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US Media Law Update

Jonathan Weinberg
Wayne State University

Recent developments in US media law

Jonathan Weinberg[1]

United States courts addressed some new media law problems in 1999-2000, and a lot of old problems in new guises. Increasingly, US courts had to address the tension between privacy and the free flow of information. They continued to wrestle with the task of assessing laws designed to restrict the availability of sexually explicit speech. In addition, the legal system grappled with problems of convergence: where should category lines be drawn when cable operators can provide internet access? When direct satellite broadcasters compete with cable television service? When internet websites can provide broadcast television programming?

Privacy and the free flow of information

The US Supreme Court's decision in *Los Angeles Police Department v United Reporting Publishing Corporation*[2] explored the tension between concerns for the free flow of information and the protection of personal privacy. Before July 1996, the names, addresses and occupations of all people arrested by California police were public information, available to the world at large. Effective July 1996, however, the legislature amended the statute so as to limit public disclosure of arrestees' addresses. This information would be released only to requesters who declared that they were seeking the information for 'scholarly, journalistic, political or governmental' purposes, or for 'investigation purposes by a licensed private investigator', and that they would not use the information, directly or indirectly, to sell a product or service. The United Reporting Publishing Corporation had been in the business of providing the names of recently arrested persons to its customers, who included lawyers, insurance companies, drug and alcohol counsellors, and driving schools. It filed a lawsuit.

The lower courts found the new limitation unconstitutional as an impermissible restriction on the dissemination of information. The Supreme Court reversed this decision. By a vote of 7-2, it held that the lower courts had incorrectly analyzed the case as a 'facial' challenge, in which a court could strike down the statute based on its effects on actors not participating in the case. The Court remanded the case so that the lower courts could consider the matter again, focusing solely on whether the statute was unconstitutional as applied to the plaintiff.

1 Professor of Law, Wayne State University.

2 528 US 32 (1999).

Six of the nine judges, though, expressed their own views about the appropriate ultimate result in the case. Their opinions sharply diverged. Four members of the Court — Justices Ginsburg, O'Connor, Souter and Breyer — suggested that the statute was plainly constitutional. California's restriction, they opined, should not be analyzed as a restriction on speech at all. California was simply declining to release government information to the public, they continued, and was restricting nobody from communicating information already in his or her possession. While the first amendment would preclude certain choices by the state in selectively distributing information — it could not, for example, distribute the address information only to supporters of the party in power — the actual statute did not appear to present such problems.

Justices Stevens and Kennedy disagreed. In their view, the state's limitation on who could receive the address information constituted unconstitutional discrimination. Certainly, they agreed, California could release the information selectively only to a limited class of users who had a special and legitimate need for it. In this case, though, the effect of the state's rule was to make the information generally available, while denying it only to those wishing to use it to facilitate advertising. Such discrimination, based on a desire to prevent the address information from being used for a constitutionally protected purpose, was unconstitutional unless supported by adequate justification. Yet the state's stated desire to protect individual privacy, Justice Stevens continued, was irrational in light of the wide-ranging dissemination that the statute allowed. Chief Justice Rehnquist, and Justices Scalia and Thomas did not take sides in the dispute.

The conflict between information privacy and the First Amendment interest in selling others' personal data was posed even more squarely in the US Court of Appeals for the Tenth Circuit decision in *US West v Federal Communications Commission*.[3] The case concerned the use of information stemming from subscribers' use of their telephone service, such as the destinations and times of their telephone calls, and the nature of the telephone service offerings they purchased. Congress has mandated that a telephone company may not use or disclose such information, except in very limited circumstances, without 'the approval of the customer'. The Federal Communications Commission, in turn, promulgated rules explaining that the statute's approval requirement called for an 'opt in' approach, under which the customer had to give express approval by written, oral or electronic means before the carrier used the information. The FCC rejected as insufficient an 'opt out' approach, in which the carrier assumed approval unless the customer objected. The Tenth Circuit condemned these rules as constitutionally flawed.

The Court first reasoned that the FCC rules restricted telephone companies' speech by preventing them from using the information to target their advertising to subsets of their customers. The government's interest in protecting customer privacy, it continued, was inadequate to support that restriction. The mere desire to protect people from broad dissemination of their personal information, the Court suggested, was not by itself a constitutionally adequate basis for regulation. The FCC had made no adequate showing that the rules were needed to protect people from the disclosure of sensitive and potentially embarrassing personal information. Further, the FCC had not adequately shown why an opt out strategy would not sufficiently protect privacy.

Judge Briscoe dissented, urging that the Court was misguided in focusing on the adequacy of the FCC's rule making record: the key policy choices were made by Congress, not the FCC. Judge Briscoe thought it plain that the restrictions directly advanced Congress's goal of protecting customer privacy (as well as its goal of promoting competition), and he found the FCC's choice of the opt in method for customer approval to be entirely reasonable. Opt out, he urged, was simply inconsistent with the statutory goal of informed consent.

The Clinton Administration did not seek review of the Tenth Circuit's decision in the Supreme Court. Reportedly, Justice Department lawyers feared that they would lose in the Supreme Court, creating bad law.

The conflict between privacy and the free flow of information, finally, was presented in a starkly

3 182 F3d 1224 (10th Cir 1999), *cert denied*, 120 S Ct 2215 (2000).

different setting in *Bartnicki v Vopper*.[4] A unknown person intercepted and recorded a cellular phone conversation between two officers of a local teachers' union engaged in contentious labor negotiations. That person sent the tape to a political opponent, who in turn sent it to a local radio station. The radio station played newsworthy portions of the tape on the air. The union officials then sued the radio station and its reporter under a federal statute creating civil and criminal causes of action against any person who 'discloses' or 'uses' the 'contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained' through illegal eavesdropping.

In a careful opinion by Judge Sloviter, the Third Circuit Court of Appeals held that the statute was unconstitutional as applied to these defendants. The statute's statement that even persons who did not participate in a call's interception were forbidden to use or disclose its contents was plainly a restriction on speech. To the extent that the prohibition was intended to protect callers from the disclosure of their private facts, the Court continued, it was arguably content based, triggering strict scrutiny. The government, however, for the most part did not rely on that justification. Rather, the government argued the prohibition was justified as a way of reinforcing the underlying ban on interception. Prohibiting subsequent use or disclosure dampened the motivation of wrongdoers to intercept communications illegally in the hope that third parties would later exploit the information thus gained.

The Third Circuit approached this second justification by means of intermediate scrutiny. It concluded that there was insufficient reason to believe that the prohibition would in fact have the desired effect. The speech in question was of considerable public interest and newsworthiness, and the defendants had not in any way encouraged or participated in its interception. Further, the prohibition might chill the use by reporters even of information that had been lawfully acquired, for fear of litigation under conditions of uncertainty. Accordingly, the Court concluded, the statutory prohibition was unconstitutional.

The Supreme Court has agreed to hear this case during its 2000 term.

Sexually explicit speech

Regulation of sexually explicit speech is the eternal preoccupation of US free speech law, and the past year saw its share of cases. In *United States v Playboy Entertainment Group*,[5] the Supreme Court struck down a statutory provision limiting the transmission of cable television channels 'primarily dedicated to sexually oriented programming'. Cable operators routinely scramble these channels so that they are available only to paying customers. By virtue of a phenomenon known as 'signal bleed', however, a determined viewer with his eyes glued to the screen may see brief glimpses of the signal and, sometimes, hear the sound. In order to protect children from the harmful effects of such images, s 505 of the *Telecommunications Act* required cable television operators to eliminate signal bleed on those channels, or to restrict their transmission to hours when children were unlikely to be watching (defined by the FCC for this purpose as 10 pm to 6 am). Because of the cost of technological measures to eliminate signal bleed on older cable television systems, most cable operators chose to block all programming on sexually oriented cable channels before 10 pm.

The Court began by noting that Congress's regulation was content based, and, indeed, singled out particular programmers; it was unconcerned with signal bleed except from channels primarily dedicated to sexually explicit programming.

4 200 F3d 109 (3d Cir 1999), *cert granted*, 120 S Ct 2716 (2000).

5 120 S Ct 187 (2000).

Further, the effect of the rule was to remove a substantial amount of speech, corresponding to one-third to one-half of all adult programming viewership, from cable channels. Accordingly, the statute could not stand unless it could surmount strict scrutiny: the government had the obligation of showing that the statute was the least restrictive means of effecting a compelling government interest.

This, the Court held, the government had failed to do. To the extent the government's interest lay in aiding parents who wished to restrict their children's exposure to sexually oriented programming, the statute already had a mechanism well suited to that goal: s 504 of the Act required cable operators to block unwanted channels on a household-by-household basis. Nor had the government shown that reliance on s 504 would be ineffective. To the extent that members of the public were unaware of signal bleed and their rights under s 504, it would be sufficient to require that these things be better publicised. While few households had requested blocking under that section to date, that could be because few members of the public saw signal bleed as a problem. And assuming that s 504 was well publicised, the government had no sufficiently compelling interest in restricting the access of children whose parents had failed to avail themselves of the blocking option.

Justice Breyer, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, dissented. The dissenting Justices urged that s 504 alone would not effectively protect children from exposure to sexually explicit materials. Parents might not be aware of what their children were watching, and might face practical difficulties in enabling blocking once they decided they wanted it. Indeed, Justice Breyer argued, if parents really were aware of the possibility of signal bleed, the threat it posed to their children and the availability of free blocking, and if cable operators responded rapidly to blocking requests, then the resulting flood of requests for blocking would impose such high costs as to shut down adult channels entirely. Playboy was content with s 504, he challenged, only because it knew it would be ineffective.

Moving from older technology to newer, the lower federal courts split on the constitutionality of the *Child Pornography Prevention Act* of 1996. Since 1984, United States federal law has banned the production, distribution or possession of child pornography without regard to whether the material meets the legal test for obscenity. The rationale behind this ban was that the sexual exploitation and abuse of children in the production of child pornography was a virulent harm that could be addressed only by shutting down the market for child pornography entirely. The 1996 statute, however, expanded the legal definition of child pornography, so that it included computer generated visual depictions that *appeared to be* of a minor engaged in sexually explicit conduct, regardless of whether any real minor had been involved in its production. (The statute contained an affirmative defence that was available in some cases in which the producer used an adult model, but that was not available where the producer used no human model at all.) Two federal courts of appeals approved the statute as constitutional.[6]

In *Free Speech Coalition v Reno*,[7] however, the Ninth Circuit Court of Appeals held that the expansive definitions of the 1996 law pushed past the constitutional boundary. Congress could not ban computer generated images for the sake of the children involved in its manufacture, the court reasoned, because no children were. Nor could Congress restrict virtual child pornography on the theory that such images encourage pedophiles to abuse children. That sort of regulation would be no more than the prohibition of evil ideas, something the First Amendment forbids. Finally, such images did not appear to play a significant role in 'luring' children into sexual activity — and in any event the realistic images proscribed by the statute would perform that function no more effectively than cartoons that were beyond the statute's bounds.

Judge Ferguson dissented. The statute was justified, he urged, because of the role that such images could play in pedophiles' seducing children into sexual activity. The images could be bartered for images of actual children, and thus were part of a larger child pornography market. Failing to criminalise them could cause

6 *United States v Acheson* 195 F3d 645 (11th Cir 1999); *United States v Hilton* 167 F3d 61 (1st Cir), *cert denied*, 120 S Ct 115 (1999).

7 198 F3d 1083 (9th Cir 1999).

all child pornography prosecutions to fail, because the government might not be able to prove beyond a reasonable doubt that images were created using real children. In any event, he urged, images of children engaged in sexual activity had little or no social value.

Finally, the Third Circuit Court of Appeals affirmed an order issued by a district court preliminarily enjoining enforcement of the *Child Online Protection Act* of 1998.[8] This statute, enacted after the Supreme Court struck down an earlier and broader law known as the *Communications Decency Act*, made it illegal for a person to post material that was 'harmful to minors' on the world wide web if the material was posted for commercial purposes and was available to minors via the web. The statute defined 'harmful to minors' material, in a manner tracking existing laws forbidding the sale of certain print material to minors, as material that the average person, 'applying contemporary community standards, would find ... with respect to minors, is designed to appeal to ... the prurient interest'; depicts or describes sexual activities 'in a manner patently offensive with respect to minors'; and 'lacks serious literary, artistic, political or scientific value for minors'.

The Third Circuit focused on the fact that under current technology it is impossible for a web publisher to tailor content according to the recipient's location. Accordingly, a web publisher would be subject to possible prosecution and conviction for making available on the web material that was 'harmful to minors' under the standards of *any* geographic community in the United States, no matter how restrictive the mores of that community might be, and notwithstanding that the material would not be considered harmful to minors under the standards of the publisher's own community. This, the court concluded, unacceptably burdened access to the materials, and constituted an overreaching restriction on speech.

Convergence

United States courts have increasingly grappled, over the past year, with problems of convergence. In one well publicised case, Canadian entrepreneur Bill Craig set up a service known as ICrave.TV, making programming from Canadian broadcast stations available over the web. Craig took the position that his service was legal under Canadian copyright law. No matter; the US rights holders in the programming (including movie studios, television networks and sports leagues) sued in a US court, urging that the ICrave.TV service was accessible to Americans and that it amounted to a plain violation of US copyright law. In the face of lawsuits, ICrave.TV collapsed, agreeing to shut down.

The Ninth Circuit, in *AT&T v City of Portland*,[9] examined the proper regulatory classification of broadband internet service offered via cable television systems. AT&T had purchased TCI Inc, the nation's largest cable system operator, with the idea of upgrading TCI's cable network to provide high speed internet access and — ultimately — local telephone service. Subscribers could purchase internet access from AT&T's partner @Home; their packets would travel over the cable television plant to @Home's own national backbone, and thence to the internet at large. ISP services such as user email accounts and a default web portal would be provided by @Home as part of the package, although subscribers would be free to buy ISP services from other providers as well if they chose to pay for them.

Many observers were concerned about the linkage between @Home's content and its conduit. A customer interesting in utilising the cable drop to his home as a data

8 *American Civil Liberties Union v Reno* 217 F3d 162 (3d Cir 2000).

9 216 F3d 871 (9th Cir 2000).

pathway was required to accept @Home's ISP services as well. Those observers urged that AT&T should be required to open up its architecture to other internet service providers. The FCC, however, declined to take action, noting its view that regulatory conditions were premature and would only slow the deployment of high speed internet access services using cable plant. Two local governments with authority over individual TCI cable franchises then voted that they would approve the franchise transfers from TCI to AT&T only on condition that AT&T provide non-discriminatory access to the cable modem platform for other providers of internet services. AT&T sued, claiming that the conditions exceeded the authority of local government, and the Ninth Circuit agreed.

The Ninth Circuit first concluded that internet access services offered by a cable operator were not 'cable services' within the meaning of the *Communications Act* and could not be regulated by local governments on that basis. Rather, the Court continued, a cable operator that controls all of the physical data transmission facilities between its subscriber and the internet should be understood as (in part) providing its subscribers with a 'telecommunications service'. The *Communications Act* specifically disables local governments from restricting or conditioning cable operators' provision of telecommunications services. Rather, the Court explained, the degree to which cable operators providing such services should be required to interconnect with competing ISPs was a matter for national resolution by the Federal Communications Commission.

In the wake of the Ninth Circuit decision, the FCC announced that it would open a formal proceeding on the open access issue. The FCC has delayed opening that proceeding, however, pending ongoing negotiations between FCC and Federal Trade Commission staff, on the one hand, and AOL and Time Warner, on the other, in connection with AOL's and Time Warner's hoped-for merger. Federal Trade Commission staffers are said to be pushing for AOL and Time Warner to enter into an agreement to provide open access to other ISPs as a condition of merger approval. The FCC delayed its broadranging inquiry so as not to interfere with those negotiations.

On another front, a lawsuit posed a different and lower tech convergence question: to what degree should a direct broadcast satellite operator be required to act like a cable television system? Congress resolved an ongoing dispute over satellite television coverage by enacting the *Satellite Home Viewer Improvement Act* of 1999. That statute, for the first time, allowed satellite operators to transmit to viewers the signals of the viewers' own local TV broadcast stations. This promises to eliminate one of the major market disadvantages that DBS has suffered in comparison with cable: cable television subscribers can receive local broadcast signals as part of their cable package, while DBS subscribers until this year could not. The statute goes on, though, to require that as of 1 January 2002, any DBS provider carrying a local broadcast station in a given market must, on request, carry the signals of essentially *all* television broadcast stations located within that market. This parallels 'must carry' obligations requiring cable operators to carry local broadcast signals.

The Satellite Broadcasting and Communications Association has now filed suit, claiming that the 'must carry' requirement is unconstitutional as applied to satellite broadcasting. The requirement, the plaintiff claims, would require satellite operators to carry 23 channels in each of Los Angeles and New York, eating up capacity necessary to serve smaller markets. While cable must carry is appropriate, they argue, as a means of protecting the financial well being of local stations, satellite must carry is simply unnecessary to achieve that goal.

The Court has not yet ruled on the dispute. ●