NEW TECHNOLOGY AND THE SUPREME COURT:
How Movie Censorship In The Early Twentieth Century Sheds Light On Contemporary Issues Of Free Speech On The Internet
By PETER K. YU

Thursday, May. 23, 2002

So far, the Supreme Court has been careful and vigilant in protecting free speech on the Internet. Recently, in *Ashcroft v. Free Speech Coalition*, the Court struck down a provision of the Child Pornography Prevention Act of 1996 that prohibited the production and distribution of "virtual child pornography" - computer-generated images of minors engaging in sexually explicit conduct. This provision, the Court held, violated the First Amendment.

A few weeks later, in *Ashcroft v. ACLU*, the Court examined the constitutionality of the Child Online Protection Act (COPA) - another statute that regulated content on the Internet with the purported goal of protecting children. In this case, the Court issued a cautious, narrow holding.

The Court made clear that it would not invalidate COPA solely due to the statute's "reliance on community standards to identify material that is harmful to minors." However, it prudently left many other important constitutional questions to be addressed by the federal court of appeals before it would address them.

The Court's reasoning in these two cases is strikingly similar to its reasoning in an earlier case, *Reno v. ACLU*, in which the Court carefully considered First Amendment arguments as they relate to the Internet. There, the Court invalidated the Communications Decency Act (CDA), the predecessor of COPA, because it would have limited the speech to which adults could have access on the Internet to only speech that was fit for children.

The Court's caution and reaffirmation of free speech principles in this area is wise and proper. And accordingly, many may take the Court's protective stance toward the Internet for granted - assuming that the decisions were dictated by common sense. After all, new technology remains the lifeblood of the country, and information and high-technology goods make up a very important sector of the American economy. The Internet, therefore, should certainly be allowed to grow and flourish.

Taking the Court's pro-Internet stance for granted, however, is a mistake. Indeed, if one looks back at the painful history of movie censorship in the first half of the twentieth century, one gains a far greater appreciation for the Court's courage in its recent Internet-related decisions. The Court was not always so courageous, history shows, nor was it always as vigilant in protecting the freedom of speech and of the press.

Movie Censorship in the Early Twentieth Century

Like the Internet, the motion picture, when it was first developed, was the "new, new thing" - a new form of entertainment with which the majority of the American public was still unfamiliar. Indeed, when then-Chief Justice of the Supreme Court Edward Douglass White was asked to view a controversial film, he responded: "Moving picture! It's absurd, Sir. I never saw one in my life and I haven't the slightest curiosity to see one."

By the turn of the century, however, the motion picture had received a lot of interest and attention, especially among immigrants and new urban migrants. Unfortunately, it also had become a major concern of social reformers, who considered motion pictures a "new kind of urban vice" and called for tougher regulation of movie houses.

Claiming to be protecting public morality, states and municipalities enacted censorship laws to regulate the operation and exhibition of motion pictures. For example, in 1907, the Chicago City Council passed the country's first motion picture censorship law, which prohibited "immoral or obscene" pictures and required exhibitors of motion pictures to first obtain permits from the police department.

The States of Pennsylvania, Ohio, Kansas and Maryland soon followed suit by establishing statewide censorship boards. Likewise, major cities like Birmingham, Detroit, Kansas City, Los Angeles, Louisville, St. Louis, San Francisco, Trenton and Washington instituted their own censorship laws and established local censorship boards.

Censorship Laws Face Constitutional Challenges

These censorship laws and measures undoubtedly would cause First Amendment concerns today. At that time, however, courts had uniformly declared their constitutionality.

The first challenge to the laws came in the 1915 Supreme Court case of *Mutual Film Corp. v. Industrial Commission*. There, a motion picture distributor challenged the constitutionality of Ohio's Censorship law - asserting, among other claims, that the statute violated the freedom of speech and press guarantees of the Ohio Constitution. (At the time the case was litigated, the Supreme Court had yet to include those guarantees among the fundamental rights and liberties protected by the Due Process Clause of the Fourteenth Amendment; accordingly, only the Ohio Constitution protected the right of free speech from abridgement by the Ohio state government.)

In *Mutual Film*, the Court conceded that motion pictures may be used for worthy purposes, but it cautioned that they also had the capacity for evil and the potential to corrupt the public - and, in particular, children. (The trio of recent Internet free speech cases discussed above, in which similar arguments were made with respect to children and the Internet, illustrates how closely history sometimes repeats itself.)

Writing for a unanimous court, Justice McKenna distinguished motion pictures from other mediums of expression, noting that the exhibition of motion pictures "is a business pure and simple, originated and conducted for profit." Thus, the Court held, motion

pictures were not part of the press, and did not warrant protection under the Ohio Constitution.

The Changing Nature of the Movie Industry Makes Censorship Problematic

The *Mutual Film* decision, although pro-censorship, initially was well received by the legal community. However, it became increasingly problematic as sound motion pictures appeared in the mid-1920s, and as the subject matter of motion pictures moved away from sex and scandal to the discussion of racial and political matters. For example, a movie showing a desegregated school class was censored because "the south does not permit negroes in white school nor recognize social equality between the races even in children."

Meanwhile, movie producers and directors were very active in reforming the industry to make it more respectable. Among the measures taken were the establishment of a national association of movie producers and directors, the adoption of the Motion Picture Production Code, and the creation of the Production Code Administration, which ensured compliance with industry guidelines and standards.

By the late 1930s, motion pictures had become a dominant communication medium in American culture; indeed, the majority of the American public went to movies every week. During such difficult times as the Great Depression and the Second World War, movies provided Americans not only with a shared visual experience, but also with a "common bond of language" that helped unify the country.

The Supreme Court Overrules *Mutual Film*

Against this background, the Supreme Court began to reconsider its earlier treatment of motion pictures. After all, by the late 1940s, radio, television and the sound truck had already replaced the motion picture as the so-called "new technology."

As the Court became more comfortable with motion pictures, it became more expansive in its interpretation of free speech and free press guarantees - and realized that these guarantees should be interpreted to encompass motion pictures as well as more traditional forms of speech and reportage.

Shortly after the Second World War, the Court resolved a case involving an antitrust lawsuit against major motion pictures companies. What was significant about the decision, however, was not the holding but some dicta - that is, words unnecessary to the case's resolution - in which the Court noted that motion pictures, along with newspapers and radio, are part of the press as defined by the First Amendment. And a year later, in another case, three justices similarly aligned motion pictures with other mediums of communication.

In 1952, the Court finally overruled the *Mutual Film* decision in the case of *Joseph Burstyn, Inc. v. Wilson*. There, a film distributor had challenged a New York statute that

permitted Roberto Rossellini's *The Miracle* to be banned on the ground that it was "sacrilegious." This time, the distributor won.

To the *Burstyn* Court, the exhibition of motion pictures was no longer "a business pure and simple." Rather, it fell squarely within the free speech and free press guarantees of the First and Fourteenth Amendments.

Lessons from *Mutual Film* and *Burstyn* for the Internet Era

Although the Supreme Court overruled the *Mutual Film* decision, several of the decision's themes live on (even in this Internet Era). For example, the Court remains skeptical of new technology and its capacity for evil.

In addition, the medium-specific analysis that characterized the *Mutual Film* decision continues to haunt litigants in other new technological media - preventing them from extending to new media strong pro-free-speech precedents developed in the context of older media.

Fortunately, the Court's current treatment of new technology (such as the Internet) has, in general, been very different from its treatment of new technology in *Mutual Film*. We should, nevertheless, not take today's decisions for granted and assume that the Court will remain skeptical of content regulation on the Internet. After all, it took the Court 35 years, two World Wars and a Great Depression to correct its earlier, mistaken decision and extend free speech and free press protections to motion pictures.

When *Ashcroft v. ACLU* returns to the Court - after the federal court of appeals has ruled on the questions the Supreme Court wisely refused to answer prematurely - the Supreme Court may be more reluctant to protect the right of free speech on the Internet. If the Court were to repeat its earlier mistakes and start a new trend in favor of Internet regulation, it might take us many decades (and hopefully not two world wars and a great depression) to recover.