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Legal Update

Communications Decency Act of 1996†

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1. Last summer, various businesses, libraries, educational societies, and non-profit organizations challenged[1] the constitutionality of the Communications Decency Act ("CDA").[2] Plaintiffs contended that two provisions of the CDA that criminalize "indecent" or "patently offensive" Internet communications[3] infringe First Amendment and due process rights.

2. The day the President signed the CDA, the American Civil Liberties Union, the lead plaintiff, requested a temporary restraining order to enjoin

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1 ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), *cert. granted*, 117 S. Ct. 554 (1996); *see also* Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996) (granting a preliminary injunction prohibiting enforcement of the CDA on overbreadth grounds).

2 On February 8, 1996, President Clinton signed into law the Communications Decency Act, Title V of the Telecommunications Act of 1996. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (to be codified at 47 U.S.C. § 223(a)-(h)) [hereinafter CDA].

3 *See* 47 U.S.C.A. § 223(a)(1)(B) (West Supp. I 1996) (creating criminal liability for any person in interstate or foreign communications who, "by means of a telecommunications device, knowingly . . . makes, creates, or solicits, and initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age"); § 223(d)(1) (criminalizing the use of an "interactive computer service" to "send" or "display in a manner available" to a person under 18, "any comment, request, suggestion, proposal, image, or other communication that, in content, depicts or describes in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication").

enforcement of the provisions.[4] A three-judge panel of the district court held that the provisions violate the First Amendment and issued a preliminary injunction.[5]

3. While the Supreme Court may reverse, uphold, or narrow the legal outcome,[6] a several commentators have suggested that the factual findings are the most important aspect of the district court decision.[7] A significant portion of the factual findings consist of stipulations by both parties involving the history and technology of the Internet, how the Internet functions, how users access the Internet, and the extent of its use.[8] This extensive record of how the Internet operates may provide technical guidance to other courts deciding Internet cases.[9]

4. The court deduced the remainder of the findings from evidence and witnesses at trial. The court recognized the Internet's importance as a mass communication tool[10] and found the content on the Internet "as diverse as human thought" and "defying classification."[11] The court found the Internet's primary goal to be non-commercial because of the significant non-profit, educational, research, political, and public interest uses.[12]

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4 *See ACLU*, 929 F. Supp. at 827. In *Shea,* plaintiff Joe Shea filed suit on behalf of the *American Reporter*, an exclusively electronic newspaper. 930 F. Supp. at 922. Shea is the editor, publisher, and part-owner of the *American Reporter*. *Id.*

5 *See ACLU,* 929 F. Supp. at 824.

6 The Supreme Court heard oral arguments for the case on March 19, 1997. *See Supreme Court Hears Oral Argument in CDA Case,* COMM. TODAY, Mar. 20, 1997, *available in* 1997 WL 7465795; Edward Felsenthal, *Justices Show Concern Over Smut on the Net in Indecency-Law Case,* WALL ST. J., Mar. 20, 1997, at B12.

7 *See* Harvey Berkman, *Medium is Message: Courts Say Congress Goofed in CDA Focus on Smut, Not the Internet*, NAT'L L.J., Aug. 19, 1996, at A1; Bruce J. Ennis, *Applying the First Amendment in the Information Age*, *in* COMMUNICATIONS LAW 1996, at 881, 889, 891 (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. G4-3980, 1996); Michael Godwin, *Dancing in the Streets*, WIRED, Sept. 1996, at 92; James C. Goodale & Albert L. Wells, *Pivotal Internet Decision Voids Statute Restricting "Indecent" Speech*, *in* COMMUNICATIONS LAW 1996, at 931, 934 (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. G4-3980, 1996); Mark Sableman, *Internet's Promise and Novelty Revealed in Court Decision*, ST. LOUIS JOURNALISM REV., July 17, 1996, at 15.

8 *See ACLU*, 929 F. Supp. at 830-38.

9 *See, e.g.*, *Shea*, 930 F. Supp. at 924 (S.D.N.Y. 1996) (using the findings of fact in *ACLU* to aid its own fact-finding process).

10 *See ACLU,* 929 F. Supp. at 842-44.

11 *Id.* at 842.

12 *See id.*

5. The court stated that "[t]he Internet is therefore a unique and wholly new medium of worldwide human communication"[13] because it has significantly lower start-up costs than other media and it reaches a potentially world-wide audience.[14] The ease and low cost of using the Internet also allow non-profit and small groups to disseminate information widely, an ability previously possessed only by large organizations.[15] The court's high regard for the Internet is unusual because courts tend to underplay the significance of new media, and give them less constitutional protection.[16]

6. Although Congress analogized the Internet to traditional broadcast media, the court found the Internet to be significantly unlike television and radio broadcasting.[17] Unlike broadcasting, the distinction between a speaker and a listener is blurred.[18] Once a user enters any of the interactive forums, including newsgroups and chat rooms, a user can be a speaker and a listener at the same time. In this way, the Internet is unlike any other existing medium.[19]

7. Furthermore, accessing the Internet substantially differs from accessing broadcast reception. Internet access requires several affirmative steps, including access to a computer, use of a password, knowledge of appropriate commands, and the input of either an address or a search engine query.[20] "Communications over the Internet do not 'invade' an individual's home or appear on one's computer screen

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13 *Id.* at 843.

14 *See id.*

15 *See id.* at 842.

16 *See* Ennis, *supra* note 7, at 883-85; Godwin, *supra* note 7, at 92. *Compare* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (following restrictive regulation of the radio because of scarcity and limited access) *and* FCC v. League of Women Voters, 468 U.S. 364 (1984) (stating that the First Amendment protects broadcasting unless the regulation is narrowly tailored to further a substantial government interest), *with* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (stating that newspaper restrictions must be the least restrictive means necessary to serve a compelling government interest).

17 *See ACLU*, 929 F. Supp. at 858-59, 862-63; Godwin, *supra* note 7, at 92; Sableman, *supra* note 7, at 15; *see also* Shea v. Reno, 930 F. Supp. 916, 930 (S.D.N.Y. 1996) (explaining that through the CDA, "Congress sought to target interactive computer systems through which a listener or viewer, by definition, has the power to become a speaker," making it different from the legislation of one-way media where a user is solely a listener or viewer.).

18 *See ACLU*, 929 F. Supp. at 843.

19 *See id.* Indeed, *Red Lion* allows restrictive regulation of broadcasting precisely because not everyone can speak on the radio. *See Red Lion*, 395 U.S. at 376-77.

20 *See ACLU*, 929 F. Supp. at 844.

unbidden. Users seldom encounter content 'by accident.'"[21] This finding contradicts case law upholding regulation of indecent broadcasts because they invade the home or children may encounter it accidentally.[22] The judges distinguished sexually explicit content on the Internet from explicit broadcasting on the grounds that the title or description of a document will appear before the document itself, and most documents are preceded by warnings allowing a user to bypass the "offensive" material.[23]

8. The three-judge panel also made several findings of fact pertaining to currently available software and the technological feasibility of verification procedures, tagging, and content policing. The findings will be important if the Supreme Court affirms the statute's unconstitutionality and Congress tries to pass an altered CDA.[24]

9. The district court determined that parents can control access to information on the Internet through currently available software.[25] Although these programs cannot screen for sexually explicit images or text unless the software manufacturers know the site exists,[26] the court concluded that a "reasonably effective" method to restrict access "will soon be widely available."[27]

10. The district court was not so optimistic about age or credit card verification procedures designed to limit access by children. The court found no "effective way" to determine a user's age.[28] Furthermore, current technology does not allow the use of a credit card for age verification.[29] Even if it were feasible, the high

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21 *Id.*; *see also* Sable Comm., Inc. v. FCC, 492 U.S. 115, 127-28 (1989) (holding that nonobscene pornographic dial-in telephone services are different from broadcasting because callers must take affirmative steps to access the service's indecent materials).

22 *See* FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978); *cf.* Shea v. Reno, 930 F. Supp. 916, 940 (S.D.N.Y. 1996) (distinguishing *Pacifica* on the grounds that children cannot gain access to the Internet easily, and accidental indecent search results are rare).

23 *See ACLU*, 929 F. Supp. at 844; *cf. Pacifica*, 438 U.S. at 748-49 (finding warnings ineffective because the audience is constantly tuning in and out and may not hear the warnings).

24 *See* Godwin, *supra* note 7, at 92.

25 *See ACLU,* 929 F. Supp. at 838.

26 *See id.*

27 *Id.*

28 *Id.* at 844.

29 *See id.* at 845. Witnesses at trial testified that neither VISA nor MasterCard found the Internet sufficiently secure to process transactions involving credit cards. *See id.*

cost of verification would limit access and destroy the low cost attraction of the Internet, while creating undesirable delays in accessing sites.[30]

11. Finally, the court found the government's tagging proposal to be ineffective, burdensome, and costly to content providers.[31] The plan would require content providers to review all material they offer online. This would overwhelm large or understaffed providers and would also require a substantial degree of human judgment as to what is indecent.[32] This, in effect, would require a "worldwide consensus among speakers to use the same tag to label 'indecent' material."[33] Even without a consensus, the criminal penalties would cause users to err on the side of caution, thereby chilling speech.[34]

12. The court concluded in its findings of fact that speakers displaying arguably indecent material must "choose between silence and the risk of prosecution," especially since the CDA's defenses--credit card verification, adult access codes, and tagging--are "effectively unavailable."[35] It used this ultimate conclusion of fact to determine that the CDA is unconstitutional as a matter of law.

13. Whatever the Supreme Court's decision, these findings of fact will be critical to the outcome of the case. The Supreme Court's most recent technology and indecency case, *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,[36] applied *Pacifica* to cable television. However, the district court's findings of fact distinguish *ACLU* from *Pacifica* because an Internet user must act both deliberately and affirmatively to acquire information.[37] Furthermore, even if a user retrieved items accidentally, warnings eliminate any potential "assault" or

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30 *See id.* at 846-47.

31 *See id.*

32 *See id.*

33 *Id.* at 848.

34 *See id.* at 855-56. The court in *Shea* granted the injunction against enforcement of the CDA on this ground. Shea v. Reno, 930 F. Supp. 916, 916 (S.D.N.Y. 1996). The court found no feasible way to comply with the CDA's defenses and held that the penalties for violating the CDA would result in chilling protected speech. *See id.*

35 *ACLU*, 929 F. Supp. at 849.

36 116 S. Ct. 2374 (1996). The Court in *Denver* reasoned that cable programming is similar to broadcast television or radio since it is pervasive in homes, is very accessible to children, and offensive material "assaults" the user with little or no warning. *Id.* at 2386-87.

37 *ACLU,* 929 F. Supp. at 851.

surprise.[38] These findings of fact distinguish *ACLU* from *FCC v. Pacifica Foundation* and give the Court an opportunity to set the legal standard for the First Amendment in cyberspace.

38 *Id.*