

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
AMERICAN CIVIL LIBERTIES UNION, et al., Plaintiffs v. JANET RENO, Attorney General of the United States, Civil Action Defendant No. 963 _ AMERICAN LIBRARY ASSOCIATION, et al., Plaintiffs v. Civil Action No. 96-1458 UNITED STATES DEPT' OF JUSTICE, et al., Defendants_
ACLU PLAINTIFFS' POST-TRIAL BRIEF
IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

The 47 plaintiffs in these consolidated actions challenge the constitutionality of portions of the Communications Decency Act of 1996 (the CDA), which criminalize making "indecent" or "patently offensive" online communications available to any person under age 18.(1) The ACLU plaintiffs also assert, and the government concedes, that the CDA's amendment to 18 U.S.C. 1462(c), criminalizing online communications about abortion services, is unconstitutional.(2) Following five days of hearings, the ACLU plaintiffs now submit this post-hearing brief in support of their motion for preliminary relief enjoining the "indecent" and "patent offensiveness" provisions of 47 U.S.C. 223(a)(1)(B), (a)(2), and (d).

In their opening brief, the ACLU plaintiffs argued that the "indecent" and "patent offensiveness" provisions of the CDA were unconstitutionally vague and overbroad, and suppressed valuable, constitutionally protected expression without any showing by the government that its broad criminal ban was the least restrictive means available to achieve any compelling state interest.(3) The testimony at the five days of hearings amply supported these contentions. First, numerous witnesses, including the government's, did not understand or could not give coherent descriptions of what they thought 223(a) and (d) prohibited. Second, on its face and as applied to a broad range of online speech on sexual subjects or containing vulgar words, the CDA is plainly overbroad, sweeping within its terms communications on political, literary, artistic, science, health, and other subjects that are constitutionally protected and have serious value for older minors as well as adults. Indeed, the testimony demonstrated that because of the nature of online communications, a substantial number of content providers, from nonprofit organizations to unmoderated interactive forums, simply have no technologically or economically feasible way of screening out minors; the CDA thus becomes a total criminalization of constitutionally protected "indecent" or "patently offensive" speech.

The government was also unable to establish any compelling state interest that the CDA served -- in part, no doubt, because 223(a) and (d) sweep so broadly and give such unbridled discretion to prosecutors to decide what is indecent or patently offensive according to some undefined community standard. The

government certainly did not meet its burden of showing that the statute served its asserted interest in protecting minors by methods that imposed the least restrictive possible burden on First Amendment rights.(4) Indeed, the evidence showed the contrary -- that the CDA, despite its draconian approach, will be ineffective in shielding minors from "indecent" or "patently offensive" material in the almost 50% of online communications that originate abroad, while parental screening mechanisms, by contrast, although admittedly not foolproof, have a far greater probability of actually blocking minors' access to sexually explicit material that may concern their parents or other adults.(5)

In the face of the CDA's overwhelming constitutional deficiencies, the government's response appears to be a proposed rewriting of 223(a) and (d) to cover only (or mostly) "pornography," and of 223(e), the section of the statute outlining "good faith" defenses to criminal liability, to permit or mandate self-labeling by online speakers or other content providers, combined with a presumed or hoped-for voluntary assumption of identity/age screening and blocking duties by the operators of Web browsers or other access providers somewhere down the communications pipeline. But, as we will show in I, infra, the operative terms in (a) and (d) cannot be saved from invalidation by the radical surgery that the government proposes; indeed, the government's own witnesses contradicted any claim that the CDA could be narrowly construed so that it did not include mere vulgar expressions or non-"pornographic" sexual subject matter. Moreover, the government's proposed definitional revisions would not cure the CDA's basic First and Fifth Amendment defects: the Act would still be unconstitutional because it effectively bans protected communications to adults as well as minors.

As to the government's tagging and blocking proposal, it cannot be a coherent defense to a criminal law that one is relying upon voluntary future action by entities not subject to the law -- in this case access providers and the manufacturers of browser software.(6) Moreover, self-labeling as proposed by the government would create new constitutional dilemmas by coercing speech under vague and subjective standards which would inevitably cause self-censorship of a substantial amount of protected and valuable expression. See infra, III.

FACTS

We will not recount in detail here the facts adduced at trial or in the numerous declarations and exhibits submitted by the parties, but will rely upon the Plaintiffs' Joint Proposed Findings of Fact (hereinafter "Prop. Fdgs."), and will cross-reference that document where appropriate. In very brief summary, however, these are the facts of the case:

The ACLU plaintiffs represent a wide variety of online speakers, including providers of information and ideas on World Wide Web sites, bulletin boards, mail exploders, and Usenet newsgroups; receivers of all these various forms of online speech; online access providers; users of e-mail; and participants in newsgroups and real-time chatrooms. The subject matter of their speech ranges from human rights, censorship, pornography, and lesbian and gay issues, to safer sex, rape in prison, and use of the "seven dirty words." None of the plaintiffs are pornographers, as that term is commonly understood,(7) but all of them provide or receive online speech that is sexually explicit or contains vulgar words, including detailed, graphic descriptions of rape and torture, explicit safer sex information and illustrations, discussions of masturbation and the meanings of the word "fuck," or art and literature about sexual relationships and sexual pleasure. Many of the plaintiffs believe that the information and ideas they convey online about these and other sexual issues are valuable, not harmful, for older minors -- a proposition not disputed by the government. Indeed, the record is undisputed that much of the sexually explicit speech that falls within the terms of the CDA has value for older minors, and that even exploitative or distasteful sexual material cannot be presumed to cause psychological harm.

Many of the ACLU plaintiffs are individuals or nonprofit organizations with limited budgets; some rely heavily on volunteer labor. For them, compliance with the CDA would be not only economically burdensome or prohibitive, but technologically unfeasible. Moreover, they do not know what the terms "indecent" and "patently offensive" mean, and so would be at a loss to determine which of their considerable volume of online communications must be shielded from minors under the Act. In addition, many of them believe that free and anonymous access to their speech is critical, so that requiring payment and/or even proof of identity and age will deter substantial numbers of their audience, both adult and minor, from accessing important and even life-saving communications.

The online world is vast, interactive, and quickly evolving. Communities form across local and even national boundaries. Indeed, more than 40% of online communications now originate outside the United States (where the CDA cannot be expected to reach); and that number is increasing.⁽⁸⁾ Moreover, given the nature of the online medium, it would be costly and cumbersome if not impossible for many content providers to identify each of their communications that might be "patently offensive" or "indecent" and then screen out all those under 18 who may access those communications. By contrast, less burdensome alternatives such as Surfwatch, PICS, and a variety of other blocking mechanisms, enable parents and other adults much more effectively to shield minors from sexually explicit online material by blocking it at the receiving end.

The evidence in summary showed that the CDA, if not enjoined, will either force online speakers to purge all their communications of content that might be deemed "indecent" or "patently offensive," or radically restrict and restructure cyberspace by eliminating the many parts of the Internet that cannot readily accommodate adult ID checks for every visitor.

ARGUMENT

I. THE CDA BANS "INDECENT" OR "PATENTLY OFFENSIVE" SPEECH IN BROAD AND VAGUE TERMS, AND CANNOT BE REWRITTEN AS THE GOVERNMENT PROPOSES

The Justice Department's efforts to rewrite and thereby narrow the CDA to a statute that might be more constitutionally defensible should not distract the Court from the actual terms of the law, and Congress's purpose in enacting it. Congress's choice of the terms "indecent" and "patently offensive" was not accidental, and cannot simply be equated with "pornography," whatever the government may mean by that term.⁽⁹⁾

As the Supreme Court made clear in Virginia v. American Booksellers Association, 484 U.S. 383, 397 (1988), it is only if a statute is "'readily susceptible' to a narrowing construction" that such an interpretation will be applied to save an otherwise questionable law.⁽¹⁰⁾ Thus, in Blount v. Rizzi, 400 U.S. 410, 419 (1971), the Supreme Court refused to salvage a federal obscenity law by adopting a narrowing construction because it was "for Congress, not this Court, to rewrite the statute." As the Third Circuit ruled recently in rejecting another Justice Department attempt to narrow a penal law, "the starting point is always the language of the statute itself. ... Courts presume that Congress expressed its legislative intent through the ordinary meaning of the words it chose to use." United States v. Knox, 32 F.3d at 744. Further, a court may not "rewrite a statutory scheme and 'create distinctions where none were intended.'"

Consumer Party v. Davis, 778 F.2d 140, 147 (3d Cir. 1985) (quoting American Tobacco Co. v. Patterson, 456 U.S. 63, 71 n.6 (1982)).(11)

Congress's use of the terms "indecent" and "patently offensive" derive from Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978), which upheld the FCC's authority to require time-channeling of constitutionally protected "indecent" radio broadcasts. The FCC derived its authority from 18 U.S.C. 1464, which prohibits both obscenity and "indecent" in radio communications.(12) The FCC at the time defined "indecent" to mean "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." See Pacifica, 438 U.S. at 732. This definition in turn derived from the second prong of the Supreme Court's three-part definition of obscenity in Miller v. California, 413 U.S. at 24.

It was understood at the time of Pacifica, and has been the case ever since, that "indecent" (or "patently offensive"), as opposed to "obscene" communications, may lack any of the prurient appeal commonly associated with pornography, and may contain serious literary, artistic, scientific, or other value.(13) Indeed, this was obvious from the "indecent" definition's elimination of the "serious value" and "prurient interest" prongs of the Miller obscenity test, and from the fact that the comic monologue at issue in Pacifica was not by any stretch of the imagination "pornography." (It was merely a numbing comic repetition of the famous "dirty words" in a satiric context.)(14) The FCC's enforcement of its "indecent" standard since Pacifica has, accordingly, encompassed sexually suggestive but nonpornographic comic routines like radio host Howard Stern's, as well as serious literary efforts such as the theatrical work, "Jerker," for the broadcast of which the agency imposed "indecent" sanctions in 1987. See Action for Children's Television v. FCC, 852 F.2d 1332, 1336 (D.C. Cir. 1988); see also John Crigler & William J. Byrnes, Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy, 38 Cath.U.L.Rev. 329, 338-41 (1989) (describing indecision over broadcast of Ulysses); United States v. Evergreen Media Corp., 832 F.Supp. 1183 (N.D.Ill. 1993) (challenge to FCC sanction of radio station that broadcast talk shows containing sexual innuendo). As the FCC made clear in KSD-FM, Notice of Apparent Liability, 6 FCC Rcd 3689 (1990), the news value of a broadcast (in that case, about a highly publicized alleged rape) did not save the broadcast from "indecent"; "the merit of a work is 'simply one of many variables' that make up a work's context; it will not be singled out so as to support an approach 'that would hol