
Bad Content

So far, we have discussed what it takes to *enter* various communication industries that provide and transport information. We have also examined how and why society might *price* these services outside the default framework of the marketplace, why we have regulated *access* to certain services in order to limit control over choke points, and how the *classification* process proceeds when a new service is introduced. We now turn our focus directly to the bits of information themselves—the *content*.

Central to any discussion about content regulations are three bodies of law: intellectual property, privacy, and the First Amendment. The former topic is outside the scope of this text. Instead, we focus on the other two topics.

Various types of information—such as genuine threats, defamation of character, releases of military secrets, fraudulent claims of medical cures, or racial epithets—can cause great harm if published, distributed, or used. From a policy perspective, the government may seek to restrict the flow of information—at least as an experiment—to limit such harms. However, from a legal perspective, some of these restrictions would violate the U.S. Constitution’s First Amendment, which protects freedom of expression.

Since CHAPTER 1: POWER, we have studied how communication technologies make it easier to create, search, and distribute information—in some sense, how technology makes information flow more easily. But these technologies do not distinguish between content that human beings judge to be good or bad. As far as these networks

and systems are concerned, content is content, bits are bits. But to policy makers, not all bits are created equal. Congress has imposed regulations on both the content that users of these services seek to access and on the collection and disclosure of information about users by their service providers. The first type of content regulations that we will study are indecency laws, which restrict access to certain types of “obscene” content. The second type of content regulations that we will study are communications privacy laws, which restrict the collection and use of personal information by service providers.

A. Indecency

The basic policy underling indecency laws is simple. Some sexual content should almost never be exposed to children, at least not without the consent of their parents. Also, some content should not even be exposed to adults unless they consent in advance. As the flow of this “offensive” content increases and barriers to access are removed by new technologies, what can and should the government do to limit the flow? Can it apply some legal or technological filter to block or shunt it off? We will look at the way indecency has been regulated in each industry because the law has developed and been applied in a different way for each new service. Throughout our study, we question whether such disparate treatment can be justified.

1. Broadcast

Imagine that you are driving your 6 year-old nephew back from school one afternoon and you turn on your car radio and hear the following:

I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever. . . . [I]t came down to seven but the list is open to amendment. . . . The . . . words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter). . . . *

FCC v. PACIFICA438 U.S. 726 (1978)

Mr. Justice STEVENS delivered the opinion of the Court.

I

A satiric humorist named George Carlin recorded a 12-minute monologue entitled “Filthy Words” before a live audience in a California theater.

At about 2 o'clock in the afternoon on Tuesday, October 30, 1973, a New York radio station, owned by respondent Pacifica Foundation, broadcast the “Filthy Words” monologue. A few weeks later a man, who stated that he had heard the broadcast while driving with his young son, wrote a letter complaining to the Commission.

In its response, Pacifica explained that the monologue had been played during a program about contemporary society's attitude toward language and that, immediately before its broadcast, listeners had been advised that it included “sensitive language which might be regarded as offensive to some.” Pacifica characterized George Carlin as “a significant social satirist” who “like Twain and Sahl

* George Carlin, Seven Dirty Words Monologue, FCC v. Pacifica, Appendix, 438 U.S. 726 (1978).

before him, examines the language of ordinary people. . . . Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.” Pacifica stated that it was not aware of any other complaints about the broadcast.

On February 21, 1975, the Commission [held] that Pacifica “could have been the subject of administrative sanctions.” The Commission did not impose formal sanctions, but it did state that the order would be “associated with the station’s license file. . . .”

The Commission characterized the language used in the Carlin monologue as “patently offensive,” though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance where the “law generally speaks to channeling behavior more than actually prohibiting it. . . . [T]he concept of ‘indecent’ is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience.” 56 F.C.C.2d, at 98.⁵ . . . In summary, the Commission stated: “We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. [§] 1464.”

The United States Court of Appeals for the District of Columbia Circuit reversed. . . .

⁵ Thus, the Commission suggested, if an offensive broadcast had literary, artistic, political, or scientific value, and were preceded by warnings, it might not be indecent in the late evening, but would be so during the day, when children are in the audience.