

Silicon Valley Tech Week

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Does the Constitution Protect Software?

Often standing up for the First Amendment has also placed me in the difficult position of defending pornography or hateful speech. No matter how much you abhor the message, you're obliged to defend the messenger's right to say it if you believe in preserving the principles of freedom that have made America great. If you make exceptions, editors tell often skeptical audiences, you could be the next person in the government's crosshairs. Sure, they snicker, and the end of the world is coming next week.

Now First Amendment advocates have an issue to rally around that doesn't involve online indecency or inflammatory speech such as posting an Internet hit list of physicians who perform abortions. And Silicon Valley better pay attention.

If you believe software is just a product, and something the government should be free to license and regulate without restrictions, then read no further.

But if you believe software is also expression, and that government has no business trying to muzzle software developers, you owe it to yourself to learn more about a case that's about to go to trial in federal district court in Washington, D.C.

The case challenges the

Commodities Futures Trading Commission's requirement that publishers of commodity investment advice register as trading advisers. The CFTC rules also apply to publishers of software designed to help people analyze the markets and make their own investment decisions.

The Institute for Justice, a libertarian public interest law firm based in Washington, D.C., is representing a coalition of publishers in the case that promises to help define the scope of government regulation of speech and commerce in the new millennium. It's important to note that none of the plaintiffs manages funds or offers personalized investment advice.

The CFTC also is seeking to extend its authority to the online media. Under its proposed rules, the only Web sites that would be exempt from registration requirements would be those that offer yellow pages-type listings. Any commentary or advertising would bring the site under the government's regulatory umbrella.

Registration would require Web site publishers to pay fees, subject them to fingerprinting and background checks, and compel them to identify their subscribers. Failure to comply could result

in fines up to \$500,000 and five years in prison.

Scott Bullock, a staff attorney for the institute, said during a recent visit to Silicon Valley that the commission's requirements are a violation of First Amendment rights to publish freely without prior restraint.

"The CFTC is trying to regulate who gets to speak on the Internet," Bullock said. "The commission is saying that only people it approves of can offer opinions on financial matters on the Internet. That destroys the whole idea of the Internet, where everyone can be a publisher."

If you're still skeptical that the case has implications for you, remember that in January a court in Texas ruled that the "Quicken Family Lawyer" software package amounted to the unlicensed practice of law. The court banned the sale of the product in Texas, saying the action was necessary to protect ordinary people from overly simplistic legal advice. The ruling protects the ability of lawyers to charge \$250 an hour or more for the same advice.

In any event, we'll be watching the CFTC case closely. Hopefully we won't have to get a license to cover it.

—Tim Graham
Editor in Chief