Computers & the Law

Recent developments in US computer law

by Professor Michael Froomkin

On 26 June 1997, the US Supreme Court issued its long-awaited decision in *Reno v American Civil Liberties Union* 117 S Ct 2329 (1997). While it has been hailed widely as an enormous victory for free speech on the Internet, the decision to overturn key portions of the *Communications Decency Act* ('CDA') was hardly a surprise. Given the poor drafting of the statute, and the extensive and completely pro-plaintiff findings of fact by the trial court – which in the US system are almost never open to direct revision by the courts of appeal – the Supreme Court had little choice.

Although the decision is a victory for free speech online, the decision is as notable for what it does not say as for what it decides. Indeed, the decision demonstrates great caution on the part of the US Supreme Court with regards to new communications technologies and new media.

WHAT IS/WAS THE CDA?

To understand what was decided in the Reno case – and, more importantly, what was not decided – requires a brief description of the CDA and of the litigation mounted by a coalition of advocacy groups that ultimately defeated it.

The CDA was added at the last minute to the omnibus *Telecommunications Act* 1996, a bill designed to foster the rapid deployment of new telecommunications technologies by promoting competition in telephones, multichannel video and broadcasting. Section 233(a), the so-called 'indecent transmission' provision, made it an offense to send an 'obscene or indecent' communication to a person known by the sender to be under 18 years of age, while s. 233(d), the 'patently offensive' provision, criminalized the use of an 'interactive computer service' to display any type of communication that:

> *'depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs'*

in a manner which might be available to a person under 18 years of age.

The constitutional problems created by these two provisions were legion. It is long-settled law that obscene speech is not protected by the First Amendment. Not all pornography is legally obscene, however, and non-obscene sexual speech falls into a vague category of 'indecency' which enjoys substantial if occasionally ambiguous constitutional protection. See, e.g. *Sable Communications of Cal Inc v FCC* 492 US 115, at p.126 (1989) (invalidating restrictions on 'dial-a-porn' services). It is also settled that the government can impose restrictions on broadcasts or public displays of 'indecent' but not obscene material to minors, e.g. *Ginsberg v New York* 390 US 629 (1968), so long as adult access is not substantially impaired. A regulation may not, however, reduce the programming available to the adult population to what is suitable for children: *Denver Area Telecommunications Consortium Inc v FCC* 518 US; 116 S Ct 2374, at p.2837–2838 (1996), and *Butler v Michigan* 352 US 380, at p.383 (1957).

But neither principle justifies a rule which criminalizes the sending of merely indecent (but not obscene) messages to a minor even if the parent consented; indeed even if the parent was sending the message. Nor could these principles stretch to fit a rule making it a crime to display 'patently offensive' non-obscene material in a manner that might be viewed by a minor. Indeed, it is a bedrock principle of First Amendment law that a statute which even 'chills' – much less criminalizes – adult non-obscene speech can only be justified if the statute is clear, specific, and narrowly tailored to achieve a compelling state interest. Given that many types of Internet communication such as Usenet, mailing lists and web pages are communications that are made available to millions of potential readers, few if any of whom are known to or knowable by the author, the CDA potentially would have reached almost any Internet-based communication other than email to specific, known recipients.

THE LITIGATION

Not surprisingly, a coalition of civil liberties groups filed suit to strike down the CDA as soon as the President had signed the bill into law. The CDA provided for expedited trial procedures, with the trial court and sole fact-finding tribunal composed of two federal district court judges and one judge from the Court of Appeal rather than the usual single-judge district court that ordinarily hears constitutional challenges. Appeals from the three-judge court went directly to the Supreme Court, bypassing the usual intermediate stop in the Court of Appeal.

The plaintiffs were a diverse group of free speech activists, providers of AIDS-related information, writers, news organizations, providers of online services including America Online and CompuServe and Microsoft, and establishment organizations such as Apple Computer, the American Library Association and Planned Parenthood. They were carefully selected to make the point that the law threatened to criminalize the ordinary activities of many people who were the furthest thing from pornographers. The plaintiffs chose to file in Philadelphia because of a favorable local precedent. Their detailed and elegant complaint demonstrated how in some cases the CDA would chill their speech by making them self-censor socially valuable communications such as sex and health education; and in other cases how the CDA imposed such onerous requirements that it would shut down entire communications fora.

BACKGROUND TO THE CASE

The case aroused considerable interest for two reasons. First, it was clear that the case would ultimately be decided by the Supreme Court, and thus would become the first case in which the court directly addressed the application of the First Amendment to the Internet. Second, the facts of the matter fell across fault lines in three related, and unsettled, lines of cases.

In *Denver Area Ed Telecommunications Consortium Inc v FCC* 518 US; 116 S Ct 2374 (1996), a highly fractured Supreme

Court was unable to agree as to how to apply first amendment jurisprudence to a similar new medium – cable television. Several members of the court cast doubt on the applicability of portions of earlier cases such as *Sable Communications of Cal Inc v FCC* 492 US 115, at p. 126 (1989), and *Turner Broadcasting v FCC* 512 US 622 (1994), which had set out principles for applying the First Amendment to non-broadcast media.

Justice Breyer's plurality opinion for four of the nine justices was almost intentionally opaque, stating

'aware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications ... we believe it unwise to and unnecessarily definitive to pick one analogy or one specific set of words now'.

In their separate opinions, Justice Kennedy and Justice Souter both responded by pointing out that there was no reason to suggest, as Breyer seemed to do, that uncertainty might justify increased regulation. On the contrary, they said, given the high standards any restriction on speech must meet, doubt should lead to fewer limits on speech, not more.

In leading cases addressing the effect of the First Amendment on broadcasting regulation, e.g. *FCC v Pacifica Foundation* 438 US 726 (1978), the Supreme Court has held that because broadcast television and radio are such pervasive media and are particularly accessible to children, the Federal Government can require broadcasters to restrict 'indecent' non-obscene speech to evening time periods when children would be less likely to be watching. The Internet is, if anything, a potentially more pervasive medium than television, raising the question of whether the logic of *Pacifica* might apply with greater force to justify the CDA.

On the other hand, neither Congress nor the Supreme Court had explained how indecent speech should be defined. The obscenity cases suggested that local community standards should define whether pornography was obscene, but a similar procedure seemed difficult to imagine in the context of Internet indecency because the Internet is a national, even international, communications channel. The relevant locality might thus be the entire country, a decision which in turn would threaten to cast some doubt on the obscenity precedents. Conversely, if one followed the obscenity model and allowed every community to be its own arbiter, the national nature of the medium would mean that the most prudish community in Utah would in effect set the entire nation's standards – or acquire the means to prosecute every utterance of a four-letter word on the national network.

Furthermore, in *Denver Area*, Justice Kennedy suggested that the reach of *Pacifica* and its ilk should be limited to broadcast media because the government must regulate the spectrum, a scare resource. Other media, he suggested, should not be subject to similar rules. In contrast, the plurality opinion of Justice Breyer appeared to rely more on the medium's pervasiveness rather than the reason for regulating a medium.

In the unfortunate decision of *Renton v Playtime Theaters Inc* 475 US 41 (1986), the Supreme Court held that even when the government could not justify content regulations prohibiting salacious speech in seedy movie theaters directly, it might still prohibit them by passing an ordinance ostensibly aimed at the 'secondary effects' of blue movie theaters on local property values and crime. Critics of *Renton* were quick to note that the same logic could be used to sneak in an otherwise unconstitutional content restriction on any speech which could plausibly be said to have an undesirable side-effect. Indeed, the CDA's defenders would argue before the Supreme Court that fear of having their children exposed to pornography discouraged them from availing themselves of the benefits of Internet access. The CDA case seemed to offer a chance for the court to either limit *Renton* or demonstrate that the critics were correct.

THE ORIGINAL DECISION

After extensive evidentiary hearings, the three judges of the trial court issued an unusual opinion. It began with a unanimous and quite impressive recitation of their factual findings. This part of the decision will no doubt serve as a primer for both judges and students seeking an introduction to the workings and significance of the Internet for some time to come. Ultimately, it may prove to be as influential as the Supreme Court's final judgment. The three judges also agreed unanimously that both the indecent transmission and the patently offensive provisions were unconstitutional. Each issued separate and somewhat conflicting opinions, however, as to why this was the case. After some doubt as to whether it might let the ruling stand, the government exercised its right of appeal to the Supreme Court.

Given the one-sidedness of the facts, the erudite and in some cases far-reaching theories employed by the trial court judges, and the importance of the issue, the stage was set for a fundamental pronouncement about free speech in cyberspace. None emerged. The Supreme Court, with two justices concurring in part and dissenting in part, affirmed the trial court but avoided grand pronouncements on most of the fundamental issues underlying the case.

This caution was all the more surprising given that the author of the court's majority opinion, Justice Stevens, recently authored *McIntyre v Ohio Elections Commission* 115 S Ct 1511 (1995), which rhapsodizes about the importance of the First Amendment while upholding the right to unfettered anonymous leafleting in political campaigns. Stevens, however, had agreed in *Denver Area* that the dynamic nature of the cable TV industry made it unwise for the court to impose categorical First Amendment limitations on federal regulatory power.

Stevens's record on the First Amendment was in any case less clear-cut than his reputation as the court's last liberal might suggest. He not only wrote the opinion in *Pacifica* but he dissented in *Texas v Johnson* 491 US 397 (1989), when the court used the First Amendment to strike down a statute criminalizing burning the US flag.

Justice Stevens's opinion in *Reno* distinguished *Renton* as relating to secondary effects, while the 'purpose of the CDA is to protect children from the primary effects'. (The two partly dissenting justices would have used *Renton* to allow the government to create smut-free zones on the Internet.) He distinguished his earlier judgement in *Pacifica* as relating to when rather than whether indecency could be broadcast. It avoided some of the definitional issues by treating indecency and 'patently offensive' as 'synonymous'. It distinguished most cases upholding the regulation of radio and television on the grounds that the regulations at issue in those cases were carefully designed to solve specific problems, arising from the evaluations of an agency (the FCC) familiar with the unique characteristics of

the medium, rather than hurried acts of Congress taken without clear evidence that the solution was tailored to the evil.

In a return to the normal practice before *Denver Area* appeared to make an exception for cable TV, the court did hold that traditional strict scrutiny analysis, the most searching type, was the appropriate level of examination of content restrictions affecting the Internet. Having said that, however, the court proceeded to invalidate both challenged portions of the CDA on the grounds that they were fatally vague, a ground of decision that does not necessarily rely on using strict scrutiny, particularly since the CDA created a criminal offense.

Vagueness is unconstitutional in both criminal law and when it chills protected speech. Indeed, even a law that is not vague but chills speech in the service of a compelling objective can be unconstitutional for 'overbreadth' if it reaches protected speech and the court believes a less restrictive alternative could have achieved the same objectives.

In the case of the CDA, the court held that adult speech would be chilled impermissibly by having to ascertain that every potential recipient of a message was of age. Relying on the trial court's factual finding that filtering by recipients would be a less restrictive user-based technology that could achieve the government's asserted aims of protecting children from material that their parents wished to shield them from, the Supreme Court also held that the CDA was overbroad.

The court accepted the premise that the state has an interest in empowering parents to control what their children read and see. It seemed particularly concerned, however, about the statute's intrusion into parent/child relations, although the state's attempt to take on the role of moral educator seemed less offensive than the danger that the statute might criminalize parent-child communications.

Despite all this, only the conclusion hinted at any grand statement, and it too was hedged with qualifications:

'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. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefits of censorship.'

THE BOTTOM LINE

The bottom line from all this is quite straightforward: restrictions on Internet speech, unlike those on broadcasting and perhaps unlike statutes regulating cable television, should benefit from an exacting First Amendment-based scrutiny near to or perhaps even equal to what is applied to the regulation of books, newspapers and films. Other than that, almost nothing has been decided about content restrictions aimed at Internet speech. In particular, the opinion says nothing about the constitutionality of a CDA that might, for example, require that web pages and perhaps other Internet communications carry a rating code giving the recipient advance warning of the sexual (or other) content of the communication.

A compelled rating statute, or one setting penalties for misrating, would fall somewhere between two stools. On the one hand, some compelled speech is currently forbidden. States, for example, are not allowed to forbid motorists from removing the state motto from a car license plate (*Wooley v Maynard* 430 US 705, at p.713 (1977)), nor may they require that students recite the pledge of allegiance (*West Virginia State Board of Education v Barnette* 319 US 624, at p.642 (1943)). On the other hand, there are many cases holding that where there is a compelling state interest, no undue burdens and a narrowly tailored rule, the government may require individuals to disclose facts.

Shortly before deciding the *Reno* case, for example, the Supreme Court held that the First Amendment imposed no bar to the state of California's requirement that growers and handlers of tree fruits contribute to a fund used for generic advertising of nectarines, plums, and peaches: *Glickman v Wileman Bros* 117 S Ct 2130 (1997). Earlier, in *Riley v National Fed'n of the Blind* 487 US 781, at p.795 (1988), the Supreme Court held that the state interest in telling donors how charities use their contributions is sufficient to mandate disclosure.

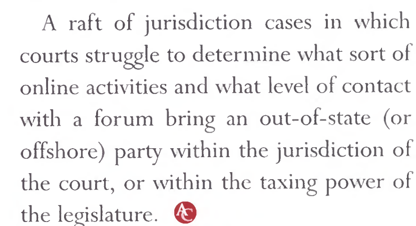
Presumably the state interest in empowering parents to control what their children access online will be no less, and could suffice to require that at least commercial suppliers of information affix some accurate information describing the nature of the content. Whether this is correct, and if so whether the principle could be extended to non-commercial speech, or to the most protected category – political speech – are issues that the Reno decision does not address.

Lurking in the background, and now working their way up from the lower courts, are further unresolved issues about the application of the First Amendment, not to mention the rest of the US Constitution, to the Internet. Notable in this regard are:

The cryptography cases – *Karn v US* 925 F Supp 1 (DDC 1996), vacated and remanded 107 F 3d 923 (DC Cir 1997), and *Bernstein v US Dept of State* 922 F Supp 1426 (DND Cal 1996); 945 F Supp 1279 (DND Cal 1996) – which test the government's ability to restrict the export of computer source code that can be used to encrypt messages in the light of the argument that source code is protected first amendment speech.

The commerce clause cases – e.g. *American Library Assoc v Pataki* 1997 WL 342488 (SDNY 20 June 1997) and *ACLU of Georgia v Miller,* available on line at http://www.aclu.org/court/aclugavmiller.html, (N D Ga 20 June 1997) – in which the courts must decide whether a state's attempt to regulate various Internet activities encroach upon the exclusive power of the federal Congress to makes rules of national commercial effect.

A raft of jurisdiction cases in which courts struggle to determine what sort of online activities and what level of contact with a forum bring an out-of-state (or offshore) party within the jurisdiction of the court, or within the taxing power of the legislature.



on the internet

http://www.w3.org/PICS and http://www.rsac.org/index.html

Examples of rating systems now being tested include PICS, the Platform for Internet Content Selection, see http://www.w3.org/PICS and the Recreational Advisory Software Council on the Internet, see http://www.rsac.org/index.html