University of Florida Journal of Law & Public Policy

Volume 9 | Issue 2 Article 8

1998

Reno v. ACLU: Establishing a First Amendment Level of Protection for the Internet

Rebecca Jakubcin

CASE COMMENT

RENO V. ACLU: ESTABLISHING A FIRST AMENDMENT LEVEL OF PROTECTION FOR THE INTERNET

*Rebecca Jakubcin***

Respondents,[1] who sought an order restraining the enforcement of the Communications Decency Act of 1996 (CDA),[2] contended that the CDA violates the First Amendment[3] by suppressing the rights of adults to transmit and receive indecent material.[4] Petitioners, Attorney General of the United States Janet Reno and the U.S. Department of Justice, defended the constitutionality of the provisions of the CDA that regulate the availability of obscene, indecent, and patently offensive material to minors on the Internet.[5] In three separate opinions, a three-judge district court[6] unanimously granted the preliminary injunction sought by respondents in relation to the regulation of "indecent" communication, but not in relation to obscenity.[7] Petitioners appealed directly to the U.S. Supreme Court,[8] which, despite acknowledging a valid governmental interest in protecting children,[9] affirmed and HELD that the challenged provisions violate the First Amendment to the extent that they unduly burden the rights of adults to communicate and receive indecent and patently offensive material over the Internet.[10] In reaching this decision, the Court gave Internet communications the most protection allowed under the First Amendment by placing Internet com-

---

* *Editor's Note:* This case comment received the *Huber C. Hurst Award* for the outstanding case comment for Fall 1997.

** This comment is dedicated to John, Diane, and Johnny Jakubcin.

1. This case is a consolidation of two actions brought by a total of forty-seven plaintiffs. Reno v. ACLU, 117 S. Ct. 2329, 2339 (1997).

2. Communications Decency Act of 1996, 47 U.S.C.A § 223(a)-(h) (1996).

3. U.S. CONST. amend. I (stating in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press").

4. *Reno*, 117 S. Ct. at 2339, 2341.

5. *Id.* at 2342.

6. *Id.* at 2339. The three-judge district court convened pursuant to a special provision of the CDA. *Id.*

7. ACLU v. Reno, 929 F. Supp. 824, 849-50 (E.D. Pa. 1996).

8. *Reno*, 117 S. Ct. at 2340-41. Direct appeal is allowed by a special provision of the CDA. *Id.*

9. *Id.* at 2346.

10. *Id.* at 2350.

munications in the same category as print media.[11]

The First Amendment has long stood for the principle of free speech in the United States.[12] However, this guarantee of freedom of speech is not without limits, especially when the speaker is the mass media.[13] The level of First Amendment protection afforded to the media differs among its various types.[14] The print media have traditionally enjoyed a higher level of First Amendment protection than other types of media. In *Miami Herald Publishing Co. v. Tornillo*,[15] the U.S. Supreme Court illustrated its reluctance to interfere with the First Amendment rights of the print media.[16] Appellee, a candidate for public office, sought space, pursuant to a right to reply statute, in the appellant's newspaper to rebut several editorials that were printed by the appellant criticizing the appellee.[17] The appellant denied this request and in the ensuing litigation, maintained that the First Amendment forbade the state from requiring the appellant to include the reply.[18]

The Court agreed with the appellant and noted that governmental restrictions on print media have traditionally been viewed unfavorably by the Court.[19] The Court relied on the fact that the press has a history of

---

11. *See id.* at 2344.

12. *See* Burstyn v. Wilson, 343 U.S. 495, 500 (1952).

13. *See id.* at 502-03 (deciding that motion pictures receive First Amendment protection, but that this protection is not unlimited).

14. *Compare* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (deciding that mandatory access to print media is unconstitutional), *and* Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1, 20-21 (1986) (holding that a utility company that distributed a monthly newsletter in its billing envelope could not be compelled to include in that newsletter the views of a group challenging the utility's rate-making policies without violating the utility's First Amendment free-speech rights), *with* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400-01 (1969) (validating an FCC order requiring a radio station to give equal time for response to a victim of a personal attack), *and* FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978) (approving the FCC's regulation of a patently offensive radio broadcast).

15. 418 U.S. 241 (1974).

16. *See id.* at 258. The Court noted:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time.

Id. (footnote omitted).

17. *Id.* at 243-44. The editorials attacked appellee's candidacy based on appellee's past political actions as Executive Director of the Classroom Teachers Association. *Id.*

18. *Id.* at 244, 247.

19. *Id.* at 254-55. " 'The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers — and hence advertisers — to assure financial success; and, second, the journalistic integrity of its editors and publishers.' " *Id.* at 255 (quoting CBS, Inc.

representing the wide and varied opinions of the citizens of the United States.[20] This historical representation has been possible because of low barriers to entry into the realm of publishing.[21] Additionally, the popularity of pamphlets, books, and small town newspapers, gave forums for expression of ideas not covered by the mainstream newspapers.[22] The Court recognized that today's print media differs in character from its historical forerunner. Today, large, national newspaper chains dominate newspaper ownership.[23] Furthermore, cities now often have only one main newspaper rather than many small local papers or news pamphlets. Despite this drastic limitation in the diversity of today's print media,[24] the Court still afforded the print media their traditional level of protection.[25]

As illustrated in *Red Lion Broadcasting Co. v. Federal Communications Commission*,[26] the broadcast media are afforded less First Amendment protection than the print media.[27] In response to a fifteen-minute broadcast in which his book and reputation were criticized, an author demanded, pursuant to the fairness doctrine,[28] free reply time from the radio station.[29] The radio station denied this request, and the Federal Communications Commission (FCC) determined that the station had violated the fairness doctrine.[30] The U.S. Supreme Court emphasized the differences between

---

v. Democratic Nat'l Comm., 412 U.S. 94 (1973)).

20. *Id.* (rejecting appellee's argument that because today's press is one of limited access, regulation of it is justifiable).

21. *Id.* at 248.

22. *Id.*

23. *Id.* at 249.

24. *Id.* at 249-50, 254. The Court agreed with appellee's assertion:

> Newspapers have become big business and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events.

Id. at 249 (footnotes omitted).

25. *Id.* at 258.

26. 395 U.S. 367 (1969).

27. *See id.* at 386 (finding that while all media are protected by the First Amendment, different types of media get different levels of First Amendment protection).

28. *Id.* at 369. The fairness doctrine requires broadcasters to give equal air time to political candidates. *Id.* As a result of FCC rulings, the fairness doctrine requires radio and television broadcasters to give fair coverage to public issues presented on their stations. *Id.* at 369-70. Specifically, *Red Lion* dealt with the fairness doctrine in the context of political editorials and personal attacks. *Id.* at 370-71.

29. *Id.* at 371-72.

30. *Id.* at 372. The station violated the doctrine by not providing the author with a tape, summary, or transcript of the broadcast in which the author was attacked. *Id.* Additionally, the station failed to offer the author free time to reply to the allegations. *Id.*

the radio and the print media.[31] Specifically, the Court focused on the fact that broadcast frequencies are a scarce commodity and thus receive less First Amendment protection than print media.[32] Reviewing the fairness doctrine under this lower level of protection, the Court held that the fairness doctrine does not violate the Constitution.[33]

In *Federal Communications Commission v. Pacifica Foundation*,[34] the Court again relied on the unique properties of the broadcast media to distinguish broadcasting from the print media.[35] Respondent, a broadcasting company, challenged the FCC's power to regulate broadcasts that are indecent but not obscene.[36] The challenge came after one of respondent's radio stations received a warning from the FCC for broadcasting a monologue that contained indecent and patently offensive language.[37]

To achieve the protection of a valid governmental interest in protecting children and unwilling adults from the indecent broadcast, the Court relied on the unique nature of broadcasting.[38] First, the Court noted that the broadcast media have a "pervasive presence" because they confront Americans in their homes.[39] Second, the Court emphasized that because listeners and viewers are constantly tuning in and out, prior warnings are

---

31. *Id.* at 376-77, 386-88 (noting that without governmental regulation radio would not function properly because of an overuse of the frequencies and because of this danger the government properly regulates broadcast).

32. *Id.* at 388. The Court emphasized the chaotic radio environment that existed before the Radio Act of 1927 in which the government divided the radio spectrum and assigned portions of it for various uses such as public broadcasting, police radio, aircraft, and amateur operation. *Id.* As part of this division, the portions of frequencies available for public broadcasting became limited. *Id.* This limitation created the need for the licensing system whereby some individuals were turned down in their requests for the right to broadcast to the public. *Id.* at 388-89.

33. Id. at 375.

34. 438 U.S. 726 (1978).

35. *Id.* at 748-50.

36. *Id.* at 729.

37. *Id.* at 730-31.

38. *Id.* at 748. Specifically, the Court noted:

> We have long recognized that each medium of expression presents special First Amendment problems. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve "the public interest, convenience, and necessity." Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism.

Id. (quoting 47 U.S.C. § 309a) (citations omitted).

39. *Id.*

inadequate to protect an unwilling receiver from indecent broadcasts.[40] Finally, the Court relied on the fact that children, even those who cannot read, may easily access the broadcast media.[41] Because of these unique properties, the Court found the regulation of broadcast media valid.[42]

The Court made yet another distinction between the various communication media in *Sable Communications of California, Inc. v. Federal Communications Commission*.[43] At issue in *Sable* was the constitutionality of a provision of the Communications Act of 1934,[44] which banned indecent and obscene commercial telephone messages.[45] Despite the government's compelling interest in protecting children from indecent material,[46] the Court held that the statute, with respect to its regulation of indecency, violated the First Amendment.[47] The Court reasoned that the dial-a-porn messages, which are telephone numbers one can call to receive obscene messages, were distinct from the broadcast media because affirmative action on the part of the listener is required to receive a dial-a-porn message.[48] A dial-a-porn caller would not be taken by surprise by an indecent message like a radio listener would if a sudden indecent message were broadcast.[49] The Court reasoned that the absence of the problem of unwilling listeners justified affording dial-a-porn greater First Amendment protection than is afforded to broadcasting.[50]

In the instant case, the U.S. Supreme Court went further when it distinguished the Internet from traditional broadcast media by providing the Internet with full First Amendment protection.[51] Due to the differences between the Internet and broadcast media, the Court found it unnecessary to limit the level of First Amendment protection given to the Internet.[52] In accord with its reasoning in *Red Lion* and *Pacifica*, the Court emphasized

---

40. *Id.*
41. *Id.* at 749.
42. *Id.* at 750.
43. 492 U.S. 115 (1989).
44. 47 U.S.C. § 223(b) (1994).
45. *Sable*, 492 U.S. at 117-18, 123 n.5.
46. *Id.* at 126 (arguing that the government has a compelling interest in protecting the physical and psychological well-being of minors, but this interest must be served by narrowly tailored means).
47. *Id.* at 131. The Court deemed the statute's regulation of obscene language constitutional, because obscenity is not protected by the First Amendment. *Id.* at 124.
48. *Id.* at 127-28.
49. *Id.* at 128.
50. *Id.* "Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." *Id.*
51. *See Reno*, 117 S. Ct. at 2343-44.
52. *Id.*

aspects of the broadcast media that are not present on the Internet.[53] First, the Court reasoned that the Internet does not suffer from a scarcity of available frequencies as does the broadcast media.[54] Anyone who wishes to exercise their First Amendment right to free speech or to receive information on the Internet is not limited by difficulty of access.[55] The Court noted that anyone with access to a computer with Internet capabilities can express their views and receive information relatively inexpensively and easily.[56] In fact, the Court reasoned, the Internet takes freedom of speech to a new level by providing easy access to millions of computer users.[57] Because of this ability to access the Internet with relative ease, the Court held that the "scarcity of available frequencies" justification for the regulation of the broadcast media is not applicable to the Internet.[58]

Secondly, in light of its evaluation of the broadcast media in *Pacifica*, the instant Court examined whether the Internet possesses the same invasive qualities as the broadcast media.[59] Relying largely on the district court's findings, the instant Court noted that the nature of the Internet does not lend itself to chance encounters with unwanted information.[60] Unlike radio or television, where one could be passively watching or listening and be surprised by an unwanted message, acquiring information on the Internet requires some affirmative action on the receiver's part.[61] Comparing the affirmative steps required for Internet use to those required to obtain dial-a-porn in *Sable*, the Court found that the Internet did not possess the qualities of the broadcast media that warrant less First Amendment protection than is traditionally afforded to speech.[62]

Finally, the instant Court relied on the fact that, unlike the broadcast media, the Internet has never been subject to extensive government regulation.[63] Because, historically, the government has regulated the broadcast media, the broadcast of indecent material would imply governmental or societal approval or sanction.[64] This danger, reasoned the instant Court, is nonexistent with the Internet, because unlike the broadcast media,

---

53. *Id.* at 2343.
54. *Id.* at 2343-44.
55. *Id.* at 2344. "Any person or organization with a computer connected to the Internet can 'publish' information." *Id.* at 2335.
56. *Id.* at 2335, 2344.
57. *Id.* at 2344. It is estimated that approximately 200 million people will have accessed the Internet by 1999. *Id.*
58. *Id.*
59. *Id.* at 2343.
60. *Id.*
61. *Id.*
62. *Id.* at 2343-44.
63. *Id.* at 2343.
64. *Id.* at 2343 n.33.

the Internet is not regulated by a federal agency.[65]

By giving the Internet the full protection of the First Amendment, the Court equated the Internet, for First Amendment purposes, with the print media and the telephone dial-a-porn messages.[66] Although the Internet has not existed long enough to have a history of expressing the diverse opinions of our nation, it is in some ways similar to the print media.[67] Like the historical print media,[68] the Internet has relatively low barriers to entry.[69] For instance, in the past, the availability of many large newspapers, small town newspapers, and pamphlets gave a potential speaker a choice of many forums, with relatively easy access, for expression through the print media. Similarly, the Internet gives a potential speaker easy access to a variety of means for expression such as e-mail, bulletin boards, and web-sites. Additionally, because of this ease of access, the Internet provides a forum for an equal exchange of differing views much like the early print media.[70]

Likewise, the Internet bears similarities to dial-a-porn, which was given full First Amendment protection by the Court in *Sable*.[71] Like dial-a-porn messages, the Internet requires affirmative steps in order to access indecent communications.[72] Dial-a-porn messages require a receiver to dial a specific telephone number to access the information, while the Internet requires a user to type in a web-site address or, at least, input search terms. Therefore, while it is possible that an Internet browser could accidentally come across indecent information, the possibility is remote for the experienced Internet navigator.[73] The instant Court's comparison of the Internet to dial-a-porn weighed heavily in its decision to give the Internet the same First Amendment protection that dial-a-porn enjoys.[74]

These similarities between the Internet, dial-a-porn messages, and the

---

65. *Id.*

66. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 129 (1989) (distinguishing the characteristics of broadcasting that give it only limited First Amendment protection from the characteristics of dial-a-porn); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding that governmental regulation of the press is inconsistent with First Amendment guarantees).

67. *Reno*, 117 S. Ct. at 2335.

68. *Tornillo*, 418 U.S. at 248.

69. *Reno*, 117 S. Ct. at 2335.

70. *Id.* at 2335-36. "From the publisher's point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can 'publish' information." *Id.* The Court also noted that "[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." *Id.* at 2344.

71. *See id.* at 2343-44 (citing *Sable*, 492 U.S. at 127-28.

72. *Id.* at 2336.

73. *Id.*

74. *See id.* at 2343-44.

print media help explain the Court's reasoning in the instant case. However, there are some distinguishing aspects of the Internet that make it difficult to protect children and reluctant adults from the indecent material available on it.[75] First, the Internet is still a relatively new communication medium, and while many people are experts at navigating the Internet, others are illiterate when it comes to computers and the Internet.[76] Children are taught about computers in school, but often their parents remain uneducated in the operation of computers.[77] As a result, the parents are unable to exercise control in their own homes over what their children access on the Internet.[78]

Secondly, even if computer-literate parents keep track of what their children receive from the Internet at home, if a child accesses indecent information outside the parents' presence, the parents often have no way of later detecting the child's access. Unlike print media, which must be physically present to impart information, once a computer is switched off, the information that was accessed disappears.[79] Therefore, indecent information that a child accesses on the Internet is more easily discarded than information accessed through print media. As a result, unlike a magazine that parents may find under a child's bed, even computer literate parents may be unable to discover what material their children access on the Internet.[80] Accessing dial-a-porn messages, to which the instant Court compared the Internet, also leaves evidence of access. Because of their pay-by-the-minute format, monthly phone bills document calls made to dial-a-porn numbers. Thus, even if parents are not immediately aware of their child's access to such information, they will discover their child's receipt of the information when the bill arrives.

Furthermore, adults who are inexperienced in navigating the Internet may themselves be unwillingly exposed to indecent material.[81] While the

---

75. Protecting children and unwilling adult recipients from indecent information are two of the justifications used to limit First Amendment protection. *See Sable*, 492 U.S. at 126, 128 (agreeing that with respect to indecent material the government has a compelling interest in protecting minors and approving the statute in question because dial-a-porn did not create a captive audience problem with adults); FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978) (justifying the regulation of indecent broadcasting because of broadcasting's unique accessibility by children).

76. *See* Sean Adam Shiff, *The Good, the Bad and the Ugly: Criminal Liability for Obscene and Indecent Speech on the Internet*, 22 WM. MITCHELL L. REV. 731, 754-44 (1996).

77. *Id.*

78. *Id.*

79. *See id.* at 755-56 (discussing parental control of Internet access and the inadequacies inherent in that control).

80. *See id.*

81. *See Reno*, 117 S. Ct. at 2336. Many "adult" web pages contain warnings before indecent or patently offensive information is displayed. *Id.* However, it is still possible to come across unwanted information accidentally during an "imprecise search." *Id.*

broadcast media is more intrusive than the Internet,[82] the Internet is potentially invasive to a novice Internet navigator who is conducting a general search.[83] An inexperienced Internet navigator can come across unwanted indecent information much like a person who is flipping television channels can be surprised by an indecent message.[84]

By comparing the similarities between the Internet, the print media, and dial-a-porn, the Court seemingly makes a logical decision. However, the potential for children to easily access indecent information and the potential invasion of the home of an unwilling adult are important unique aspects of the Internet that the Court failed to examine. Had the Court considered these unique aspects of the Internet, it may not have been as quick to afford the Internet the highest level of First Amendment protection available.

82. *See generally Pacifica*, 438 U.S. at 748-49 (discussing the imperious presence of the broadcast media in our private homes). The only affirmative action needed to receive information from television or radio is turning on the medium.

83. *Reno*, 117 S. Ct. at 2336. Only some web-pages that contain indecent information give the user a warning before displaying the indecencies.

84. This potential for surprise in the broadcast media is one of the reasons the Court has not given the broadcast media full First Amendment protection. *Pacifica*, 438 U.S. at 748.