IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 94-6648
No. 94-6649

ROBERT ALAN THOMAS
AND CARLEEN THOMAS

Appellants,

v.

UNITED STATES OF AMERICA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

BRIEF FOR AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION

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APRIL 19, 1995

INTEREST OF THE AMICUS CURIAE

The Electronic Frontier Foundation (EFF) is a privately funded nonprofit organization concerned with the civil liberties, technical and social issues raised by the application of new computing and telecommunications technology. EFF was founded by Mitchell Kapor, a leading pioneer in software development who was the first CEO of the Lotus Development Corporation and developed the Lotus 1-2-3 spreadsheet software, and John Perry Barlow, an author and lecturer interested in digital technology and society.

The Electronic Frontier Foundation is concerned with the chilling effect the District Court's decision will have on the freedom of speech of users of electronic communications and on the growth of online communications technology and communities. EFF respectfully asks this court to overturn the lower court's decision regarding the files downloaded from the Amateur Action bulletin board system.

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STATEMENT OF THE ISSUE

SHOULD MEMPHIS, TENNESSEE, BE PERMITTED TO DICTATE THE APPROPRIATE
COMMUNITY STANDARDS FOR ALL ONLINE COMMUNITIES THAT CAN BE ACCESSED FROM
MEMPHIS, EVEN WHERE WARNINGS AS TO THE NATURE OF THE MATERIALS ARE CLEARLY
POSTED, CHILDREN ARE DENIED ACCESS TO ADULT MATERIALS, AND USERS
SELF-SELECT WHICH ONLINE COMMUNITIES TO JOIN?

SUMMARY OF THE ARGUMENT

This is a case of first impression regarding jurisdiction over computer networks. Online communications are physically nonterritorial, and individuals have a heightened ability to self-select which electronic "communities" to join, and are empowered to willingly and knowledgeably accept or block access to materials available electronically. Any obscenity definition that relies on the boundaries of the physical world is dangerous to the growth of online communications, in that such a definition would require all electronic communities to limit acceptable speech to only what is acceptable in the most restrictive of physical-world communities. In a realm where adults can easily avoid unwanted materials and prevent their children from accessing these materials, the state's interest in protecting the unwanting or underage from exposure to materials is substantially weakened, and First Amendment protections of speech and association must prevail.

Computer communications are still in their infancy, but we already know that they implicate long-standing speech and privacy issues under the

Constitution. The precedents we set today may radically affect the course of the computer networks of the future, and with it the fate of an important tool for the exchange of ideas in a democratic society. When the law limits or inhibits the use of new technologies, or when it fails to provide the same degree of protection for a new communications technology that it provides for older methods of communicating, it creates a grave risk of compromising speech and privacy interests protected by the Bill of Rights. In this brief, Amicus Curiae Electronic Frontier Foundation respectfully asks this Court to make the determination that utilizing geographical community standards to satisfy the test for obscenity is inappropriate when dealing with networked communications that never actually enter any physical community.

ARGUMENT

I. THE DISTRICT COURT'S APPLICATION OF THE MEMPHIS, TENNESSEE, COMMUNITY
STANDARDS TO THE AMATEUR ACTION BULLETIN BOARD SYSTEM IS UNCONSTITUTIONAL
IN THAT IT RESTRICTS EVERYONE IN THE WORLD TO ONLY MATERIALS THAT ARE
DEEMED FIT FOR CITIZENS OF MEMPHIS, TENNESSEE.

Under the current obscenity test, first articulated by the Supreme Court in 1974 in Miller v. California, 413 U.S. 15 (1974), materials are considered obscene if 1) the average person, applying contemporary community standards, would find the materials, taken as a whole, appeal to the prurient interest, 2) the materials depict or describe, in a patently offensive way, sexual conduct specifically prohibited by applicable state law, and 3) the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

The community standards criteria was included in this three-prong obscenity test because "our nation is simply too big and diverse for [the Supreme] Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. . . . It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. [People] in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed [uniformity]." Id.

Tennessee is but a single locality that can access the international telecommunications network generally and the Amateur Action

bulletin board system specifically. Robert and Carleen Thomas had no physical contacts with the State of Tennessee, they had not advertised in any medium directed primarily at Tennessee, they had not physically visited Tennessee, nor had they any assets or other contacts there. The law enforcement official in Tennessee, not the Thomases, took the actions required to gain access to the materials, and it was his action, not the Thomases, that caused them to be "transported" into Tennessee (i.e., copied to his local hard disk). The Thomases may indeed have been entirely unaware that they had somehow entered the Tennessee market and had subjected themselves to the standards applicable in that community.

This case is operationally indistinguishable from one in which a Tennessee resident travels to California and purchases a computer file containing adult-oriented material that he brings back to his home. Whatever sanctions the local community in Tennessee might impose on the purchaser -- and we note here that the Supreme Court has consistently held that private possession of obscene materials cannot be outlawed -- the seller, who had not "knowingly transported" material into Tennessee, would not have violated federal law.

Application of geographically-based community standards to transmissions over the global network, if interpreted to allow conviction on the basis of any access of a bulletin board system by a member of any community with standards that would disapprove of the materials in question, will have the perverse effect of prohibiting, worldwide, anything disapproved in any single territorial location -- precisely the kind of uniform national (or global) standard that the community standards test was designed to avoid.

II. THE DISTRICT COURT ERRED IN APPLYING THE COMMUNITY STANDARDS OF MEMPHIS, TENNESSEE, WHEN THE MATERIALS WERE DOWNLOADED TO A COMPUTER DISK IN MEMPHIS BUT NEVER ACTUALLY ENTERED THE "MEMPHIS COMMUNITY."

Courts have struggled with the concept of "community standards" and have upheld a wide variety of geographic definitions of community. See, Karo and McBrian, Note: The Lessons of Miller and Hudunt: On Proposing a Pornography Ordinance that Passes Constitutional Muster, 23 U. Mich. J.L. Rev. 179 (1989). State courts have approved units ranging from state (People v. Calbud, Inc., 49 N.Y.2d 389, 426 N.Y.S.2d 238, 402 N.E.2d 1140 (1980); LaRue v. State, 611 S.W.2d 63 (Tex. Crim. App. 1980); Commonwealth v. 707 Main Corp., 371 Mass. 374, 357 N.E.2d 753 (1976); People v. Better, 33 Ill. App. 3d 58, 337 N.E.2d 272 (1975); and Pierce v. State, 292 Ala.

473, 296 So. 2d 218 (1974), cert. denied, 419 U.S. 1130 (1975)) to county (Sedelbauer v. Indiana, 428 N.E.2d 206 (Ind. 1981), cert. denied, 455 U.S. 1035 (1982); and State v. DePiano, 150 N.J. Super. 309, 375 A.2d 1169 (1977)) to city (People v. Ridens, 59 Ill. 2d 362, 321 N.E.2d 264 (1974), cert. denied, 421 U.S. 993 (1975); and City of Belleville v. Morgan, 60 Ill. App. 3d 434, 376 N.E.2d 704 (1974)) to local community. (Price v. Commonwealth, 214 Va. 490, 201 S.E.2d 798, cert. denied, 419 U.S. 902 (1974)). Federal courts have held community to mean state (United States v. Danley, 523 F.2d 369, 370 (9th Cir. 1975)), county (United States v. Bagnell, 679 F.2d 826, 836 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983)), and federal judicial district (United States v. Dachsteiner, 518 F.2d 20, 21-22 (9th Cir.), cert. denied, 421 U.S. 954 (1975)).

In addition, courts have recognized a distinction between what is distributed to the community and what is simply possessed in the home. In Stanley v. Georgia, 394 U.S. 557 (1972), the Supreme Court first made the legal distinction between the distribution and the possession of obscene materials. In Stanley, the Court held that an individual had the right to possess obscene materials, based on the privacy of the home. While that case has been challenged throughout the years, the Court has continued to hold that possession of obscenity cannot be outlawed. While the Court has refused to hold that Stanley requires states to permit obscene materials to be imported (United States v. 12 200-ft. Reels of Film, 413 U.S. 123 (1973)), transported through interstate commerce (United States v. Orito, 413 U.S. 139 (1973). See also, United States v. Reidel, 402 U.S. 354) or sent over telephone wires (Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115 (1989)), the Court's reasoning has been "that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material _when the mode of dissemination carries with it a significant danger_ of offending the sensibilities of unwilling recipients or of exposure to juveniles." Miller v. California, 413 U.S. 15, 18-9 (1973) (emphasis added).

The "mode of dissemination" of electronic communications actually minimizes the stated dangers. Unlike any other form of communication, networks and online services require passwords. This is an important point, because the password provides the disseminator of the information with the opportunity to refuse access to children. It also permits disseminators to prescreen and warn potential users of the system of the nature of the materials to be found online. There is advance notice of the nature of the communications, which provides an uninterested consumer with the knowledge to avoid access.

In preparing the case against Robert and Carleen Thomas, Federal Postal Inspector David Dirmeyer applied for and was granted a password to the Amateur Action bulletin board system. Before Inspector Dirmeyer was

granted the password, he was screened to ensure that he was not a minor and was warned about the explicit nature of the materials. In spite of the warnings, he chose to access the Amateur Action bulletin board system database and to download files -- a process that does not happen automatically or accidentally, but rather requires the knowledgeable and active participation and decision-making of the recipient to select specific items to retrieve and to run the program necessary for the retrieval and viewing of those items. This was clearly not an undesired exposure to these materials.

In applying the federal law against interstate distribution of obscene material, the U.S. government is seeking to prevent adverse impacts on local communities that stem from causes that have a range and source too great to be handled by the local territorial community. Absent some real or threatened adverse impact on the local community, the rationale for federal intervention fails. Here, there was simply no such impact.

The fact that someone in Tennessee could call a computer in California, or indeed anywhere else in the world, to access materials the physical sale of which might be prohibited in Tennessee, is neither news nor reason for concern. As noted, a citizen of Tennessee might get on a plane and go anywhere in the world in short order and be exposed to or obtain and bring home similar material. Accessing materials through a computer screen is most often, and was in this case, an entirely private matter with no risk of accidental or incidental exposure. Even if conducted in groups in a private setting, it is akin to reading books or other materials that might be physically obtained and imported into the local jurisdiction with impunity. It does not involve posting signs, entering into sales transactions, establishing a building, or taking other steps of any kind that might even become known to, much less adversely impact upon, the members of the local geographic community.

Acknowledging the lack of impact of the actions involved in this case on the local community, and finding that the federal government had no legitimate basis on which to prohibit such activity, does not amount to a concession that the local geographic community might not regulate actions that had such an impact. If a local system operator or user were to sell admission to view the screens in question, for example, or if the local user were to have displayed the screens in question in a store window, then perhaps the local community could impose some sort of regulation. But no such local commercial activity nor any such public exhibition occurred in this case.

III. THE DISTRICT COURT ERRED IN APPLYING THE COMMUNITY STANDARDS OF

MEMPHIS, TENNESSEE, BECAUSE ELECTRONIC COMMUNICATIONS GIVE INDIVIDUALS THE
AUTONOMY TO SELECT THE ELECTRONIC COMMUNITIES THEY WISH TO JOIN AND PROVIDE
SCREENING MECHANISMS TO RESTRICT ACCESS TO CHILDREN.

Communities, it seems, no longer depend on physical location, and old legal definitions that look to physical location no longer work in a world where individuals regularly "visit" places that have no physical location. Howard Rheingold, who has authored a book describing his interactions on the WELL, a virtual community he considers home, described the relationship:

> A virtual community is a group of people who may or may not meet one another face-to-face, and who exchange words and ideas through the mediation of computer bulletin boards and networks. In cyberspace, we chat and argue, engage in intellectual discourse, perform acts of commerce, exchange knowledge, share emotional support, make plans, brainstorm, gossip, feud, fall in love, find friends and lose them, play games and metagames, flirt, create a little high art and a lot of idle talk. We do everything people do when people get together, but we do it with words on computer screens, leaving our bodies behind. Millions of us have already built communities where our identities commingle and interact electronically, independent of local time or location.

Howard Rheingold, "A Slice of Life in my Virtual Community," Global Networks: Computers and International Communication 57 (1993). See also, Howard Rheingold, The Virtual Community: Homesteading on the Electronic Frontier (1994).

Each participant in this form of communication chooses not only whether, when and where to participate, but also whether to send or receive information at any specific time; at what rate writing and reading (sending and receiving) will occur; and what topic this communication will concern. Hiltz and Turoff, The Network Nation 29 (1993). Participants also have the option of "filtering" out messages and files in many ways, ranging from simply choosing not to download files to sophisticated text analysis programs that can effectively block receipt of all messages containing non-text files such as graphics or containing certain words, phrases or names.

If application of local, geographically-based community standards to determine whether material is "obscene" is inappropriate in this new context, how, then, can that determination be made with due regard to the rights of members of various communities to establish their own divergent standards? EFF respectfully submits that the very best source of a definition regarding what constitutes "obscenity," for purposes of determining when U.S. (or other) law should intervene to prohibit electronic distribution of materials, is the standard set by the community of users that, collectively, set the rules applicable to any particular online forum in question. Where, as here, the nature of the materials is clearly disclosed on warning screens encountered as the users access the system, or is otherwise made plain, those who sign on -- who voluntarily join the community -- have already determined that the materials in question do not violate their own sensibilities, or have accepted responsibility for their own sensibilities should the material offend them after all. If the operators of a system were to post materials that violated the collective standards of that user community, the community in question could quickly correct things by voting with their modems to go elsewhere.

Like any other community, online communities use censure and other peer group actions to enforce their own rules. Violators of these rules will find themselves ejected, ignored, lambasted, or gently guided as apropos to the transgression. This process is directly and incontrovertibly analogous to its physical-world counterpart. When violators of the standards of geographical communities become unbearable, people either remove themselves from the violator's presence, eject the violator, or attempt to correct the violator's behavior. When legal action is sometimes required, the standards of the local community are applied, not those of a distant town in another state, nor those of any hypothetical national censorship body.

As one might expect, online communities have in practically all cases developed their own arbitration and dispute-resolution systems -- applying their own community standards to their own issues and problems spontaneously in the absence of directives compelling them to do so. These compromise and arbitration systems vary with the scale and sophistication of the online community, and range from a single arbitrator or moderator, through "town hall" committee-like structures (often informal, but still effective), to complex systems of community-approved (and enforced) regulations complete with fines and even "incarceration" (temporary removal from the online community, with no ability to send or receive messages or files to and from the group in question). In fact, some communities have even invoked the "death penalty," completely deleting a recalcitrant's user i.d. from the system. See, e.g., Julian Dibbell, "A Rape in Cyberspace,"

The Village Voice, December 21, 1993, 38(51): pp. 36-42.

We reaffirm the right of communities to regulate the contents of the materials to which their members are exposed. Part of this right is the right of a community not to have its standards dictated by another community. Miller v. California, supra. Those who wish to associate for religious purposes, for example, should have a right to establish places where materials inconsistent with those purposes are excluded. Those who wish to exchange speech offensive to others should have an ability, indeed have a right, to establish spaces where such speech can be exchanged. The First Amendment exists to protect potentially offensive speech, as no one tries to ban the inoffensive kinds. Communities and places should not be defined exclusively in terms of physical geography, particularly when community standards and self-regulation are already evolving rapidly in the online world. The trial court's decision, if allowed to stand, will tear apart these years of online community self-moderation and internal arbitration development, all without any notable benefit or protection to any community, geographically defined or otherwise.

This is an age when computer networks allow the formation of virtual communities, globally, without any significant impact on local, territorial communities. Any decent regard for preservation of freedom of expression and the free flow of information (at least other than information posing more direct physical threats to local communities than those presented in this case) requires protection of the right of each individual to associate with others, to communicate freely with others and, in effect, to "travel" throughout the online spaces made available by the global networks.

The boundaries between online places and communities are the tools used for ensuring voluntary association, such as the passwords and warning screens used in this case. These passwords and screens provided ample opportunities for anyone in Tennessee to avoid coming into contact with the materials in question. They also provided the opportunity for people who share the standards of the community to establish and implement that community standard.

In most online contexts, receipt of materials must be actively and willfully initiated by the receiver, not the sender. In addition, password schemes permit parents to readily supervise (and, if the parents choose, to easily prevent) their own children's access to online materials. Determining what is appropriate for their children are parents' rights and responsibilities (Wisconsin v. Yoder, 406 U.S. 205 (1972)), and this screening capability is not available in telephony or postal mail and package shipping, nor in broadcast television or radio.

Today's technology provides "space" in which system operators like the Thomases can form communities with others of similar interests. Communication in this space happens quietly and does not interrupt, offend, or otherwise intrude upon people of differing interests. The materials that travel in this space should be judged by the standards of the local "residents" therein. The community of Memphis citizens has few or no members in common with the community of Amateur Action bulletin board system users and maybe even the larger community of adult-oriented bulletin board system users. The standards of the bulletin board system users are the correct community standards to apply.

The Thomases may reasonably have believed that California standards, like the standards of the Amateur Action bulletin board system community, permit the materials in question. This is clearly not a case in which the electronic community's standards are beyond the pale. To punish this speech, the government must establish a more compelling interest which would prohibit using an online community's standards to judge speech and publication in that community. The standards of the group that voluntarily joined together to establish and use the bulletin board system in question should govern.

IV. THIS IS A CASE OF FIRST IMPRESSION AND SHOULD BE CONSIDERED IN LIGHT OF THE SERIOUS CHILLING EFFECT ON FREEDOM OF EXPRESSION THAT WOULD RESULT FROM THE LIMITING OF SPEECH ON ALL COMPUTER COMMUNICATIONS TO THE STANDARDS OF THE MOST RESTRICTIVE COMMUNITY.

Electronic communications are different than other forms of communications, and this difference must be legally recognized in order to avoid a severe chilling effect on speech on the networks. The Supreme Court has "long recognized that each medium of expression presents special First Amendment problems." FCC v. Pacifica Found., 438 U.S. 726, 748 (1978). Broadcast radio and television are treated differently under the law than cable television, which, in turn, is treated differently than magazines and books. Factors such as risk of exposure to children and uninterested adults, level of intrusion, and spectrum or bandwidth scarcity have all been taken into account in determining appropriate limitations of speech by government. The requirements placed on the Thomases and other system operators by the trial court's ruling will have a chilling effect on the provision of online services.

Given that it was lawful for the system operators convicted in this case to maintain their bulletin board system system physically in the

geographical community where it was located, the only way in which they might have avoided violation of the distribution law, as interpreted by the trial court, would have been to establish elaborate technical means to screen incoming calls. This may not even be physically possible, in light of the growing ability to route networked communications through numerous locations, and the failure of technology like calling line identification ("caller i.d.") to be deployed globally and interoperably. Even if some steps might provide some such screening of calls originating from territories that disapprove of the content in question, however, no obligation to take such steps should be established. Any such doctrine would seriously burden the entire communications infrastructure. It would impossibly require system operators, who may not have the resources to retain regular legal counsel, to stay informed regarding the rules of countless local jurisdictions. In effect, only the wealthy would afford to operate. And it would interfere with the interoperability of computer based communications systems.

Additionally, the invasiveness of some forms of the technology that might in the future be able to provide enough identifying information to be used for such screening is controversial and may pose very serious privacy problems. Given this, the lack of clear standards, and other reliability and authentication issues, no court should mandate the use of this unproven and possibly easily-exploitable technology.

Cases upholding convictions of those who send physical objects through the U.S. mail are distinguishable. In such cases, it is easy for the distributor of material obscene under Tennessee standards to decline to send physical objects to that jurisdiction. In contrast, the system operators in this case had no way to check in advance where any particular person might be calling from. They did not themselves take the steps required to send the copy to the local jurisdiction. And the installation of mechanisms designed to protect against such an occurrence would be both expensive and unfeasible, and, in fact, probably physically impossible.

The question presented by this case is, in essence, how best to protect Tennessee citizens from what they consider the adverse effects of "obscene" materials while preserving, as fully as possible, the right of groups with differing sensibilities to associate and to form communities that establish and enforce different standards. Ultimately, that question reduces to one involving who should bear the burden of preventing undesired exposure to offensive material -- combined with the question of how, generally, to preserve the free flow of lawful information and the right of all groups lawfully to associate. EFF submits that the appropriate answer is to be found in exactly the kinds of labeling and password protection schemes found in this case. Requiring system operators like the Thomases to accurately label and appropriately fence off potentially offensive

materials is appropriate. Thereafter, any local territorial community that wants to enforce its own obscenity standards has a duty to use tools to help it stay away from the offending materials.

CONCLUSION

Applying Tennessee community standards to the Amateur Action bulletin board system would have the perverse effect of imposing unworkable burdens on system operators and all providers of electronic communications and computer based information services, or of imposing a single national (or perhaps even global) standard regarding what constitutes obscenity, or of prohibiting an otherwise constitutionally protected free exchange of speech under circumstances in which no significant detrimental impact on local territorial communities could be shown.

For the foregoing reasons, Amicus Curiae Electronic Frontier Foundation respectfully asks this Court to reverse the District Court's convictions regarding files downloaded from the Amateur Action bulletin board system.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing

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