CURRENT DEVELOPMENTS IN THE LAW

A Survey of Cases Affecting Obscene and Indecent Communications

This section presents a selection of issues currently being litigated and resolved by the courts of the federal system and is not intended to be a comprehensive collection of cases.

General Media Communications, Inc. v. William J. Perry, No. 96 CIV. 7525 (SAS), 1997 U.S. Dist. WL 23180 (S.D.N.Y. Jan. 22, 1997). THE DISTRICT COURT FOUND THE MILITARY HONOR AND DECENCY ACT (THE ACT, THE MHDA), WHICH PROHIBITS THE SALES AND RENTAL OF ADULT MATERIALS ON MILITARY BASES, TO BE UNCONSTITUTIONAL UNDER THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS.

I. INTRODUCTION

Plaintiff General Media Corporations, publishers of *Penthouse* magazine,[1] joined with plaintiffs engaged in similar industries and brought this action against the Secretary of Defense and the United States Department of Defense to enjoin them from enforcing a ban under §2489a of the Act on the sales and rental of their products and other "adult" magazines and videos on military property.[2] The district court found that the Act banning sales and rental of pornographic materials was unconstitutional under the First, Fifth and Fourteenth Amendments and granted plaintiffs injunctive relief.[3]

II. BACKGROUND

Plaintiffs contended that the Military Honor and Decency Act ("MHDA")[4] violated their First Amendment rights to free speech by preventing them from selling and renting "sexually explicit" magazines and videos on military property.[5] They also claimed that the MHDA violated their equal protection rights under the Fourteenth Amendment, because the ban affected only sexually explicit materials in magazine and video format.[6] The plaintiffs also alleged that the vague wording of the statute infringed on their Due Process rights under the

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[1] Gen. Media Communications, Inc. v. William J. Perry, No. 96 CIV. 7525 (SAS), 1997 U.S. Dist. WL 23180 at *2 (S.D.N.Y. Jan. 22, 1997).

[2] *See id.* at *1.

[3] *See id.*

[4] 10 U.S.C. §2489a.

[5] Gen. Media Communications at *2. The MHDA defines "sexually explicit material" as "an audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium, the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way." 10 U.S.C. § 2489a(d).

[6] *See* Gen. Media Communications at *6.

Fifth Amendment.[7]

The Act was signed by President Clinton on September 3, 1996 and became effective on December 22, 1996.[8] Plaintiffs filed an amended complaint with the district court for the Southern District of New York on October 18, 1996.[9] Plaintiffs sought declaratory and injunctive relief against the defendants under 28 U.S.C. §§ 1331 and 2201.[10]

The MHDA provides in relevant part, "The Secretary of Defense may not permit the sale or rental of sexually explicit material on property under the jurisdiction of the Department of Defense."[11] The Act further specified that no officer or employee of the Department of Defense was to sell, rent or otherwise be compensated for providing "sexually explicit material to another person."[12]

The court granted a temporary restraining order prohibiting the defendants from preventing the sale of Penthouse and other pornographic materials on December 20, 1996 pending their decision on plaintiffs' motion.[13]

III. ANALYSIS

A. *The Plaintiff's Burden*

The court began its discussion by stating that the plaintiff needed to satisfy a four-pronged test in order for the court to grant a permanent injunction against the defendant.[14] Under this test, the plaintiffs were required to establish "(1) success on the merits of their claims; (2) irreparable harm absent injunctive relief; (3) that the threatened injury to plaintiffs outweighs any harm the injunction may cause to defendants; and (4) that the injunction is not adverse to the public interest."[15] The court held that if the plaintiffs' claim satisfied the first prong of the analysis, the other three followed with no other showing necessary.[16]

B. *Appropriateness of First Amendment Analysis*

The court began their analysis by finding that *Penthouse* and other publications were appropriate materials for First Amendment analysis and protection.[17] The court found that visual depictions are no less capable of expressing ideas

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[7] *See id.* at *9.

[8] *See id.* at *1.

[9] *See id.* at *3.

[10] *See id.*

[11] 10 U.S.C. § 2489a(a).

[12] 10 U.S.C. § 2489a(b).

[13] *See* Gen. Media Communications at *3.

[14] *See id.* at *3.

[15] Gen. Media Communications at *3 (citing E.E.O.C. v. Local 40. Int'l Assn. of Iron Workers, 76 F.3d 76, 80 (2d Cir. 1996).

[16] *See* Gen. Media Communications at *3 (citing Elrod v. Burns, 427 U.S. 347, 373 (1976). CHARLES A. WRIGHT, ARTHUR R. MILLER AND MARY KANE, FEDERAL PRACTICE AND PROCEDURE §2948.1 at 161 (2d ed. 1995)).

[17] *See id.* at *3-4.

and sentiments than the written or spoken word.[18] Visual depictions can effectively express opinions, in some cases more effectively than written words.[19] The fact that the MHDA applied only to pictorial depictions in no way shielded the Act from First Amendment scrutiny.

Also, while contending that pornography "do[es] not reflect the dominant cultural values in American Society,"[20] the court nevertheless asserted that offensive or disagreeable speech could not be prohibited unless it was also obscene.[21] Such a ban would be impossible for several reasons. First, no constitutional standard exists for distinguishing offensive speech, because "offensiveness" is entirely subjective.[22] Second, "offensive" speech may be tied together with legitimate, worthy ideas, and in many instances one cannot prohibit one without eliminating the other.[23]

C. *Government's Defense*

The defendants argued that the government can ban offensive speech in other circumstances, such as in the broadcast media and public schools.[24] The court distinguished these cases by noting that each involved "indiscriminate public exposure" which the viewer may not be able to elect to avoid.[25]

The court stated that First Amendment restrictions on broadcast media are appropriate for several reasons. First, broadcast transmissions are "uniquely pervasive" in that they are present in almost every home and immediately accessible.[26] Second, because radio and television owners are not currently able to block particular public transmissions, viewers may be confronted with images or ideas without warning that they find undesirable and would not otherwise elect to view.[27] Finally, if sexually explicit, morbid, or vulgar material were broadcast publicly, even children too young to read may access unhealthy or frightening

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[18] *See id.* at *3-4 (citing Bery v. City of New York, 97 F.3d 689, 693-94 (2d Cir. 1996)).

[19] *See id* (citing West Virginia State Board of Education v. Barnette, 319 U.S. 624, 632 (1943)).

[20] *See* Gen. Media Communications at *1.

[21] *Id.* at *5-6. The court defined "obscene" speech as material that an average person would believe appeals to the prurient interest, depicts sexual activity in a "patently offensive" manner, and lacks any serious "literary, artistic, political, or scientific value." *Id.* at *3 n.6 (citing Miller v. California, 413 U.S. 15, 24 (1973)). The court did not define "offensive" but uses the term in a way suggesting that the term signifies material that is objectionable or undesirable to many people without reaching the standards of "obscenity."

[22] *See id.* at *4 (citing Cohen v. California, 403 U.S. 15, 25 (1971)).

[23] *See id.* (citing Cohen, 403 U.S. at 26.)

[24] *See id.* at *5 (citing F.C.C. v. Pacifica Foundation, 438 U.S. 726, 748-49 1978) and Board of Education v. Pico, 457 U.S. 853, 871 (1982)).

[25] *Id.* (citing Sable Communications, 492 U.S. at 127).

[26] *See id.*

[27] See *id.*

images.[28]

The Supreme Court has also allowed municipal governments to ban or remove nonobscene sexually explicit materials from school libraries.[29] In these cases, the school administration's intent must be to protect young children and not to ban ideas with which it disagrees.[30] The Supreme Court has recognized that the effective administration and protection of children in school systems are compelling interests allowing limitations on constitutional rights.[31]

The Supreme Court has only allowed the government to limit free speech in the areas of broadcasting and grade school education.[32] In these situations, the government can only prevent the harm feared by restricting expression, and both exceptions are designed to protect children. The government advances neither of these interests, nor similar ones, by banning the sales of plaintiffs' products on military installations.

D. *First Amendment Violation*

To determine whether the government has permissibly restricted speech or expression in a particular forum, a court must first determine whether the forum is "public" or "nonpublic."[33] The court must use a "strict scrutiny" standard to determine whether the First Amendment has been violated if the forum is public[34] and the less strict "reasonableness" standard if the forum is nonpublic.[35] In this case, however, the court did not believe it needed to determine whether military installations are "public" or "nonpublic."[36] Even in nonpublic fora, the government may not restrict nonobscene speech merely because it is "offensive."[37]

The government argued that the restriction served several compelling, overriding interests. First, the government argued that sexually explicit materials were "unpalatable to many"[38] and that by allowing sales of *Penthouse* and other publications, the public could conclude that the government was implicitly endorsing those products.[39] The government also argued that the MHDA prevented the sale

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[28] See *id.*

[29] *See* Gen. Media Communications, 1997 U.S. Dist. WL 23180 at *6 (citing Pico at 871).

[30] *See id.* at *6.

[31] See *id.* (citing Thomas v. Board of Educ., Granville Central School Dist., 607 F.2d 1043, 1057 (2d Cir. 1979)).

[32] See *id.*

[33] See *id.* at *6.

[34] *See id.* at *7 (citing Perry Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983)).

[35] See *id.* at *7 (citing Paulsen v. County of Nassau, 925 F.2d 65, 68-69 (2d Cir. 1991)).

[36] See *id.* at *7.

[37] *See id.* at *7.

[38] *See id.* at *7.

[39] *See id.*

and rental of these materials in order to preserve the values of "honor, courage, and commitment"[40] that the military wishes to advance.

The court was unpersuaded by any of these arguments. Most importantly, the MHDA did not ban the ownership or use of sexually explicit materials on military property.[41] Whatever result the military feared the ownership of pornography would have on the moral constitution of its officers might still occur in the same magnitude and with the same frequency.[42] Nor did the government offer any proof that the sale, rental, or ownership of these materials would effect the core values of the military or its public image.[43] The court was also unpersuaded that the public assumes the military "endorses" these materials any more than it endorses the use of cigarettes and alcohol, which are also sold at military bases.[44]

The court also disagreed with the defendants' analysis of the intent of the MHDA. A plain reading of the Act suggests that it is intended to restrict "non-obscene speech that Congress believed to be offensive and to penalize those who publish it."[45] The court held that the defendants sought to restrict the expression of ideas with which they disagreed in direct violation of the First Amendment.

E. *Fourteenth Amendment Equal Protection Violation*

The court held that the MHDA was also unconstitutional under the Fourteenth Amendment.[46] Under the Equal Protection Clause of the Fourteenth Amendment, the government may not allow access to fora to speakers with whom it agrees and deny access to those whose ideas the government finds objectionable.[47] Alleged Equal Protection violations are subject to strict scrutiny, and are considered unconstitutional unless the government can demonstrate that the restriction serves a compelling government interest by the least restrictive means available.[48]

The court found that the Act impacts on distributors of periodicals and videotapes without affecting the rights of those that publish in hardcover formats.[49] The court held that the Act did not restrict the sale or rental of sexually explicit written or pictorial material distributed in hardcover, but the defendants offered no proof that pictorial periodicals and videotapes affect the military's efficiency or function more than similar material released in hardcover.[50] The unequal impact of the MHDA also does not restrict the use and availability of these materi-

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[40] *Id.*

[41] *See id.*

[42] *See id.*

[43] *See id.*

[44] *See id.*

[45] *Id.* at *8.

[46] *Id.* at *1.

[47] *See id.* at *8 (citing Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972)).

[48] *See id.* (citing Bernal v. Fainter, 467 U.S. 216, 219 (1984)).

[49] *See id.* at *9.

[50] *See id.* at *9.

als on military grounds,[51] nor did it advance the defendants' stated goals of promoting "honor, courage, and commitment."[52] The court held the MHDA did not serve any compelling government interest, nor is it "narrowly tailored" to serve the government's stated interest.[53]

F. *Fifth Amendment Due Process Violation*

The plaintiffs also argued that the MHDA was void because its vague construction violates the Fifth Amendment's Due Process clause.[54] The court acknowledged that the level of scrutiny used to determine if a statute is constitutionally vague depends on the particular circumstances of the case, but noted that vague laws that impact the right to free speech should be subject to a "more stringent" vagueness test.[55]

The court held that the key provision of the MHDA contains vague terms, rendering the entire statute void for vagueness.[56] Most significantly, the act bans "lascivious" depictions of nudity, a term which the defendants conceded is subjective.[57] Neither the court nor the defendants can possibly distinguish "lascivious" materials any more than either could establish a distinction between "offensive" and "inoffensive" speech.[58] The vagueness of the statute would allow the military to arbitrarily ban materials which express ideas with which it does not agree.[59]

V. CONCLUSION

The district court found the Military Honor and Decency Act of 1996 to be in violation of the First, Fourteenth and Fifth Amendments. The court enjoined the defendants from "changing, as a result of the Act, their existing stock, display and selling policies or practices."[60] While it applauded the Department of Defense's attempt to combat recent charges of sexism and unfair treatment of women, and agreed that the materials sought to be banned were "offensive," it held that the military may not seek to advance these ideals by impeding the free exchange of ideas, even those which many would find objectionable.

Daniel I. Steinberg

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[51] *See id.*

[52] *See id.* (quoting from the transcript of defendant's oral argument).

[53] *See id.* at *9.

[54] *See id.*

[55] *Id.* at *9 (citing Villages of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982)).

[56] Gen. Media Communications, 1997 U.S. Dist. WL 23180 at *10.

[57] *See id.*

[58] *See id.*

[59] *See id.*

[60] *Id.* at *11.

United States v. Thomas, 74 F.3d 701 (6th Cir. 1996). UNDER 18 U.S.C. §1465, THE GOVERNMENT MAY PROSECUTE THE TRANSMISSION OF OBSCENE MATERIAL THROUGH A PERSONAL COMPUTER IN THE JUDICIAL DISTRICT WHERE THE MATERIAL WAS RECEIVED.

I. INTRODUCTION

A federal grand jury for the Western District of Tennessee returned a twelve-count indictment charging defendants Robert and Carleen Thomas with one count of conspiracy to violate federal obscenity laws (count 1), six counts under 18 U.S.C. 1465[1] of knowingly using and causing to be used a means of interstate commerce for the purpose of transporting obscene, computer-generated materials in interstate commerce (counts 2-7), three counts of shipping obscene videotapes via the United Parcel Service (counts 8-10), one count of causing the transportation of materials depicting minors engaged in sexually explicit conduct (count 11), and one count of forfeiture (count 12).[2] Defendants were tried by a jury and found guilty on all counts except Count 11.[3]

II. BACKGROUND

The defendants began operating the Amateur Action Computer Bulletin Board System (AABBS) from their home in California in February 1991.[4] The AABBS was a computer bulletin board system that operated through the use of telephones, modems, and personal computers.[5] Its features included public messages, chat lines, and files that members could download to their own computer and printers.[6] Defendant Robert Thomas also sold and delivered pornographic video-

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[1] *See* U.S. v. Thomas, 74 F.3d 701, 709-711 (6th Cir. 1996) (citing 18 U.S.C. §1465). 18 U.S.C. §1465 provides:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution, or knowingly travels in interstate commerce, or uses a facility or means of interstate commerce for the purpose of transporting obscene material in interstate or foreign commerce, any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both.
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> The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption is rebuttable.

See id.

[2] *See* Thomas, 74 F.3d at 705-706.

[3] *See id.* at 706.

[4] *See id.* at 705.

[5] *See id.*

[6] *See id.*

tapes to those AABBS members that ordered them.[7]

Robert Thomas used an electronic device called a scanner to convert pictures from pornographic magazines into computer files called Graphic Interchange Format files (GIF files).[8] Mr. Thomas would run a scanner over the pictures, the scanner converted the pictures into computer code and the pictures were then loaded onto the bulletin board.[9] Members of the AABBS accessed the GIF files by using a telephone, modem and personal computer.[10] A modem in the defendants' home answered the calls.[11]

In July 1993, a U.S. Postal Inspector, Agent David Dirmeyer, received a complaint about the AABBS from a person who resided in the Western District of Tennessee.[12] Dirmeyer, using an assumed name, gained membership in the AABBS.[13] Robert Thomas telephoned Dirmeyer at his undercover telephone number in Memphis, Tennessee, and gave him a personal password.[14] Dirmeyer then used his personal computer to log on to the AABBS and download GIF files that depicted images of bestiality, sadomasochistic abuse, and sex scenes involving urination.[15] Dirmeyer also ordered six pornographic videotapes from the AABBS, which were delivered by U.P.S. to a Memphis, Tennessee address.[16]

On January 10, 1994, a U.S. Magistrate Judge for the Northern District of California issued a search warrant.[17] The AABBS' location was searched and the defendants' computer system was seized.[18]

On appeal, the defendants challenged their convictions on several grounds. First, the defendants argued that their conduct, as charged in counts 1-7, was not a violation of 18 U.S.C. §1465.[19] The defendants also argued that venue in the Western District of Tennessee for counts 2-7 of their indictments was improper.[20] Third, the defendants argued that their convictions under counts 1-7 violated their First Amendment rights to freedom of speech.[21] Fourth, the defendants contend that the government was required to present expert testimony regarding the

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[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See id.* People became members of the AABBS by filling out an application form and paying a fee. Defendants would then contact the member and give him or her a personal password which allowed the member to select, retrieve, and transport GIF files to their own computer. The members could then view the GIF files on their computer screen and print the image using their printer. *See id.*

[11] *See id.*

[12] *See id.*

[13] *See id.*

[14] *See id.*

[15] *See id.*

[16] *See id.*

[17] *See id.*

[18] *See id.*

[19] *See id.* at 706.

[20] *See id.* at 709.

[21] *See id.* at 710.

prurient appeal of the materials at issue.[22] The Court of Appeals rejected each of these arguments and affirmed the defendants' convictions.[23]

III. ANALYSIS

A. *Defendants' Conduct Constituted a Violation of §1465*

The court held that §1465 applied to the defendants' conduct of transporting obscene computer-generated materials from California to Tennessee.[24] The defendants claimed that §1465 applied to the interstate transport of tangible objects, not intangible articles like strings of computer code which become viewable images only after they were decoded by an AABBS member's computer.[25]

The court found the manner of transmission of obscene images did not affect the end result which was the images being viewed on a computer screen in Tennessee or their being printed out in that location.[26] Since Congress' intent in passing §1465 was to "stem the transportation of obscene material in interstate commerce regardless of the means used to effect that end," the defendants' conduct falls within the statute's meaning.[27]

B. *Venue was Proper in the Western District of Tennessee*

Defendants contended that counts 2-7 should have been severed and transferred to California because they did not cause the GIF files to be transmitted to the Western District of Tennessee.[28] The court disagreed. To establish a §1465 violation, the court held, the Government must prove that a defendant knowingly used a facility or means of interstate commerce for the purpose of distributing obscene materials.[29] Furthermore, the court found that "there is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent."[30] The court cited evidence introduced at trial to show that AABBS materials were distributed to an approved AABBS member known to reside in the Western District of Tennessee.[31]

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[22] *See id.* at 713.

[23] *See id.* at 716.

[24] *See id.* at 707.

[25] *See id.* at 706-707. Defendants cited United States v. Carlin Commun., Inc., 815 F.2d 1367 (10th Cir. 1987), to support their argument. The court said that *Carlin* dealt with pre-recorded pornographic telephone messages, which are inherently different from the computer-generated images at issue. *See id.*

[26] *See Thomas* at 706-707 (citing United States v. Gilboe, 684 F.2d 235 (2d Cir. 1982)).

[27] *Id.* at 709 (citing United States v. Maxwell, 42 M.J. 568, 580 (A.F.Ct.Crim.App. 1995)).

[28] *See id.* at 709.

[29] *See id.*

[30] *Id.* at 709 (citing United States v. Bagnell, 679 F.2d 826, 830 (11th Cir. 1982)).

[31] *See id.* at 710.

Based on the evidence, the court found that the effects of the defendants' criminal conduct reached the Western District of Tennessee, parties could conduct accurate fact-finding there, and venue there was proper.[32]

C. *Convictions Did Not Violate Defendants' Freedom of Speech*

The defendants argued that they had a constitutionally protected right to possess obscene materials in the privacy of their own home.[33] The court found that this right does not create a "correlative right to receive it, transport it, or distribute it" in interstate commerce.[34] Furthermore, although the right to possess obscene materials in the privacy of one's own home creates a zone of constitutionally protected privacy, that zone does not attach to obscene material when it leaves the house.[35] The court concluded that the defendants went beyond merely possessing obscene GIF files in their home,[36] but ran a business that advertised and promised its members the transportation of the pornographic GIF files they selected.[37]

The defendants also argued that they had not violated the first prong of the test for obscenity set forth in *Miller v. California*.[38] The defendants contended that in cases involving interstate transportation of obscene material, juries are properly instructed to use the community standards of the geographic location where the materials are sent to determine whether the material is obscene.[39] The court disagreed.[40] The court said that it was constitutional to apply one community's standards to material and find that material obscene, even though the same material would not be obscene in the community from which it was sent.[41]

D. *Government Did Not Have to Produce Expert Testimony*

The defendants argued that the district court made a mistake when it informed the jury that the government was not required to present expert testimony regarding the prurient appeal of the images.[42] The court disagreed and held that

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[32] *See id.*

[33] *See* Thomas at 710 (citing Stanley v. Georgia, 394 U.S. 557 (1969)).

[34] *See id.* (citing United States v. Orito, 413 U.S. 139, 141-142 (1973)).

[35] *See id.*

[36] *See id.*

[37] *See id.*

[38] *See id.* (citing Miller v. California, 413 U.S. 15 (1973)) (Supreme Court held that the first prong of the test for obscenity is whether the "average person applying contemporary community standards could find that the work, taken as a whole, appeals to prurient interest.").

[39] *See Thomas* at 711.

[40] *See id.*

[41] *See id.* (citing United States v. Peraino, 645 F.2d 548, 551 (6th Cir. 1981)).

[42] *See* Thomas at 713. Under the first prong of the *Miller* test, the jury must decide whether the allegedly obscene material "appeals to the prurient interest." Miller, 413 U.S. at 24.

the challenged jury instruction was valid.[43] The court cited several Supreme Court decisions which held that "expert testimony is not necessary to enable the jury to judge the obscenity of material which . . . has been placed into evidence."[44] Nevertheless, a licensed clinical psychologist testified as an expert on behalf of the defendants that some people do become sexually aroused by the acts depicted in the images the defendants sent to Tennessee.[45] This testimony and the images themselves were sufficient to guide the jury with regard to prurient appeal.[46]

IV. CONCLUSION

The court held that sending pornographic images by personal computer across state lines is an activity that falls within the proscription of 18 U.S.C. §1465. Furthermore, the case may be tried in the jurisdiction where the pornographic images were sent with the jury using its own community's standards. Finally, expert testimony as to the prurient appeal of the materials is not necessary to help the jury decide this issue.

Brock Lunsford

Playboy Entertainment Group Inc. v. United States, 945 F. Supp. 772 (D. Del. 1996). THE COURT FOUND THE PETITIONERS TO BE UNLIKELY TO DEMONSTRATE THAT THE COMMUNICATIONS DECENCY ACT (THE CDA, THE ACT) DENIED THEM THEIR FIRST AMENDMENT RIGHTS, FOURTEENTH AMENDMENT EQUAL PROTECTION RIGHTS, OR THAT THE STATUTE WAS UNCONSTITUTIONALLY VAGUE.

I. INTRODUCTION

Playboy Entertainment Group, Inc. (Playboy) and Graff-Pay-Per-View, Inc. (Graff) brought suit to prevent the United States from enforcing §505 of the Communications Decency Act of 1996 (the CDA, the Act).[1] Section 505 orders cable stations that transmit sexually explicit adult video programs to scramble their transmission signals.[2] The Act requires programmers unable to comply with §505 to broadcast sexually explicit material only during specified hours.[3] The district court found that the petitioners' challenges to the Act would probably not succeed in court and removed the TRO.[4] Playboy and Graff claimed that §505 violated the First Amendment, the Fourteenth Amendment's Equal Protec-

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[43] *See* Thomas at 14.

[44] Hamling v. United States, 418 U.S. 87, 100 (1974) (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973)).

[45] *See* Thomas at 714.

[46] *See id.*

[1] *See* Telecommunications Act of 1996, tit. 5., Pub. L. No. 104-104, 110 Stat. 56.

[2] *See id.* at §505(a).

[3] *See id.* at §505(b)

[4] *See* Playboy Entertainment Group, Inc., v. United States, 945 F. Supp 772 (D. Del. 1996).

tion Clause, and was unconstitutionally vague.[5]

II. BACKGROUND

Section 505 of the CDA was intended to prevent the signal bleed of "video images and/or audio sounds on a scrambled channel."[6] To comply properly with §505, cable providers would have to block the signal of sexually explicit materials entirely.[7] Section 505(b) listed the limited hours during which programmers would be allowed to broadcast sexually explicit programs if they were unable to block their signal completely.[8] Playboy and Graff challenged the constitutionality of §505 in separate actions that were later consolidated.[9]

Playboy and Graff brought suit about two weeks after the Communications Decency Act was signed into law.[10] They sought relief in the form of an injunction, which was temporarily granted until a three judge panel of District Court judges could convene to hear the case.[11]

The District Court removed the injunction after determining that the constitutional challenges to the statute were unlikely to succeed.[12] The court based its decision on an analysis of the standard required for the granting of a preliminary injunction, an application of the First Amendment, an examination of the Fourteenth Amendment Equal Protection Clause and the established standard for vagueness.[13]

III. ANALYSIS

A. *The Standard for Granting a Preliminary Injunction*

To receive a preliminary injunction, petitioners must show that their claims might succeed on their merits.[14] The court must also balance the potential relief an injunction would bestow upon the petitioners, the possible damage the defendants may suffer,[15] and the harm to the petitioners should the injunction be denied.[16] The court examined the challenge to §505 and determined that the petitioners' likelihood of success on the merits was not great enough to warrant an

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[5] *See id.* at 783.

[6] *See id.* at 776.

[7] *See id.* at 773.

[8] *See id.*

[9] *See* FED. R. CIV. P. 42(a) (stating that cases with common questions of law or fact may be consolidated).

[10] *See* Playboy Entertainment Group at 783.

[11] *See id.* at 775.

[12] *See id.*

[13] *See id.*

[14] *See* American Civil Liberties Union v. Reno, 929 F. Supp. 824, 851 (E.D. Pa. 1996) (citing Campbell Soup Co. v. Con Aga, Inc. 927 F.2d 86, 90-91 (3d Cir. 1992).

[15] *See* Playboy Entertainment Group at 788 (financial loss is not the type of irreparable injury that warrants granting of injunctive relief).

[16] *See id.* at 782, (citing Reno at 851).

injunction.[17]

B. *First Amendment Protections*

The court delayed their decision until the Supreme Court released the *Denver Consortium* decision.[18] The present case differs from *Denver Consortium*, which protected the right of private access channels to limit certain types of programming but did not extend such liberties to public access broadcasters.[19] Section 505 did not directly attempt to regulate speech, but instead focused on the method used to transmit the speech.[20] The court also considered whether the issue encompassed "content-based" or "content-neutral" speech.[21] The court determined that §505 is a "content-based" restriction because it only applies to certain programming material.[22] The court held that enough evidence existed to demonstrate that the intent of §505 was to eliminate the potential harm of certain programming on children, especially those in households not subscribing to receive such broadcasts.[23] Congress' inclusion of a time provision for stations unable to comply with proper scrambling of sexually explicit programming showed their willingness to reduce the potential economic harm to broadcasters.[24] The cumulative effect of protective provisions and diminished chance for economic suffering lead the court to determine that the petitioners were unlikely to succeed under a claim of First Amendment violations.[25]

C. *The Fourteenth Amendment Equal Protection Clause*

The plaintiffs also claimed that §505 deprived them of equal protection rights under the Fourteenth Amendment.[26] They claimed that because the Act did not apply to cable stations that broadcast material containing sexually explicit scenes, the Act placed burdens on the petitioners that did not affect similar businesses.[27] The exempted stations, however, only televised shows in which a small

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[17] *See id.* at 783.

[18] *See* Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission, 116 S. Ct. 2374 (1996) (holding that (1) the right of programmers under the Cable Television Consumer Protection and Competition Act to prohibit indecent or offensive programming on leased access channels does not violate the First Amendment; (2) the use of "segregate and block" on leased access channels is inconsistent with the First Amendment; and (3) the First Amendment is violated by granting programmers the right to prohibit offensive and indecent programming on public access channels).

[19] *See id.*

[20] *See* Playboy Entertainment Group at 785.

[21] *See id.*

[22] *See id.*

[23] *See id.* at 786.

[24] *See id.* at 787.

[25] *See id.* at 790.

[26] *See id.*

[27] *See id.*

portion of the show contained sexually explicit footage, and Congress did not believe that this limited amount of content would harm viewers if unintentionally transmitted.[28] The court held that this disparate programming content distinguished these broadcasters from the petitioners, and that the petitioners' equal protection claim would fail if a court were to evaluate their case on its merits.[29]

D. *Vagueness*

The court briefly examined the petitioners' vagueness claim and concluded that no sufficient foundation for the success of this claim existed.[30] The court relied on the recently decided *Denver Consortium* decision, which denied a similar vagueness claim.[31] The court held that §505 was clear and unambiguous in its intent and application, and the petitioners' claim was unlikely to defeat a challenge.[32]

IV. CONCLUSION

The District Court of Delaware determined that the petitioners' claims did not satisfy the requirements of the preliminary injunction test and lifted the temporary restraining order. Neither the language nor the intent of the statute is unconstitutional, and the statute is clear and unambiguous. The background and language of §505 of the Telecommunications Act of 1996 shows a strong intent to support the need to block sexually explicit broadcasts or limit the times during which they are transmitted.

Michelle Tarson

Shea on Behalf of American Reporter v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996). SECTION 223(d) OF THE COMMUNICATIONS DECENCY ACT OF 1996, A TOTAL BAN ON CONSTITUTIONALLY PROTECTED INDECENT COMMUNICATION AMONG ADULTS, IS UNCONSTITUTIONALLY OVERBROAD.

I. INTRODUCTION

The plaintiff brought this action on behalf of *American Reporter*, an electronically-distributed daily newspaper, and sought a declaratory judgment that §223(d) of Title V of the Telecommunications Act of 1996 (the Communications Decency Act, the CDA)[1] is unconstitutionally vague and overbroad.[2] The plaintiff also moved for a preliminary injunction to prevent the Department of Justice

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[28] *See id.* at 790-791.
[29] *See id.* at 791.
[30] *See id.*
[31] *See id.*
[32] *See id.*
[1] *See* 47 U.S.C. §223(d).
[2] *See* Shea on Behalf of American Reporter, 930 F. Supp. 916, 924 (S.D.N.Y. 1996).

from enforcing §223(d) of Title V.[3] The district court granted the plaintiff's motion for a preliminary injunction.[4]

II. BACKGROUND

The plaintiff Joe Shea is the editor-in-chief, part-owner, and publisher of *American Reporter*, a daily newspaper distributed on the Internet.[5] *American Reporter* published an editorial criticizing the CDA.[6] Section 223(d) of the CDA prohibits the use of an interactive computer service to transmit or display "patently offensive" material in a manner accessible to minors.[7] The *American Reporter* editorial contained language of a kind restricted from Internet transmission by §223(d).[8]

A three-judge district court considered plaintiff's facial challenge to §223(d), pursuant to 28 U.S.C. §2284.[9] After hearing opening arguments, the court recognized the need for an evidentiary hearing to determine whether available technology permits Internet content providers to establish the affirmative defenses allowed under the Act.[10] At the time of the hearing, a similar challenge to §223(d) was pending before a three-judge panel in the Eastern District of Pennsylvania.[11] Before hearing closing arguments, the three-judge court in the instant case directed the parties to aid the fact-finding process by incorporating relevant portions of the record from the Philadelphia case.[12] The court held: (1) that the plaintiff failed to establish a likelihood of success on the claim that §223(d) is unconstitutionally vague; and (2) that plaintiff had demonstrated a likelihood that the provision is unconstitutionally overbroad.[13] Plaintiff's motion for preliminary injunction was submitted to the United States District Court following supplemental briefing by the parties.[14]

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[3] *See id.*

[4] *See id.* at 950.

[5] *See id.* at 923.

[6] *See id.*

[7] *Id.* at 923-24 (citing Pub. L. No. 104-104, §502(2)(d), 110 Stat. 56, 133 (1996)). The provision provides criminal penalties of fine, imprisonment, or both. *See id.*

[8] *See id.* at 923.

[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *See id.* The court found that, while nonmutual collateral estoppel may apply against the government with respect to factual issues, the doctrine was not appropriate where the nature of the Philadelphia finding's was "avowedly tentative." *Id.* at n.1 (citing Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962)).

[13] *See id.* at 922.

[14] *See id.* at 924.

III. ANALYSIS

The court began its analysis by noting that §223(d) of the CDA targets Internet content providers who transmit or display material that, "in context, depicts or describes, in terms patently offensive as measured by the contemporary community standards, sexual or excretory activities and organs."[15] The provision's language parallels the Federal Communications Commission's (FCC) definition of "indecency" as used in the broadcast context.[16]

A. *Vagueness*

On the vagueness issue, the court noted that a federal statute or regulation violates the Due Process Clause of the Fifth Amendment where it fails to supply a "fair warning of what will give rise to criminal liability."[17] Also, where such a statute or regulation "purports to limit freedom of expression" its vagueness violates the First Amendment by chilling the exercise of that freedom.[18]

The court rejected the plaintiff's argument that §223(d)'s definition of prohibited material renders the provision unconstitutionally vague.[19] The court noted that virtually identical language, as used in the FCC's definition of "indecency," has withstood similar challenges.[20] The court found that Internet content providers are in no worse a position than those subject to restrictions that require publishers and broadcasters to adhere to community decency standards.[21]

The court declined to address the plaintiff's argument that, since a content provider has no way of determining what communities receive his material, he must "gear his message toward the least tolerant community."[22]

B. *Substantial Overbreadth*

On the plaintiff's claim of overbreadth, the court noted that a statute will be invalidated only if the overbreadth is substantial and the statute cannot be adequately limited by construction.[23] Since the court found that §223(d) is a content-based regulation, the court used strict scrutiny in its evaluation of the statute.[24] After assuming that the government had a compelling interest in restricting minors' access to patently offensive material, the court focused its analysis on

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[15] 47 U.S.C. §223(d).

[16] *See* Shea, 930 F. Supp. at 934-35.

[17] *Id.* at 935 (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).

[18] *Id.*

[19] *See id.* at 936.

[20] *See id.* at 935-37. In particular, the court cites FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding the application of the FCC definition to a deliberately provocative radio broadcast by comedian George Carlin). *See id.*

[21] *See id.* at 936-37 (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 125-26 (1989)).

[22] *Id.* at 937-38.

[23] *See id.* at 939 (citing Broadrick v. Oklahoma, 413 U.S. 601, 613, 615 (1973)).

[24] *See id.* at 939-40.

whether the CDA is a narrowly drawn regulation so it does not unnecessarily interfere with freedom of expression.[25]

The court noted that the nature of Internet communication prevents providers transmitting indecent communications from knowing with certainty that the indecent material will not reach a minor.[26] Thus, in order to comply with §223(d), the provider would have to "refrain from transmitting any indecent content."[27] This result, the court found, would impermissibly restrain protected communication among adults.[28]

C. *Affirmative Defenses*

The court rejected the government's argument that two affirmative defenses provided by the CDA would adequately ensure that providers could still transmit protected communications to adults.[29] The court found that, under current technology, the affirmative defenses provided by §223(e)(5) are infeasible and do not provide content providers with a "safe harbor" from the proscriptions of §223(d).[30]

Section 223(e)(5) of the CDA establishes two affirmative defenses to liability under §223(d).[31] One of these defenses exempts providers who restrict access by requiring age verification.[32] The other defense requires a showing that the provider has taken good-faith actions, under available technology, to prevent access by minors.[33]

The court found the age-verification defense to be inadequate in protecting content-providers from liability under §223(d).[34] In particular, the court noted that such verification systems are available only to providers using certain methods of Internet communication.[35] Moreover, the expense of such a system would be burdensome for providers to whom the technology is available.[36]

The court also found the good-faith defense to be an inadequate protection against liability under the CDA.[37] The court rejected government suggestions that content providers could restrict access to indecent material by minors through the use of a "tagging" procedure.[38] The court noted that content provid-

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[25] *See id.* at 941.

[26] *See id.* at 941-42.

[27] *Id.* at 942.

[28] *See id.*

[29] *See id.* at 942-50.

[30] *See id.* at 943, 948.

[31] *See id.* at 942.

[32] *See id.* (citing 47 U.S.C. §223(e)(5)(B)). Age verification is most often achieved through the use of credit card numbers or adult access codes. *See id.* at 934.

[33] *See id.* at 942 (citing 47 U.S.C. §223(e)(5)(A)).

[34] *See id.* at 943.

[35] *See id.* at 942-43.

[36] *See id.* at 943.

[37] *See id.* at 948.

[38] *See id.* at 944-46. "Tagging" is a scheme that involves the insertion of a label into

ers wishing to "tag" their material would have to rely on third-party software developers to configure their products to detect such tags.[39] Because the CDA places no obligations on software producers, reliance on their products by content providers does not constitute a "safe harbor" from §223(d).[40]

IV. CONCLUSION

The district court found that the plaintiff had not demonstrated a likelihood of success on the claim that §223(d) of the CDA is unconstitutionally vague. However, the court found that plaintiff demonstrated a likelihood of success on the claim that §223(d) is unconstitutionally overbroad because it bans protected indecent communication between adults. Additionally, the court held that the overbreadth of §223(d) was not cured by the availability of two affirmative defenses in §223(e)(5). The court found that present technology renders both defenses infeasible.

John Matosky

American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D.Pa. 1996). THE PROVISIONS OF THE COMMUNICATIONS DECENCY ACT OF 1996 PROHIBITING THE TRANSMISSION OF OBSCENE OR INDECENT MATERIAL AND PATENTLY OFFENSIVE COMMUNICATIONS TO PERSONS UNDER THE AGE OF 18 VIOLATE THE FIRST AMENDMENT.[1]

I. INTRODUCTION

Businesses, libraries, noncommercial and not-for-profit organizations, and educational societies challenged provisions of the Communications Decency Act of 1996,[2] which restricted obscene or indecent communications over the Internet. Plaintiffs contended that the challenged provisions restricting indecent communications to minors violated the First and Fifth Amendments.[3] A three-judge panel of the District Court granted plaintiff's motion for a preliminary injunction.

II. BACKGROUND

Title V of the Telecommunications Act of 1996, known as the Communications Decency Act, was signed into law on February 8, 1996. The two provisions challenged in this case are §§ 223(a) and 223(d).

Section 223(a), the 'indecency' provision, subjects to criminal penalties of imprisonment of no more than two years or a fine or both anyone who: (1) in in-

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the name or address of a particular site so as to identify its content as unsuitable for minors. *See id.* at 932-33.

[39] *See id.* at 946.

[40] *See id.*

[1] *See* American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996).

[2] 47 U.S.C. § 223(a)-(h).

[3] *See* American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996).

terstate or foreign communications . . . (B) by means of a telecommunications device knowingly—

(i) makes, creates, solicits, and

(ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication place the call or initiated the communication;

. . .

(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity.

Section 223(d), the 'patently offensive' provision, subjects to criminal penalties anyone who: (1) in interstate or foreign communication knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image or other communication that, *in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs,* regardless of whether the use of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunication facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity. (emphasis by court).[4]

The day after the Communications Decency Act was signed, the District Court granted a limited temporary restraining order, holding that § 223(a)(1)(B) was unconstitutionally vague.[5] A three-judge panel was then appointed to hear the case. Plaintiffs did not challenge the statute because it covered obscenity or child pornography, but argued that it was unconstitutional because it applied to speech which was constitutionally protected by the First Amendment, and was vague in violation of the Fifth Amendment's Due Process Clause.[6] In support of its defense, the government argued that the Act provides a "safe harbor' defense under § 223(e)[7] which protects those solely providing access to a service not

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[4] *See id.* at 850 (citing Communications Decency Act of 1996, § 223(d)).

[5] *See id.* at 827.

[6] *See id.* at 829.

[7] Section 223(e) provides in full: (1) No person shall be held to have violated subsection (a) or (d) of this section solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software or other related capabilities that are incidental to providing such access or connection that does not included the creation of the content of the communication. (2) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications. (3) The defenses provided

under their control or those who have made a good faith attempt to restrict or prevent access to minors.[8]

The three judge panel granted a preliminary injunction and held that: (1) the plaintiffs established a reasonable probability of success on the merits that § 223(a) is facially unconstitutional to the extent that it covers indecent communications, and that § 223(d) is facially invalid; (2) the plaintiffs have shown irreparable injury; and (3) the public interest will be served.

III. ANALYSIS

A. *Preliminary Injunction Standard*

To grant a preliminary injunction, plaintiffs must show that they are likely to prevail on the merits and they will suffer irreparable harm if the preliminary injunction is not granted.[9] The court must also consider whether the harm to the defendant that may arise from granting an injunction outweighs the harm to the plaintiff if it is denied, and whether it is in the public interest to grant injunctive relief.[10] However, when First Amendment interests are involved, irreparable injury is tied to the finding of likelihood of success on the merits.[11] This is based on the principal that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[12] Also, having access to constitutionally protected speech in the public interest.[13]

B. *Standard of Review*

The restrictions of the Act cover "indecent" or "patently offensive" speech

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by paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system or network engaged in violation of this section that is owned or controlled by such person. (4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of their employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct. (5) It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) with respect to the use of a facility or an activity under subsection (a)(1)(B) that a person— (A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or (B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

[8] 929 F. Supp. at 855.

[9] *See id.* at 851.

[10] *See id.*

[11] *See id.*

[12] *Id.* (quoting In Elrod v. Burns, 427 U.S. 347, 373 (1976)).

[13] *Id.*

which is entitled to constitutional protection.[14] Since a First Amendment right is involved, the regulation is subject to strict scrutiny.[15] The government must show a compelling government interest and that the Act is narrowly tailored to further that interest.[16]

C. *Government's Interest*

The court found that the government does have a compelling interest protecting minors from some of the material that the statute prohibits, but also found, however, that the statute covers some material that the government may not have a compelling interest in.[17] The court found that the Act covers some material which is not pornographic or obscene, such as news articles, artistic material and informative material that may be "indecent" due to its sexual nature.[18] Adults, and perhaps even minors, have a constitutional right to such speech and those who display the protected speech must choose between silence and prosecution.[19] However, the court held that because there was a compelling interest in preventing access to some material, it would not invalidate the statute on this basis.[20]

D. *Narrowly Tailored Means*

The court held that the statute is not narrowly tailored because " 'indecent' and 'patently offensive' are inherently vague, particularly in light of the government's inability to identify the relevant community by whose standards the material will be judged."[21] For these reasons, the court also found that the statutory defenses under the statute would not provide protection from the unconstitutional reach of the statute.[22] The court also found that under current laws, obscenity and child pornography were already vigorously prosecuted.[23]

The government argued that upholding the statute will cause the Internet community to be creative and find a way to find technological solutions.[24] The court found, however, that it cannot uphold a criminal statute on the basis of future technology. It also stated that under current technology it was impossible for most people to comply with the statute.[25] The court concluded that it was likely that plaintiffs would prevail on the merits and held the Act facially invalid under

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 852.
[18] *Id.*
[19] *Id.* at 854-855.
[20] *Id.* at 853.
[21] *Id.* at 856.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 857.
[25] *Id.*

the First and Fifth Amendments.[26]

IV. CONCLUSION

A three-judge panel of the District Court granted a preliminary injunction, enjoining the enforcement of the Communications Decency Act. The court found that the government did not meet its burden of showing a narrowly tailored means to further a compelling government interest and thus did not survive strict scrutiny, which was necessary to uphold an infringement on First Amendment speech and Fifth Amendment due process. As such, it was likely that plaintiffs would prevail on the merits, thus showing irreparable injury and a public interest in their favor.

Greg Iskander

[26] *Id.*