulation. Access to indecent materials on the Internet, on the other hand, generally requires several affirmative steps, which makes accidental exposure a much less likely. In addition, the Court noted that the Internet does not lack capacitye.g., spectrum - which has served as the anchor allowing regulation of the broadcast medium due to the lack of alternative channels of communication for other speakers.

Instead, the Court likened the CDA to legislation designed to illegalize sexually oriented prerecorded telephone messages, which the Court had previously struck down. In that case, the Court determined that the listener had to take affirmative steps to receive the communication, so the speech was reasonably contained to only those who sought it. Blanket restrictions on such speech was determined to be excessive to meet the goal of keeping such speech from children.

The Court found the CDA to be overly vague to the extent that it would be extremely difficult for a speaker to determine beforehand whether certain communication would fall under the CDA's provisions, causing a chilling effect on

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all speech. The Court found this particularly troublesome because the CDA is a criminal statute. Coupled the vagueness in the CDA, criminal prosecution under the CDA carries the risk of discriminatory enforcement. The Court also found that the CDA was not sufficiently tailored to burden only speech that was necessary to further its goal of protecting children from exposure to indecent materials on the Internet. In order for a speaker to make certain speech over the Internet did not reach minors, the Court determined, the statute would also burden protected communications among adults.

In defending the CDA, the government argued that affirmative defenses included in the statute would alleviate the problematic enforcement of the statute. The Court rejected these defenses. First, the court noted that the statute requires a speaker to take "good faith, reasonable, effective" actions to ensure that minors do not receive indecent materials on the Internet. Due to the open, and often anonymous, nature of the Internet, the defense of "effective" actions was found to be illusory. Specific actions, such as "tagging" (labeling) materials to be sexually oriented, or requiring verified credit card or other forms of adult identifications in order to access sexually explicit information, would not be economically feasible for the average noncommercial user.

US Supreme Court, Reno v. ACLU, 26 June 1997, N°96-511

http://www.cmcnyls.edu/public/USCases/CDA-Des.htm

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