

How the Internet Compares with Television and Radio for Constitutional Purposes¹

Recent Supreme Court rulings regarding the constitutionality of federal government regulation of speech communicated via the Internet have distinguished the Internet as a communication medium that should be regulated differently from television and radio, two other pervasive mediums of communication in America today.² The Supreme Court asserts that television and radio are unique mediums of communication because of their pervasiveness and their long history of regulation.³ However, although the Internet is extremely pervasive today, the Supreme Court's opinions hold a misplaced reverence for the Internet as a regulation-free medium. An analysis of the history of the invention and subsequent regulation of television and radio demonstrates that it is actually quite analogous to the invention and subsequent attempts to regulate the Internet.

When the Supreme Court's reasoning regarding the regulation of radio and television is applied to the Internet, it becomes clear that Congress is justified in its attempts to regulate speech that is both obscene and harmful to minors. The Internet is pervasive, and unwanted speech that enters the home is justifiably regulated.⁴ The Internet is also uniquely accessible to children, and because of this the state has a greater interest in regulating speech conveyed through this medium.⁵ Finally, although radio and television frequencies are less available than Internet web pages for the expression of speech, web page availability, like broadcast frequencies, is also regulated.⁶ Due to these similarities, the Internet should rightly be treated and regulated similarly to radio and television.

I. The Developmental and Regulatory History of Television and Radio

The federal government has had a long history of regulating radio content. However, that regulation did not start until many years after radio had been invented and was in general use. Nikola Tesla first publicly demonstrated radio technology in 1893. Guglielmo Marconi sent and received his first radio signal in Italy in 1895. In 1899 he flashed a wireless signal across the English Channel. Radio proved to be an effective mode of communication for those involved in rescues after sea disasters occurred. Around the turn of the century, numerous ocean liners installed radios. In 1899 the United States Army established radio communications with a lightship in New York. In 1900 Tesla opened a commercial radio tower. In 1901, the Navy adopted its first radio system. Also in 1901 a radio service between the five Hawaiian Islands began functioning. President Theodore Roosevelt greeted King Edward VII over the radio in 1903. Reporters radioed home news of the naval battle of Port Arthur in the Russo-Japanese War in 1905. In 1906 meteorologists began to use radios to speed up notice regarding weather conditions. Also in 1906, Reginald Fessenden transmitted the first radio audio broadcast, on Christmas Eve. He played his violin and read from the Bible. In 1910 Marconi formed the first American-European radiotelegraph service.⁷

Two years later, Congress passed the Radio Act of 1912,⁸ part of which "required that users of the radio spectrum uphold decency standards."⁹ Ever since, Congress has included a mandate for the executive branch to regulate decency on the airwaves.¹⁰ Television became prominent in America in the late 1950s.¹¹ In 1962, Congress began to

regulate television technology and broadcasts,¹² and the same decency standards that apply to radio broadcasts apply to television broadcasts.¹³

Although the origins of the Internet date back to the 1960s,¹⁴ the Internet did not become prominent until the early-to-mid 1990s,¹⁵ and, subsequently, the Communications Decency Act (the first attempt to regulate sexually explicit content on the Internet) was enacted in 1996.¹⁶ In all three cases, soon after the communications medium became prominent in America, Congress attempted to regulate the communication of sexually explicit content. With television and radio, Congress succeeded. However, it has not been so fortunate with respect to the Internet.

II. The Supreme Court's View on Regulation of Television and Radio

In *FCC v. Pacifica*,¹⁷ the Supreme Court gave two reasons why regulating broadcast communications on television and the radio survived First Amendment scrutiny. First, the Court stated that "broadcast media (has) established a uniquely pervasive presence in the lives of all Americans."¹⁸ Because of this, "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."¹⁹ Second, the Court asserted that "broadcasting is uniquely accessible to children, even those too young to read."²⁰

In *Reno v. ACLU [Reno I]*,²¹ the Supreme Court refused to compare the Internet to television and radio broadcasting because 1) television and radio had a long history of regulation, 2) broadcast frequencies are scarce, and 3) television and radio are invasive communication mediums.²² This comparison requires further analysis. The pervasive nature of the Internet, the regulation of web page availability, its various communication methods, and the ease of accessing those communications makes distinguishing the Internet from television and radio more complicated than the passing reference in *Reno I* suggests.

The Supreme Court detailed in *Pacifica* the pervasive and invasive nature of television and radio:

- "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content"²³

Warnings on Internet sites may provide a measure of protection in some instances. However, most pornographic sites at this time do not contain warnings, and no statute requires them.²⁴

Second, the warnings appear as part of a larger image that is emblazoned on the viewer's brain before he or she can switch screens.²⁵ Moreover, some pornographic sites are set up so that switching screens or exiting the site is very difficult. A 2003 study found that 26% of youth that inadvertently stumbled onto a pornographic website were "brought to another sex site when they tried to exit the site they were in."²⁶ Sometimes, the only escape is turning the power off on the computer. Finally, for some children the warnings provide an added element of curiosity and enticement. Minors are presumed under the law to be unable to give binding consent.²⁷ As a matter of law, the government cannot rely on a position that assumes children will voluntarily heed warnings.

- “To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.”²⁸

Surely, we must acknowledge that hearing offensive language is more easily forgotten than seeing a sexualized image in full color. It takes the mind a fraction of a second to incorporate an image and images have elevated mental staying power in the brain, particularly images that are shocking or titillating.²⁹ “One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.”³⁰

As discussed above, any harm caused by hearing offensive language is vastly magnified when it become viewing a full color image. This is especially true for children who have less experience with nudity and sexuality, and are not as comfortable with those images as may be some adults.

In addition to the quite obvious comparisons between the intrusiveness of radio/television and the Internet, some of the rights analysis applied by the Court in *Pacifica* directly applies to the Internet. The Court stressed the governmental interest in supporting the right of privacy in the home and the right to control activities on private property. “[T]his Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue.”³¹ So, the Court reasons, if a communication medium is so pervasive that it can invade the privacy of the home without allowing viewers or listeners to “completely protect” themselves, the government may then properly act (upon a compelling interest in the least restrictive means possible) to “prohibit intrusions” of unwelcome communication into the home.³² Of course, a family may choose to avoid unwanted intrusions by simply canceling their Internet service. But the fact that home owners could easily dispense with a television or radio, or put them where all usage could be monitored by a parent, was no justification for avoiding governmental involvement in *Pacifica*.

In *Pacifica*, the Court stated that the FCC was justified in regulating indecent broadcasts because they posed a nuisance to those who wished to shield their homes from invasive and indecent broadcast communications.³³ In other words, the Supreme Court stated that the government is justified in regulating a medium that conveys indecent speech if that medium poses a nuisance to those attempting to raise their children and run their houses in a certain manner.

III. The Supreme Court and the Internet

When this reasoning is applied to the Internet as a communication medium, it becomes clear that the Internet should be grouped together with television and radio broadcasts. A study by the Kaiser Family Foundation found that, in 1999, 62 percent of children in America have a computer at home.³⁴ A 2002 survey found that 89.5 percent of all children between the ages of 5 and 17 use computers for some purpose, and 58.5% of those children use the Internet.³⁵ While perhaps not as pervasive as television, but far more pervasive than radio was when it became subject to governmental regulation of indecency, Internet-equipped computers are easily accessible to children and are extremely invasive.

Part of the problem with the Court's treatment of the parallels to *Pacifica* in *Reno I* was the factual findings of the district court. The Court justified its conclusion that the Internet was not as "invasive" on the district court's findings that:

"[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'" 929 F.Supp., at 844 (finding 88). It also found that "[a]lmost all sexually explicit images are preceded by warnings as to the content," and cited testimony that "'odds are slim' that a user would come across a sexually explicit sight by accident." *Ibid.*³⁶

All this makes apparent is that the judges in the Third Circuit and on the Supreme Court do not spend much time on the Internet, which is a good thing. However, these findings are almost laughable to those of us who do use the Internet extensively.

The National Research Council reported that at least 25 percent of youth had "at least one unwanted exposure to sexual pictures in the year before (its) survey."³⁷ The study also demonstrated that inadvertent exposure to indecent or obscene material on the Internet most often occurs while at home.³⁸ Nielson//Net Ratings reported that almost 14% of those who viewed (intentionally or inadvertently) Internet pornography in April, 2005 were between the ages of 2-17.³⁹

This inadvertent exposure, however, is not like inadvertent exposure to inappropriate material on television. First, it is not difficult to avoid hearing or viewing inappropriate material—one can simply check the broadcast schedule available in magazines, daily newspapers, and on the screen of most recently manufactured televisions. Television and radio broadcasters do not intentionally mislead viewers/listeners as to the content of their programming. On the other hand, purveyors of Internet pornography frequently place pornographic communications on pages with easily misspelled or misleading website addresses.⁴⁰ In addition, they use innocuous terminology on the pages with pornographic images so that search engines will include their inappropriate pages in searches for completely non-sexual topics,⁴¹ and so filters which scan for language, but are not sophisticated enough to scan for the infinite variety of images, won't block the pages.

Conclusion

In conclusion, "wide availability, frequent inadvertent exposure by adults and children, the broad array of communication methods, and the invasiveness of the Internet on the home, school and libraries"⁴² is real. Further, avoiding unwanted content on the Internet is more difficult than in other medias because "inadvertent Internet exposure poses problems not present in the real world because, unlike walking down the street, watching television or listening to the radio, an Internet user cannot simply avert his/her eyes to avoid inadvertent exposure."⁴³

Footnotes:

1. Cheryl B. Preston, with Aaron Harris.

2. See *Reno v. ACLU* [Reno I], 521 U.S. 844, 845-46 (1997); *Ashcroft v. ACLU* [Ashcroft I], 535 U.S. 564, 604 (2002). For a more in-depth explanation, see *infra*, II. The Supreme Courts on Regulation of Television and Radio.
3. See *id.*
4. See *infra*, II. The Supreme Courts on Regulation of Television and Radio and III. The Supreme Court and the Internet.
5. See *id.*
6. The Internet is regulated by ICANN, the Internet Corporation for Assigned Names and Numbers. ICANN is “responsible for the global coordination of the Internet’s system of unique identifiers [including domain names and the addresses used in a variety of Internet protocols].” ICANN, <http://www.icann.org/> (last visited Oct. 11, 2006).
7. See Federal Communications Commission, *History of Communications – Radio Pioneers & Core Technologies*, <http://www.fcc.gov/omd/history/radio/>. Guglielmo Marconi was awarded a British patent for radio in 1896. See also Wikipedia, *Radio*, http://en.wikipedia.org/wiki/Radio#History_and_invention.
8. Pub. L. No. 62-264, 37 Stat. 302.
9. Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 BYU L. REV. 1463, 1470-71 (2005).
10. See *id.* See also 18 U.S.C. § 1464 (2000). This statute empowers the FCC to regulate broadcast material, and it has done so in 47 C.F.R. § 73.3999 (2006).
11. See Federal Communications Commission, *History of Communications – Historical Periods in Television Technology: 1960-1989*, <http://www.fcc.gov/omd/history/tv/1960-1989.html>.
12. See *id.*
13. See 47 C.F.R. § 73.3999.
14. See Barry M. Leiner et al., *A Brief History of the Internet*, <http://www.isoc.org/internet-history/brief.html> (last visited Oct. 11, 2006).
15. See Ethan Katsh, *Online Dispute Resolution to Virtual Worlds: Creating Processes through Code*, 49 N. Y. L. SCH. L. REV. 271, 276-77 (2004-05) (The National Science Foundation decided, in 1992, to lift its ban on commercial activity on the Internet; only then did the Internet begin to enter the mainstream).
16. Communications Decency Act of 1996 Pub.L 104-104, 110 Stat. 133.
17. 438 U.S. 726 (1978).
18. *Id.* at 748.
19. *Id.*
20. *Id.* at 749.
21. 521 U.S. 844 (1997).
22. *Id.* at 868.
23. *Pacifica*, 438 U.S. at 748-49.
- 24.
- 25.
26. Kimberly J. Mitchell, David Finkelhor, & Janis Wolak, *The Exposure of Youth to Unwanted Sexual Material on the Internet: A National Survey of Risk, Impact, and Prevention*, 34 YOUTH & SOCIETY 330, 342 (2003).
27. See e.g., *In re Gault*, 387 U.S. 1, 17 (1967); *Powers v. Floyd*, 904 S.W.2d 713, 718 (Tex. App. 1995); *Sheller by Sheller v. Frank’s Nursery & Crafts, Inc.*, 957 F. Supp 150, 153 (N.D. Ill. 1997); *MacGreal v. Taylor*, 167 U.S. 688, 698 (1897).
28. *Pacifica*, 438 U.S. at 748-49.
- 29.
30. *Id.*
31. *Id.* at 749.
32. *Id.* at 748-49.
33. See *id.*
34. Kaiser Family Foundation, *Kids and Media at the New Millennium: a Comprehensive National Analysis of Children’s Media Use* (1999), <http://www.kff.org/entmedia/1535-index.cfm>.

35. National Telecommunications and Information Administration. *A Nation Online: How Americans Are Expanding Their Use of the Internet*. U.S. Department of Commerce, Washington, D.C. (2002), <http://www.ntia.doc.gov/ntiahome/dn/html/anationonline2.htm>.
36. *Reno v. ACLU* [*Reno I*], 521 U.S. 844, 869 (1997)..
37. DICK THORNBURG & HERBERT S. LIN, YOUTH, PORNOGRAPHY AND THE INTERNET, 5.5.2 (2002), available at [http:// bob.nap.edu/html/youth_Internet/](http://bob.nap.edu/html/youth_Internet/).
38. *See id.*
39. JILL C. MANNING, THE IMPACT OF INTERNET PORNOGRAPHY ON MARRIAGE AND THE FAMILY, 28 (2006).
40. See Christopher G. Clark, The Truth in Domain Names Act of 2003 and a Preventative Measure to Combat Typosquatting, 89 CORNELL L. REV. 1476, 1488 (2004). “Typosquatting...involves registering domain names in order to profit from the success and popularity of others....[T]yposquatting uses misspellings or variations of legitimate domain names in order to trick individuals into viewing unrelated advertisements or web sites.” *Id.* See also 18 U.S.C.A. § 2252B (2006). This statute criminalized typosquatting if the misleading domain name leads to material that is obscene or harmful to minors.
41. See Russell B. Weekes, *Cyber-Zoning a Mature Domain: The Solution to Preventing Inadvertent Access to Sexually Explicit Content on the Internet?*, 8 VA. J. L. & TECH. 4, 5 (2003).
42. *Id.* at 5.
43. *Id.*