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1997

## The Court Logs On

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### Recommended Citation

Richard C. Reuben, *The Court Logs On*, 83 *ABA Journal* 42 (1997).

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# The Court Logs On

## Decency act decision might change the nature of the Internet

BY RICHARD C. REUBEN

The U.S. Supreme Court is expected to issue a landmark decision soon on the ability of government to slow down X-rated traffic on the information superhighway.

At issue in *Reno v. American Civil Liberties Union*, No. 96-511, argued March 19, is the constitutionality of the Communications Decency Act of 1996, 47 U.S.C. § 223, a major effort by Congress to restrict minors' access to the pornography that is readily available on the Internet.

Legal experts say the decision could set an important benchmark for future rulings affecting the electronic communications network that may reach some 200 million users before the end of the century, a development encouraged by the Clinton administration.

"The case presents the justices with the major conceptual challenge of how to redefine its old 'marketplace of ideas' metaphor in light of a new and rapidly changing technology," according to Professor Bernard James, a First Amendment expert at Pepperdine University School of Law in Malibu, Calif.

In this regard, one of the central challenges is determining whether the Internet should be treated like a print medium, a broadcast outlet or, as some justices suggested during oral arguments, like a telephone. The answer to that question will determine the degree of constitutional scrutiny that will be applied to issues raised by the Internet.

At the heart of the controversy are provisions in the act that make it a crime, punishable by fines and up to two years' imprisonment, for anyone to use a "telecommunications device"—presumably a modem—to display or transmit "indecent" or "patently offensive" materials "knowing that the recipient" is under 18.

It is an understatement to say

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the Communications Decency Act is controversial. On the day President Clinton signed it into law last spring, a remarkably broad array of plaintiffs, led by the ACLU and the American Library Association, filed



The government's interest in protecting children from porn is up against adults' free speech rights.

suit, challenging its facial constitutionality on First Amendment and due process grounds.

A special three-judge trial panel created by the act ruled that it violated the First Amendment. Writing for the panel's majority, Chief Judge Delores K. Sloviter of the 3rd U.S. Circuit Court of Appeals based in Philadelphia applied a classic First Amendment strict scrutiny analysis, under which government may impose free speech restrictions only when it has a compelling interest and lacks less restrictive alternatives.

While Sloviter recognized that the government's interest in protecting children and safeguarding morality is compelling, she held that the law is not narrowly tailored to meet that interest because it is "either technologically impossible or economically prohibitive" for parties

posting materials on the Internet to limit their communications to adults to take advantage of the statutory defenses available under the act.

Act challengers claim the prime means of limiting access—credit card or age verification—pose logistical and technical difficulties. The only alternative might be not posting information at all, they suggest.

### Examining Government Interest

Defending the statute in oral arguments before the Court, Deputy U.S. Solicitor General Seth Waxman cited the government's especially strong interest in protecting children from sexually explicit materials.

Waxman maintained that the provisions are in accord with regulatory prohibitions on radio broadcasts of indecent materials that were upheld in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In that case, the Court upheld prohibitions against daytime broadcasts of George Carlin's infamous (at least in those days) "seven dirty words" monologue.

"Just as it was constitutional for the FCC to channel indecent broadcasts to times of the day when children most likely would not be exposed to them, so Congress could channel indecent communications to places on the Internet where children are unlikely to obtain them," Waxman insisted in a position backed by amicus briefs from several religious and family values groups.

But the library association's Bruce J. Ennis Jr. focused on the act's potential to inhibit transmission of a wide range of materials.

"The act covers not only 'commercial' purveyors of 'pornography' ... but also the noncommercial speakers who constitute the vast majority of all speakers in cyberspace," argued Ennis of the Washington, D.C., office of Chicago's Jenner & Block. He insisted the act is unconstitutional as a flat ban on protected speech and would "reduce the adult population to reading and viewing only what is suitable for children."

The justices are expected to decide *Reno* by the end of the term in June. Given the pace of technological change, however, we can only hope the decision will not already be obsolete. ■