

Internet Indecency Decision Points Way to Future Copyright Rulings

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On June 26, 1997, by a 7-2 vote, the Supreme Court found unconstitutional provisions of the Communications Decency Act (the “CDA”) which criminalized the transmission of indecent or patently offensive material to minors over the Internet. Because the case concerned the First Amendment, discussion of the decision in the press naturally focused on its Free Speech ramifications for the Internet. The Court’s very positive attitude towards the Internet, however, provides clues about how it might treat other Internet-related cases, particularly the liability of Internet service providers for the infringements of their subscribers. This article discusses these clues after briefly reviewing the Court’s decision.

I. The Decision

The CDA was enacted as part of the Telecommunications Act of 1996, and sought to protect minors from harmful material on the Internet. In *Reno v. ACLU*, ___ U.S. ___ (1997), the Supreme Court struck down certain provisions of the CDA as a violation of the First Amendment and, importantly, declined to apply to the Internet the limited First Amendment protection that it has applied to the broadcast media.

The CDA’s prohibitions on “obscene” material were not at issue here. Rather, the challenge was to the CDA’s broader prohibitions on “indecent” and “patently offensive” communications on the Internet. The Court did not find it necessary to reach the issue of whether these terms are so vague as to violate the Fifth Amendment. Instead, the Court held that these provisions were problematic for purposes of the First Amendment, in part because the terms are vague and undefined. This vagueness is of

particular concern where, as here, the statute is content-based regulation and also imposes criminal penalties. Further, the Court held that the CDA lacks the “precision” required by the First Amendment for content-based regulation. The Court concluded that the burden on non-obscene adult speech was unacceptable given that less restrictive alternatives exist, such as user-based software that permits parents to prevent their children’s access to inappropriate material.

In declining to apply to the Internet the more limited First Amendment protection that applies to the broadcast media, the Supreme Court noted the significant ways in which the Internet differs from the broadcast industry: (1) the Internet is not and has not been subject to the extensive governmental regulation that applies to the broadcast industry; (2) the Internet is not “invasive” in the way that broadcast programming is, because users seldom encounter content on the Internet by accident; and (3) unlike broadcast spectrum, the Internet is not a scarce commodity.

The Court also rejected the Government’s arguments that the CDA’s statutory defenses save the statute’s constitutionality. The Court held that the first of these defenses -- the “good faith, reasonable, effective, and appropriate actions” provision or “tagging” provision -- is illusory because no technology exists today that is guaranteed to be effective. In the Court’s view, the second and third defenses -- credit card verification and the requirement of adult identification -- could not be employed on an economically feasible basis by noncommercial speakers.

Finally, while the Court did not strike down the obscenity portions of the CDA, the majority declined to retain the challenged provisions by limiting their application in some way. According to the Court, the statute was so broad, and Congress’ signals so

inconsistent, that any narrowing of the statute by the Court would impermissibly invade the authority of Congress.

II. The IP Tea Leaves

Reading the CDA decision, one gets the impression that the Court truly admires the Internet. The decision conveys this impression through its word choice in its description of the Internet and its uses. The Internet “now enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is ‘a unique and wholly new medium of worldwide human communication.’” Slip. Op. at 2. With great enthusiasm the Court explained the many different sources for obtaining access to the Internet, and its “wide variety of communication and information retrieval methods.” Id. at 3. The Court remarked that there are thousands of newsgroups, “each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls.” Id. at 4. Quoting the district court, the Court noted that “[i]t is ‘no exaggeration to conclude that content on the Internet is as diverse as human thought.’” Id. The Court then turned to the World Wide Web, observing that from the readers’ viewpoint, it is comparable “to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.” Id. at 5. The Court added that from the publishers’ viewpoint, the Web “constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers.” Id.

In distinguishing the cases cited by the Government, the Court noted that the CDA is not a form of “cyberzoning” because it “applies broadly to the entire universe of cyberspace.” Id. at 21. Moreover, “the vast democratic fora of the Internet” have never

“been subject to the type of government supervision and regulation that has attended the broadcast industry.” Id. at 22. In a 1989 decision involving dial-a-porn, the Court “remarked that the speech restriction there amounted to ‘[b]urning the house to roast the pig.’ The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community.” Id. at 37. In closing, the Court stated that “[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.” Id. at 40.

In short, the Court rejected a statute it felt would endanger “the new marketplace of ideas” which is the Internet. Id. This protective attitude towards the Internet suggests that the Court would likely reject an interpretation of the Copyright Act which would similarly endanger the Internet. In recent years, content providers, either individually or through their trade associations, have brought copyright infringement actions against bulletin board services (BBSs) and Internet Service Providers (ISPs) for carrying infringing material uploaded by subscribers. In some cases, courts found direct liability for infringement of the reproduction right as well as vicarious liability and liability for contributory infringement. *See, e.g., Playboy v. Frena*, 839 F.Supp. 1552 (M.D. Fla. 1993). These cases have prompted ISPs to seek legislative relief from Congress, but the content providers have succeeded thus far in preventing Congress from acting.

Accordingly, there is a good chance that the extent of ISP liability for subscriber infringements will be determined by the courts -- and ultimately the Supreme Court. The leading ISP liability decision to date, *Religious Technology Center v. Netcom*, 907 F.Supp. 1361 (N.D. Ca. 1995), interpreted the Copyright Act in a manner favorable to ISPs, and the *CDA* decision indicates that the Supreme Court would interpret it similarly.

The *Netcom* court held that an ISP would be found contributorily liable only if it had knowledge of and substantial participation in the infringing activity. The distribution of infringing material would satisfy the substantial participation prong. Notice from the copyright owner would satisfy the knowledge prong, but “a possible fair use defense, the lack of copyright notices on the copies, or the copyright holder’s failure to provide the necessary documentation to show that there is a likely infringement” would provide the ISP with a reasonable basis for not having knowledge, and free it from contributory infringement liability. *Id.* at 1374. The *Netcom* court, therefore, made it fairly easy for the ISP to deny knowledge even if it had received notice from the rightholder.

The *Netcom* court was likewise reasonable, from an ISP perspective, with respect to vicarious liability. It found that an ISP would have vicarious liability only if it had the right and ability to control the infringer and it received a direct financial benefit from the infringing activity. The right and ability to control the infringer is a complex factual issue: could the ISP, by screening software or some other means, police the postings of all its subscriber. By contrast, the court gave ISPs an easy out with respect to direct financial benefit. It found that an infringing subscriber’s fixed access fee did not provide the ISP with direct financial benefit from the infringing activity, and thus freed the ISP from vicarious liability.

The court’s ruling on direct liability for infringing the reproduction right also favored ISPs. Although *Netcom*’s servers made random access memory (RAM) copies of the infringing works as they moved through its system, “*Netcom* did not take any affirmative action that directly resulted in copying plaintiffs’ work” beyond installing and maintaining its Internet access system. *Id.* at 1368. The court reasoned that if *Netcom* infringed the reproduction right, then so did every other server that carried the infringing

message as it traveled through the Internet, “regardless of whether that server acts without any human intervention” *Id.* at 1369. This would lead to “unreasonable liability” of “countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet.” *Id.* at 1369, 1372.

While acknowledging that “copyright is a strict liability statute,” the *Netcom* court held that “there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.” *Id.* at 1370. It interpreted the Copyright Act to require an “element of volition” because without such a requirement, the Internet could not operate efficiently. In other words, the *Netcom* court construed the Copyright Act narrowly -- some might say creatively -- so as to protect the Internet.

The Supreme Court’s effusive language concerning “the vast democratic fora of the Internet” indicates that it too would construe the Copyright Act narrowly so as to protect the Internet. The Court probably would reach the same result as the *Netcom* court, either by agreeing with its interpretations concerning knowledge, direct financial benefit, and volition, or by liberal interpretations of Section 107 (fair use) and Section 117 (copying as an essential step in the use of a computer program). Of course, until the issue reaches the Supreme Court, the threat of copyright liability will cast a dark shadow on ISPs’ business plans.