

Cyberporn and Dangerous Judicial Precedent

The issue of online pornography has been talked to death. Obviously, we all want to protect children from exposure to lewd images on the Internet. At the same time, we want to preserve online freedom of speech. On a larger scale, nation-states are concerned with the protection of public morals in their jurisdictions — an almost impossible task in the border-free cyberspace environment. In legal battles between online freedom and online control, cyberporn serves the values of free speech very poorly. It creates bad judicial precedent.

An immediate objection to this statement is the case of *Reno v. ACLU*, 117 S.Ct. 2329 (1997), where the Supreme Court declared unconstitutional the government's attempt to regulate indecent speech online. However, many free-speech battles are fought in other legal arenas, such as copyright, privacy, and cases involving the liability of Internet service providers. There, courts often use a balancing approach, which is, by definition, very subjective. Moreover, copyright litigation is not content-neutral. This creates the possibility that judges who preside over cases involving online pornography may feel that the material at issue does not deserve protection. As copyright expert Niva Elkin-Koren noted, "Providing a forum for exchanging sexually explicit materials . . . may be perceived by some as worthless." Thus, subjective decisions in particular cases may create a line of judicial precedents unfavorable to the principle of the online freedom of speech.

Judicial alarm bells first rang when it turned out that the principle of "community standards" did not apply in the world of the Internet. This principle helped courts avoid uniformity in their definition of "obscenity" by considering the standards of local communities. However, in the landmark case of *United States v. Thomas*, 74 F.3d 701 (6th Cir.1996), the federal district court in Tennessee obtained jurisdiction over California residents who operated an adult computer bulletin board from their home. A San Francisco couple was brought to trial in Memphis on obscenity charges and subsequently convicted. This case illustrates how communities with stricter speech regulation can dictate what is allowable on computers in other jurisdictions.

On an international scale, a similar case occurred in 1995 in Munich, Germany, where Bavarian police raided a local CompuServe office and forced the network to shut down online access to more than 200 allegedly pornographic

sites. Among the closed sites were ones devoted to the culture of sexual minorities — sites not deemed illegal by many countries. This incident prompted Floyd Abrams, former counsel to *The New York Times* in the Pentagon Papers case, to conclude that in the future countries that afford less protection to the freedom of speech may be "the ones that really rule in terms of what is ultimately posted or carried at all by other forms of media." This rationale may apply not only to online pornography, but to hate speech and political debates as well.

For many citizens of totalitarian regimes, the only way to express their beliefs in political discussions is to seek privacy in the online forum. Many political dissidents, abuse victims, and recovering alcoholics turn to the services of anonymous remailers. These services strip all identification from e-mail messages and forward them to their intended destinations anonymously. However, anonymity is also sought by people with much less laudable motives — namely, online pornographers.

Consequently, law enforcement agencies seek to curb services of anonymous remailers in an effort to expose child pornographers on the Internet. For example, in the fall of 1996, Penet, a popular free-of-charge remailer service maintained by a Finnish volunteer, closed after the *London Observer* accused it of facilitating online communication among pornographers. The Internet community termed the service's demise "a sad day for the Net," because it took away "a certain free-wheeling spirit." Online privacy helps to ensure free online discussions.

Cyber-freedoms depend largely on entities that provide users with online access — namely, Internet service providers (ISPs) and operators of bulletin board services (BBSs). Companies such as Netscape and Microsoft take on "the color of the state" by monopolizing Internet access service and regulating online activities. If courts hold ISPs and BBS operators directly responsible for illegal activities of their users, the latter may start censoring online speech in fear of costly litigation.

However, when it comes to cases involving explicit adult-oriented material, the heavy aura of moral wrongdoing that is often present around them could sway the opinion of any reasonable person, including a judge. Just put yourself in the shoes of a Texas federal judge presiding over the case *Playboy Enterprises, Inc. v. Webbworld, Inc.*, 968 F. Supp. 1171 (N.D. Tex. 1997). *Playboy* sued operators of the adult-oriented "Neptics" site for reproduction, distribution and display of its copyrighted images. However, just weeks prior to the trial, all "Neptics" equipment was seized by police on charges of child pornography. Knowing this

fact, which has little to do with the copyright litigation at issue, could you stay completely impartial? The Texas court found the site operators directly and vicariously liable for unauthorized use of *Playboy* images.

In its decision, the *Webbworld* court relied on another case involving display of adult-oriented images, *Playboy Enterprises, Inc. v. Frena*, 839 F.Supp. 1552 (M.D. Fla. 1993). The *Frena* case was one of the first cases involving liability of BBS operators for illegal activities of their users. It dealt with the unauthorized display of nearly 170 adult images from *Playboy* and *Playmate* publications by a private BBS. The federal district court in Florida found the BBS operator, George Frena, directly responsible for the acts of his subscribers despite the fact that Frena claimed he was unaware of any illegal conduct on his network.

This case had two major consequences. First, it set a troublesome precedent: ISPs can be held directly liable for illegal acts of their users. Since then, the *Frena* decision has been cited by most of the courts dealing with the issue of ISP liability. Among those cases are *Central Point Software v. Nugent*, 903 F.Supp. 1057 (E.D. Tex. 1995), *Sega Enterprises v. Sabella*, US Dist. LEXIS 20470 (N.D. Cal. 1996) and *Marobie-FL, Inc. v. NAFED*, US Dist. LEXIS 18764 (N.D. Illinois 1997). Thus, the *Frena* rationale extended to other materials, such as computer clip art and electronic video games.

Second, George Frena set the example for ISPs when, upon *Playboy's* notification, he voluntarily took from the network all allegedly infringing images. Soon thereafter, courts developed a standard holding ISPs liable for activities of their users if they "know or have reason to know" about infringing acts. Usually, this requirement can be satisfied by notifying the online providers of allegedly infringing conduct on their network. However, what appears to be a copyright infringement may very well be a fair use. Determining what are fair and unfair uses of someone's work is a complex process involving careful balancing of multiple factors. ISPs may not be reasonably expected to know the nuances of copyright law, and come to a sound conclusion in each case whether a certain use qualifies for a fair-use exemption. As a result, another limitation on the freedom of communication has emerged — only now by private online service companies and not by government.

When defending speech "extremes," such as pornography on the Internet, we should remember that there is much at stake. The judicial precedents from cases involving pornography will apply in the future to other materials, more "worthy" of First Amendment protection.

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