



## 14th BILETA Conference: “CYBERSPACE 1999: Crime, Criminal Justice and the Internet”.

Monday, March 29th & Tuesday, March 30th, 1999.  
College of Ripon & York St. John, York, England.

### Free Speech, Crime, and the Challenge of Advancing Technology

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In recent decades, "speech technology" has developed rapidly and has taken many different forms (*i.e.*, cable television, the internet and satellites). The internet, in particular, poses a difficult challenge for society because it contains pornography, obscenity, and other forms of "indecent" material, and it is easy for children to gain access to such material. U.S. courts have struggled with the problem of how to reconcile the internet, and other more advanced technologies, with traditional First Amendment free speech doctrine. For many years, U.S. courts distinguished between so-called "traditional forms" of technology (*i.e.*, newspapers and handbills printed on printing presses), and other forms of technology, in particular broadcast technology (*i.e.*, radio and television). While the courts have always provided strong protections for traditional forms of technology, they have provided less protection to broadcast technology.

The "new" technology that has developed in recent years, in particular the internet, has challenged the dichotomy between "traditional" technology and broadcast technology, and has forced the U.S. Supreme Court to reconsider its precedents relating to technology. This reconsideration has made it more difficult to regulate the internet for the "health, welfare and morals" of society. This paper analyzes the scope of government authority in light of recent precedent.

#### I. The Evolution of Free Speech Doctrine

In the late eighteenth century, when the First Amendment to the U.S. Constitution was ratified, the American people had limited avenues available of communication available to them. Anyone could stand on a soapbox on a corner and preach to the public. In addition, those who owned a press or had the means to hire a printer, could publish newspapers or handbills. But modern forms of technology were unknown even to the most prescient of that time.

In general, the U.S. Supreme Court has been highly protective of speech stated in traditional forms. Numerous examples of this protectiveness can be cited. For example, in *New York Times Co. v. United States*, the Court refused to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy" despite claims of an adverse impact on national security. Moreover, although *Beauharnais v. Illinois* stated that some speech is not entitled to First Amendment protection -- including the "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words" -- in *New York Times Co. v. Sullivan*, the Court overrode *Beauharnais'* suggestion that defamation is not protected under the First Amendment. Likewise, in *Near v. Minnesota*, the Court articulated a broad rule against prior restraints in a

case where the county attorney of Hennepin county sued to enjoin publication of what was described as a "malicious, scandalous and defamatory newspaper." In *Brandenburg v. Ohio*, the Court even limited a legislature's right to prohibit advocacy of illegal action by striking down Ohio's Criminal Syndicalism Statute as applied to a Klu Klux Klan rally held in Ohio, and it did so even though there was talk of "revengance" as well as ethnic and racial slurs.

"Traditional" technology is not completely insulated from governmental regulation. The Court has held that the government has the right to prohibit "obscenity," as well as so-called "kiddie porn" -- pornographic pictures of children. In addition, in *Ginsberg v. New York*, the Court upheld a New York statute prohibiting the sale of material that was deemed to be "obscene" for minors even if not deemed "obscene" for adults. In that case, the Court emphasized the "State's independent interest in the well-being of its youth" and the parent's interest in directing the upbringing of their children. Nevertheless, cases like *Miller*, *Ferber* and *Ginsberg* are the exceptions that prove the general rule. Despite the Court's generally protective approach to traditional speech forms, the Court has been less protective of the broadcast media. In *Red Lion Broadcasting Co. v. FCC* the Court concluded that the government could regulate the content of radio and television broadcasts under the so-called "Fairness Doctrine." That Doctrine required broadcast licensees to practice editorial fairness and balance, something which could not be required of newspapers. In upholding the Fairness Doctrine, the Court noted that "[a]lthough broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them." The Court noted that "[w]hile there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to post an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." The Court upheld the Fairness Doctrine despite claims that the Doctrine would force broadcasters to engage in self-censorship and that their coverage of matters of public interest would be unduly circumscribed.

The Court's more restrictive approach to the broadcast media is most dramatically revealed in *FCC v. Pacifica Foundation*. In that case, the Court held that the FCC could prohibit a radio station from broadcasting George Carlin's "Filthy Words" monologue. It did so at the behest of a man who complained after hearing the broadcast while driving with his young son. The Pacifica Foundation, which broadcast the material, argued that the monologue was broadcast as part of "a program about contemporary society's attitude toward language," and characterized Carlin as a satirist who was poking fun at our attitudes toward these words. In other words, the broadcast involved material of literary, artistic, social and political value deserving of First Amendment protection. Describing the broadcast as "vulgar," "offensive" and "shocking," the Court concluded that the FCC could relegate the broadcast to late night hours when children would be less likely to be listen. The Court gave two justifications for its decision: the invasive nature of the technology which derives from the uniquely pervasive presence of the broadcast media in the lives of Americans; & the fact that broadcasting is uniquely accessible to children.

Over the last decade, as "new" technology has taken center stage (*i.e.*, the internet, satellites and cable television), the Supreme Court has been faced with difficult questions about how to fit this new technology into its existing precedent. Would the Court apply its "traditional" technology precedent, or would the Court apply its broadcast precedent? Many of the new technologies were similar to broadcast technology in that they can enter millions of homes. Indeed, unlike radio and television which can be broadcast only a limited distance, many new technologies can transmit information around the world at the flick of a button.

However, "new" technology can be distinguished from broadcast technology because it is decidedly more democratic. Anyone who can afford a computer and the price of an internet connection can "broadcast" information to people around the world. Thus, the "scarcity"

rationale that the Court used in *Red Lion* to justify regulation of radio and television simply does not apply. Tens of millions of people now have internet access, and the number is expected to grow exponentially over the next couple of years. In part, this growth is due to the fact that the barriers to entry are low. While many people gain access to the internet through their employer or a university, anyone can get "on line" through an internet provider such as Microsoft Network, CompuServe, America Online and Prodigy, or through their local library or a storefront "computer coffee shop." Those who do gain access can connect to millions of others through chat rooms, e-mails, listservices (which retransmit e-mails to everyone on the list), news groups, and the "World Wide Web."

While the democratic nature of the internet eliminates the scarcity rationale, the ease of access means that children can gain easy access to the internet through home computers. As a result, children can be exposed to material that is unsuitable for them including sexually explicit material. In the *Pacifica* case, the Supreme Court recognized that the government is entitled to protect children from indecent communications that an adult would have an unfettered right to receive. Moreover, unlike radio, which can restrict programs to certain hours of the day, when children are less likely to be listening, the internet is available 24 hours a day. A web page or web site is constantly available, and listserves can automatically forward e-mail. Given that internet communications are posted all over the world, it is virtually impossible to restrict such communications to certain hours.

Of course, the internet is different from broadcast technology in that few users will encounter sexually explicit materials accidentally. Before a document can be accessed, it is usually preceded by its title and a description of its contents, and sexually explicit material may also be preceded by a warning. Of course, these warnings do not prevent a child who sets out to access sexually explicit material from doing so. Parents can attempt to control their children's access to certain sites through barrier software. This software can limit child access to an approved list of sources that have been identified as containing no adult material, it may block designated inappropriate sites, or it may attempt to block messages containing identifiable objectionable features. But this software is not fool-proof. At present, although software can screen for certain suggestive words, it cannot screen for sexually explicit images."

The internet poses particular problems for children because it is difficult for one who communicates over the internet to verify the age and identity of those to whom they speak through web sites, listservices, chat rooms, or e-mails. Technology exists by which an operator of a Web site may condition access on the verification of requested information such as a credit card number or an adult password. However, such verification is only possible in connection with a commercial transaction in which the card is used, or by payment to a verification agency. Either approach imposes significant costs on internet providers, and would preclude those who cannot obtain a credit card.

## II. The CDA and the First Amendment

The U.S. Supreme Court's most important pronouncement on the internet came in *Reno v. American Civil Liberties Union*, and involved the Communications Decency Act (CDA). The CDA prohibited "indecent" and "patently offensive" communications on the Internet. Congress' stated objective was to protect children from harmful materials, and the CDA sought to accomplish that objective in two ways: First, it prohibited the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. Second, it prohibited the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. The CDA contained a defense for those who take "good faith, reasonable, effective, and appropriate actions" to prevent minors from gaining access to prohibited communications, and for those who restrict access by requiring proof of age.

The Supreme Court struck down most provisions of the CDA. The Court referred to the internet as "a unique and wholly new medium of worldwide human communication," and refused to apply its broadcast precedent to this new technology. The Court emphasized the democratic character of the internet, and noted that that it is not as invasive as broadcast technology. Instead of its broadcast precedent, the Court relied on its holding in *Sable Communications of Cal., Inc. v. FCC*, which struck down portions of the Communications Act that imposed a ban on indecent and obscene commercial telephone messages (a/k/a "dial-a-porn"). The Court upheld the statute as applied to obscene messages, but it struck it down the law as applied to indecent messages. The Court did so because the "dial it" medium "requires the listener to take affirmative steps to receive the communication."

In *Reno*, the Court struck down the CDA as applied to indecent speech, but upheld it as applied to obscene speech. The Court did so using its "traditional technology" precedent and by concluding that, since the CDA involved a content-based restriction on speech, the First Amendment imposed "an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA." The Court concluded that the government had failed to satisfy that burden. The Court took an aggressive free speech stance and noted that, if indecent speech could be prohibited from the internet, there would be an unnecessarily broad suppression of speech available to adults. The Court emphasized that the Government may not "'reduc[e] the adult population [to] only what is fit for children.'"

The Court also expressed concern that, if the government could prohibit a transmission whenever it is known that a potential recipient is a minor, that would preclude a substantial amount of information from the internet:

Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be minor--and therefore that it would be a crime to send the group an indecent message--would surely burden communication among adults.

This conclusion was required because existing technology did not include any effective method of preventing minors from obtaining access to information on the internet. The Court concluded that it would be "prohibitively expensive for noncommercial--as well as some commercial--speakers who have Web sites to verify that their users are adults." The Court suggested that the only reasonable alternative is for parents to use barrier software to prevent their children from accessing portions of the internet.

The Court was particularly concerned about the CDA's breadth. The Court noted that the CDA applied to all commercial speech and commercial entities, as well as to nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. In addition, the CDA's vague terms - "indecent" and "patently offensive" - included large amounts of nonpornographic material without regard to whether it contained serious educational value. Finally, the CDA purported to apply "community standards" meaning that any communication, whether intended for a local or a national audience, would be judged by the standards of the community most likely to be offended by the message.

The Court rejected any analogy to *Pacifica* noting that "'of all forms of communication' broadcasting had received the most limited First Amendment protection," and focusing on "the ease with which children may obtain access to broadcasts...." The Court pointed out that the *Pacifica* order was "issued by an agency that had been regulating radio stations for decades, targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when--rather than whether--it would be

permissible to air such a program in that particular medium." The Court noted that the CDA did not limit its application to particular times, and did not involve an agency "familiar with the unique characteristics of the Internet." In addition, the Court emphasized that the *Pacifica* order was not punitive whereas the CDA contained criminal penalties. Finally, "the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material."

The Court also rejected any analogy to *Ginsberg* holding that that decision is distinguishable in four respects:

[W]e noted in *Ginsberg* that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." Under the CDA, by contrast, neither the parents' consent--nor even their participation--in the communication would avoid the application of the statute. Second, the New York statute applied only to commercial transactions whereas the CDA contains no such limitation. Third, the New York statute cabined its definition of material that is harmful to minors with the requirement that it be "utterly without redeeming social importance for minors." The CDA fails to provide us with any definition of the term "indecent" ... and, importantly, omits any requirement that the "patently offensive" material ... lack serious literary, artistic, political, or scientific value. Fourth, the New York statute defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority.

The Court also rejected the government's characterization of the CDA as a "zoning" statute. In *Renton v. Playtime Theatres, Inc.*, the Court upheld a zoning ordinance that prohibited adult movie theatres from locating in residential neighborhoods. "The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the 'secondary effects'--such as crime and deteriorating property values--that these theaters fostered." In *Reno*, the Court distinguished *Renton* on the basis that the CDA applies to the "entire universe of cyberspace. And the purpose of the CDA is to protect children from the primary effects of "indecent" and 'patently offensive' speech, rather than any 'secondary' effect of such speech. Thus, the CDA is a content-based blanket restriction on speech, and, as such, cannot be 'properly analyzed as a form of time, place, and manner regulation.'" Justice O'Connor took issue with this conclusion.

Interestingly, in *Reno*, the government claimed a right to patrol the internet for "indecency" on the basis that "the unregulated availability of 'indecent' and 'patently offensive' material on the Internet is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material." The Court rejected the argument noting that the "dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal." The Court concluded, as "a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it."

## Conclusions

*Reno* is a landmark decision because it accorded broad First Amendment protection to the internet, and rejected the government's contention that the internet should be treated like broadcast technology. In doing so, the Court made it extremely difficult for the government to regulate the content of internet transmissions. Of course, the government has the right to prohibit certain types of communications from the internet (*i.e.*, obscenity and "kiddie porn"),

but the government may find it difficult or impossible to prohibit "indecent" communications based on their content. If the government is going to protect children from such communications, it will have to do so in ways that do not unduly restrict adult access to such materials. For example, as the Court suggested in *Reno*, the government might require communications to be "tagged" in a way that facilitates parental control of material coming into their homes, but the Court suggested that the government must be sensitive to the fact that some aspects of the internet are different than others and require differential treatment. The government cannot simply criminalize internet transmissions.