

Supreme Court Declares Communications Decency Act Unconstitutional

July 3, 1997

In a landmark decision defining constitutional protections in cyberspace, the United States Supreme Court declared the Communications Decency Act ("CDA") unconstitutional, holding that the Act unconstitutionally abridged free speech rights. The Court in *Reno v. ACLU* unanimously invalidated the CDA provision imposing criminal penalties for the display in computer communications, "in a manner available" to anybody under 18 years of age, of "indecent" and "patently offensive" materials. By a 7-2 vote, the Court also invalidated a CDA provision imposing criminal penalties for transmission of "indecent" materials to a person known to be under 18.

Importance to Businesses

This major First Amendment decision has particular significance for all types of businesses that use computers in the workplace, in marketing, or in everyday communications. The United States Chamber of Commerce presented this perspective in an amicus brief submitted to the Supreme Court (which was prepared by Wiley, Rein & Fielding). While recognizing the laudable and important goal of protecting children, the Chamber explained that the CDA, with its extremely vague, unpredictable, and overly broad standards, did not effectively serve that goal and threatened to stifle this vital emerging medium. In particular, the Chamber of Commerce brief detailed several potential harmful effects of the CDA on businesses. The very nature of the Internet and computer communications suggests widespread dissemination to a vast and potentially limitless audience. Businesses in a variety of personal care fields, including health care and pharmaceuticals, would have been faced with a Hobson's choice of potential criminal liability, or insulation from this dynamic medium. Computer communications and e-mail also are now routine for many businesses, and the statute might have criminalized a wide range of communications because of their "availability" to an unknown individual under 18. Any business with an employee under 18 would have been particularly at risk. Critically, moreover, the CDA threatened American competitiveness and leadership by hampering businesses' ability to communicate through cyberspace.

In the wake of the Supreme Court's decision, many observers noted the importance of these concerns. The New York Times emphasized the Chamber of Commerce's amicus argument that "the law presented a threat to the country's ability to compete globally in an age of new communications," and observed that the argument "very likely got the attention of" at least some of the Justices. The Wall Street Journal likewise

heralded the decision as a "major win" for business, explaining that "the ruling, which gave the Internet the fullest possible free speech protection, will keep the new medium from being hampered by regulation as it develops."

Highlights of Opinion

The Supreme Court held that, unlike traditional broadcast media, restrictions on Internet communications merit the highest level of constitutional scrutiny. Applying that scrutiny, the Court found the undefined categories of communications prohibited by the CDA vague and unconstitutionally overbroad. These sweeping prohibitions, coupled with criminal penalties of up to two years imprisonment, threatened to chill protected free speech between adults. The Court concluded that defenses provided in the CDA – such as those for speakers who restricted minors from covered communications or used such screening devices as credit card or other age verification – were practically or technologically infeasible for many or all Internet users.

Legislative and Administration Response

In the aftermath of the Court's decision, a number of Members of Congress, including Sen. Dan Coats (R-IN), co-author of the CDA, have introduced legislation (or signaled their intent to do so) to protect children from harmful material on the Internet. If it is to withstand judicial scrutiny, any such legislation will, of course, need to address this issue within the limitations defined by the Supreme Court opinion. Both H.R. 774, introduced by Rep. Zoe Lofgren (D-CA), and a statement of principles released by Sen. Patty Murray (D-WA), encourage the industry to adopt technology that will allow parents to exercise control over their children's access to the Internet, rather than mandating governmental speech restrictions.

The Clinton Administration appears to have retreated significantly from the regulatory approach of the CDA. The Administration's "Framework for Global Electronic Commerce," released July 1 (see accompanying story), emphasizes alternatives such as user-empowerment and parental control, rather than governmental restrictions, to protect children from harmful material on the Internet. President Clinton recently convened a meeting with government officials, industry participants, and interest groups in furtherance of this policy.

Businesses should also be aware that state legislatures have considered statutes similar to the CDA in jurisdictions across the country. Such legislation poses a particular threat to businesses and other computer communications users due to the often boundaryless nature of such communications. However, a federal district court struck down a New York state statute in June 1997 in part due to its effect on out-of-state communications.

Conclusion

The Supreme Court's decision averts a serious threat to continued development and dynamism of the emerging medium of computer communications and, indeed, to American competitiveness. The decision, and the CDA legislation that prompted it, highlight the importance to businesses of educating courts, legislators, and regulators about this vital area.

If you would like further information, or a copy of the amicus brief prepared by Wiley, Rein & Fielding on behalf of the U.S. Chamber of Commerce, please contact insights@wiley.law.