

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, et al.,
Plaintiffs

v.

JANET RENO,
Defendant

CIVIL ACTION
NO. 96-963

MEMORANDUM

BUCKWALTER, J.
February 15, 1996

I. BACKGROUND

Plaintiffs are providers and users of on-line communications. The affidavits filed in support of plaintiffs' request for a temporary restraining order (TRO) support the statement in plaintiffs' brief (page 2) that these communications deal with issues involving sexuality, reproduction, human rights, social responsibility, environmental concerns, labor, conflict resolution, as well as other issues, all of which have significant educational, political, medical, artistic, literary and social value.

On February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996. Title V of the Act includes the provisions of the Communications Decency Act of 1996 (CDA), codified at 47 U.S.C. Section 223 (a) to (h).

Pertinent to the matter now before this court, Section 223 (a) (1) (B) provides:

(a) Whoever --

(1) in interstate or foreign communications --

(B) by means of a telecommunications device knowingly --

(i) makes, creates, or solicits, and

(ii) 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, regardless of whether the maker of such communication placed the call or initiated the communication;

Section 223 (d) provides:

(d) Whoever --

(1) in interstate or foreign communications knowingly --

(A) uses an interactive computer service to send to

a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communications that, in context, 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; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18 United States Code, or imprisoned not more than two years, or both.

In seeking a TRO with regard to the above provisions/1, plaintiffs claim that they will be irreparably harmed because their rights under the First Amendment will be infringed. They fear prosecution under the CDA because as a result of the vagueness of the crimes created by the Act, they do not even know what speech or other actions might subject them to prosecution. Thus, even attempts to self-censor could prove fruitless. There is also the concern by those plaintiffs who rely on on-line providers and other carriers that these providers will likely ban communications that they consider potentially "indecent" or "patently offensive" in order to avoid criminal prosecution themselves, thereby depriving plaintiffs of the ability to communicate about important issues.

The defendant counters by stating that there must be a realistic danger of sustaining a direct injury as a result of the statute's enactment or enforcement, apparently suggesting that plaintiffs' fears of prosecution are imaginary or speculative. There is no evidence on the present record to suggest defendant's position is correct in the latter regard.

Moreover, the defendant's brief quotes a portion of a Third Circuit case for the proposition that "the assertion of First Amendment rights does not automatically require a finding of irreparable injury." What the defendant failed to cite from that case was the sentence immediately preceding the above quote which was, "It is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Hohe v. Casey*, 868 F.2d 69, at 72, 73 (3d Cir. 1989). The *Hohe* case goes on to explain that plaintiff must show "a chilling effect on free expression." That has been shown in this case by affidavits previously referred to.

What likelihood is there that plaintiffs will prevail on the merits? In *Wright, Miller & Kane*, *Federal Practice and Procedure: Civil 2d Section 2948.3*, it is suggested that this concept of probability of success on the merits must be considered and balanced with the comparative injuries of the parties.

As the Second Circuit put it, when

the balance of hardship tips decidedly toward plaintiff.
. .it will ordinarily be enough that the plaintiff has raised questions

going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation. *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953).

I believe plaintiffs have, at least with regard to 47 U.S.C. Section 223 (a) (1) (B) (ii) and (a) (2) raised serious, substantial, difficult and doubtful questions which are fair grounds for this litigation.

In explaining my reason for this conclusion, I will not go through a piecemeal analysis of the cases, all of which have been set forth in both plaintiffs' and defendant's briefs, except, perhaps, in passing while discussing the respective arguments of the parties.

First of all, I have no quarrel with the argument that Congress has a compelling interest in protecting the physical and psychological well-being of minors. Moreover, at least from the evidence before me, plaintiffs have not convinced me that Congress has failed to narrowly tailor the CDA.

Where do I feel that the plaintiffs have raised serious, substantial, difficult and doubtful questions is in their argument that the CDA is unconstitutionally vague in the use of the undefined term, "indecent." Section 223 (a) (1) (B) (ii).

This strikes me as being serious because the undefined word "indecent", standing alone, would leave reasonable people perplexed in evaluating what is or is not prohibited by the statute.

It is a substantial question because this word alone is the basis for a criminal felony prosecution.

It is a difficult question, I think, because any laws affecting freedoms such as the ones here in question have spawned opinions which arguably support both sides.

Finally, it is a doubtful question because it is simply is not clear, contrary to what the government suggests, that the word "indecent" has ever been defined by the Supreme Court. See *Alliance for Community Media v. F.C.C.*, 56 F.3d 105 (D.C. Cir. 1995) p. 130, footnote 2:

We note that the Supreme Court has never actually passed on the FCC's broad definition of "indecent". See *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339-39 (D.C. Cir. 1988) (acknowledging that in *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), the Supreme Court never specifically addressed whether the FCC's generic definition of indecency was unconstitutionally vague, but arguing that because the Court "implicitly" approved the definition by relying on it, lower courts are barred from addressing the vagueness issue on the merits.

Parenthetically, I had reached the same conclusion as Judge Wald, author of the above footnote, before reading *Alliance for Community Media*. That, of course, does not mean that we are correct but it did reinforce my belief that the question of vagueness is a difficult

and doubtful one.

In connection with the vagueness argument, the government correctly states that plaintiffs face a most difficult challenge. That challenge has been stated as one in which "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Rust v. Sullivan*, 500 U.S. 173, 183 (1990) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

It is hard to imagine a set of circumstances where an act proscribing certain conduct could be rendered valid if the description of that conduct, the violation of which is a felony, is vague.

Defendant seems to argue that an indecent communication means the same as a communication that in context, depicts or describes "in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs. . . ."

While I do not believe the patently offensive provision of Section 223 (d) (1), quoted above, is unconstitutionally vague, I do not see how that applies to the undefined use of the word "indecent" in Section 223 (a) (1) (B) (ii). Depending on who is making the judgement, indecent could include a whole range of conduct not encompassed by "patently offensive."

The remaining considerations relative to a TRO request weigh in favor of plaintiffs. I have not overlooked or ignored the outstanding argument made by the government in part 1 of its brief. I particularly have pondered the oft cited quote: When a court is asked to invalidate a "statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons." *Mistretts v. United States*, 488 U.S. 361, 384 (1989), p. 17 of defendant's brief.

It is, of course, impossible to define conduct with mathematical certainty, but on the other hand, it seems to me that due process, particularly in the arena of criminal statutes, requires more than one vague, undefined word, "indecent."

It is a most compelling constitutional reason to require of a law that it reasonably informs a person of what conduct is prohibited particularly when the violation of the law may result in fines, imprisonment, or both.

An order follows.

n1/ Plaintiffs have also sought relief as to 18 U.S.C. Section 1462, but at this early stage of the litigation, it seems clear that no irreparable harm will befall plaintiffs. (See Gov't Ex. 13).

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ORDER

This case is before the court on plaintiffs' motion for a temporary restraining order against enforcement of both 47 U.S.C. Section 223 (a) (1) (B) (as amended by the Telecommunications Act of 1996, Section 502), and 47 U.S.C. Section 223 (d). The court having considered plaintiffs' submissions in support of their motion, and defendants' submission in opposition thereto,

IT IS HEREBY ORDERED THAT plaintiffs' motion for a temporary restraining order is GRANTED, in part, as follows:

The defendant, her agents, and her servants are hereby ENJOINED from enforcing against plaintiffs the provisions of 47 U.S.C. Section 223 (a) (1) (B) (ii), insofar as they extend to "indecent", but not "obscene". The plaintiffs' motion is in all others respects, DENIED.

Unless previously ordered by this court, pursuant to 28 U.S.C. Section 223 Section 2284 (b) (3), this order shall remain in force only until the hearing and determination by the district court of three judges of the application for a preliminary injunction.

SO ORDERED this 15th day of February, 1996

BY THE COURT:

RONALD L. BUCKWALTER, J.

cc: Counsel of record via FAX by chambers 2/15/96.