UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs,

v. Civ. Act. No. 98-CV-5591

JANET RENO, in her official capacity as ATTORNEY GENERAL OF THE UNITED STATES,

Defendant.

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs submitted a Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction on November 17, 1998. Tomorrow, Plaintiffs will be filing their opposition to Defendant's Motion to Dismiss. Those two legal memoranda will contain Plaintiffs' positions on the majority of the issues raised by the hearing on Plaintiffs' motion for a preliminary injunction scheduled for January 20-22, 1999. This memorandum is submitted not to repeat those arguments, but to provide the Court with Plaintiffs' views regarding the application of the law to the expected testimony at the hearing, and with Plaintiffs' views regarding disputed and undisputed facts.[1]

The law and facts, as established in the briefs and testimony before the Court, demonstrate that Plaintiffs are clearly entitled to preliminary injunctive relief against enforcement of the "Child Online Protection Act (the "COPA" or "statute"), 47 U.S.C. Sect. 231. First, the evidence will show that the COPA threatens a large amount of speech that Plaintiffs and other Web users are constitutionally entitle to communicate and receive. Second, the COPA's affirmative defenses do nothing to cure its constitutional defects. Finally, Defendant cannot meet her burden of proving that the COPA is narrowly tailored to address a compelling government interest.

I. COPA Threatens to Suppress a Substantial Amount of Protected Speech

Plaintiffs allege that the statute on its face bans constitutionally protected speech in violation of the First Amendment and is both overbroad and vague.[2] *See* Plaintiffs' Complaint for Declaratory and Injunctive Relief, filed October 22, 1998 ("Complaint"), and Plaintiffs' Memorandum In Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction, filed November 17, 1998 ("Pls. Initial Br."). Defendant has conceded that the statute restricts speech that is constitutionally protected, at least for adults, on the basis of its content. *See, e.g.* Def. Opposition to Plaintiffs' Motion for a Temporary Restraining Order, Nov. 18, 1998 at 10. Under such circumstances, the statute must be strictly

scrutinized, must be justified by a compelling governmental interest, and must be narrowly tailored to achieve that interest. *Reno v. ACLU*, 521 U.S. 844 (1997) *aff'g ACLU v. Reno*, 949 F. Supp. 824 (E.D. Pa. 824 (1996) ("*ACLU I*"). There can be no serious dispute that when a statute deprives adults of constitutionally protected speech, which by definition includes all of the speech at issue in this case, it is unconstitutional even if the purpose of the statute was to protect minors. *Id.* at 2346; *Butler v. Michigan*, 352 U.S. 380 (1957). It is also clear that a content-based regulation of speech is presumptively invalid. *Simon & Schuster v. Crime Victims Bd.*, 112 S. Ct. 501, 50 (1991).

In Defendant's motion to dismiss, she argues that Plaintiffs lack standing to challenge the COPA, referencing only portions of the testimony Plaintiffs have submitted in support of their preliminary injunction motion. As Plaintiffs will discuss fully in their response to Defendant's motion, Plaintiffs clearly have standing to bring a facial challenge to the COPA. *See* forthcoming Plaintiffs Memorandum of Law in Opposition to Defendant's Motion to Dismiss, January 12, 1999 ("Pls. Opp. Br."). The testimony and exhibits at the preliminary injunction hearing (particularly those of the Plaintiffs), the evidence at the TRO hearing, and the declaration paragraphs that are admitted (collectively, "the evidence"), will show that Plaintiffs and other Web speakers engage in a substantial amount of speech that may violate the standard of the statute.[3] 47 U.S.C. Sect.231 (e)(6). Indeed, Plaintiffs expect that Defendant's law enforcement witness, Mr. Hecker, will testify that there is a substantial amount of "harmful" matter on the Web, and further will concede that he found some of the Plaintiffs' speech could be considered prurient, patently offensive, and valueless for minors in some communities.

Especially given Defendant's reliance on evidence, the substance of her standing motion is really a disguised request for the Court to narrowly consture the statute to apply only to "commercial pornographers," whatever that means, and not to speakers like the Plaintiffs. (Of course, neither Plaintiffs' view that their speech should be protected, nor Defendant's argument in a civil brief that it will not be prosecuted, are dispositive.) Given the plain language of the statute, there is simply no way for the Court to rewrite the COPA to cure its fatal overbreadth, or to eliminate its chilling effect on protected speech. *See* Pls. Opp. Br.; s*ee also ACLU I,* 117 S. Ct. at 2350 (quoting *Virginia v. American Booksellers Association*, 484 U.S. 383, 397 (1988)) (rejecting the government's argument for a narrowing construction and stating that a court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction").[4] As the Court will find on applying the plain language of the statute to the evidence submitted, Defendant's motion to dismiss should be denied and Plaintiffs' motion for a preliminary injuction should be granted. The Court should consider at least the following issues in deciding the parties' motions:

a. Defendant must establish that the statute is so exact in its applications that it will not reasonably chill Plaintiffs and other speakers on the Web. The evidence will show that the COPA will chill the exercise of constitutionally protected speech by Plaintiffs and other speakers on the Web.

b. Defendant argues that some of Plaintiffs' speech is not, as a matter of law, "prurient" under 47 U.S.C. Sect.231 (e)(6)(A). The evidence will show that Plaintiffs, many of whose Web sites were created explicitly to provide information about sexuality, reasonably believe that some communities might find that their speech is designed to appeal to the "prurient" interest of minors.

c. The evidence will show that Plaintiffs do not know how to determine community standards and are fearful that their speech may be judged by local communities who may not share their views. Strikingly, Defendant does not attempt to define the "community" whose standards apply in determining whether speech meets the "prurience" prong in Sect. 231 (e)(6)(A)..

d. Plaintiffs will testify that the language "taken as a whole" in Sect. 231 (e)(6)(A) is exceptionally

complex to interpret in the context of the Internet, and thus contributes to their fear of prosecution. For example, does "as a whole" refer to the entire Web site, a single Web page, or a portion of text or graphic on a Web page? Defendant has not seriously addressed the problems created by this ambiguous language.

e. All of the Plaintiffs communicate speech involving a "sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast." 47 U.S.C. Sect.231 (e)(6). Defendant does not dispute that at least some Plaintiffs engage in such speech. *See* Def. MTD Br. Defendant's non-binding argument is that such speech cannot be deemed "prurient" and does not "lack value" as a matter of law. *See* Pl. Opp. Br.

f. The evidence will show that Plaintiffs believe their speech has value for adults and older minors, but that they have a reasonable basis for fearing prosecution under the COPA because their speech may be considered by others to lack value for minors, especially younger minors. Many of the Plaintiffs have learned that their opinions regarding value are not universal or even shared by a majority of others.

g. Defendant briefly and simplistically asserts that Plaintiffs have no credible fear of prosecution for "hosting" content or providing "links" on the Web. However, the evidence will show that, because of the the nature of the Web, Plaintiffs reasonably fear prosecution for "hosting" Web-based media such as chat, email, bulletin boards, and other Web sites, and for linking to other Web sites, particularly when they have "selected" such content. [5] *See* 47 U.S.C. Sect.231 (b)(4). Plaintiffs and other Web speakers reasonably fear prosecution for links, particularly when those links are consciously chosen to enhance the content of the speaker's Web site, and are framed by portions of the speaker's site. Similarly, Plaintiffs and other speakers fear prosecution for chat rooms and similar fora, particularly when they solicit discussion of certain topics.

h. Defendant argues that Plaintiffs are not "engaged in the business," as defined by the COPA, of communicating speech that is "harmful to minors." *See* Def. MTD Br. This is another attempt by Defendant to defeat the COPA's overbreadth, and Plaintiffs' standing, by rewriting the statute to exclude "occasional" transmitters of material that is "harmful to minors." Under its plain terms, a speaker is covered by the COPA if, as a regular course of business, she communicates any material on the Web that includes any material that is harmful to minors. *See* Pls. Opp. Br.

II.COPA's Defenses Fail to Cure Its Constitutional Defects

Defendant clearly has the burden of proving that the defenses in the COPA cure its presumptive unconstitutionality. The government "'must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" *Simon and Schuster v. Crime Victims Board*, 112 S. Ct. 501, 509 (1991) (quoting *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987)).[6] The burden on the government is a "heavy" one. *Fabulous*, 896 U.S. at 787 (quoting *Carlin Communications v. FCC*, 837 F.2d 546, 555 (2nd Cir. 1984)). "Even the least restrictive means of regulation must be reasonable as assessed by balancing the limits on free speech against the benefits of the regulation." 837 F.2d at 557. Because the evidence will show that the COPA defenses are effectively unavailable to the vast majority of speakers covered by the statute, Defendant will fail to meet her burden of proving that the defenses cure the COPA's constitutional defects.

In addition, the Defendant will fail to meet her burden of proving that, even if the defenses were feasible, they would not impose unconstitutional burdens on speakers, readers and viewers. The evidence will show that the COPA imposes at least two unconstitutional burdens on speech. First, the COPA would require adults to register in order to obtain access to protected speech. In *Fabulous*

Associates v. Penn. Public Util. Comm'n, the Third Circuit held that "the First Amendment protects against governmental 'inhibition as well as prohibition.' An identification requirement exerts an inhibitory effect and such deterrence raises First Amendment issues comparable to those raised by direct state imposed burdens or restrictions." 896 F.2d 780, 785 (3rd Cir. 1990) (quoting *Lamont v. Postmaster General*, 381 U.S. 60, 64-65 (1965) (Brennan, J. concurring) (citations omitted); *Denver Area Educ. Telecomms. Consortium v. FCC*, 116 S.Ct. 2374, 2392 (1996) (striking down statute that required users to place their "name on a special list" to obtain access to protected speech on cable television). Second, the COPA imposes a severe economic burden on the exercise of protected speech, and such burdens are routinely struck down by the courts. *See, e.g, Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975) (The Supreme Court found an unconstitutional deterrent effect on free speech where, to avoid prosecution, theater owners were required either to "restrict their movie offerings or [to] construct adequate protective fencing which may be extremely expensive or even physically impracticable.").[7] The Plaintiffs expect the testimony of witnesses for both parties to show that the COPA places burdens on speech by Plaintiffs and other Web speakers.

A. The Defenses Are Not Available to Some Speakers.

1.The "Reasonable Measures" Defense

Plaintiffs expect the testimony to show that there are no "reasonable measures that are feasible under available technology," Sect.231(c)(1)(C), other than self-censorship, that could ensure that prohibited speech does not reach minors. Defendant will be unable to prove that this defense is available to speakers covered by the COPA.

2. The "Digital Certificates" Defense

Plaintiffs expect that experts for both parties will testify that no digital certificates are available today that "verif[y] age." Sect.231(c)(1)(B). Defendant will be unable to prove that this defense is available to speakers. Whether the defense will become available in the future or not is irrelevant to the constitutionality of the statute, which would impose criminal penalties today if not enjoined. *See ACLU v. Reno*, 929 F. Supp. at 856.

3.The "Credit Card" and "Adult Access Code" Defenses

The only conflicting testimony about the COPA defenses will concern credit cards and adult access codes. Sect. 231(c)(1)(A). However, Plaintiffs expect there will be undisputed testimony that:

a. Both techniques are dependent on software such as CGI script, which is technologically unavailable to many Web speakers. See also *ACLU v. Reno*, 929 F. Supp. at 845, Finding 96.

b. Neither technique can be used in the context of the interactive fora on the Web such as email, chat, and discussion groups, unless all speech in those fora, whether "harmful" or not, is placed behind the credit card or adult identification screen. Many Plaintiffs and other Web speakers utilize such fora and reasonably believe that they are an important method for attracting and retaining visitors to their sites, and for obtaining revenue from advertisers. As discussed above, Plaintiffs fear that the "hosting" defense does not immunize content providers for speech communicated in such fora.

B. THE DEFENSES ARE BURDENSOME FOR ALL SPEAKERS

Plaintiffs anticipate that there will be undisputed testimony that COPA imposes a burden of compliance

on all speakers:

a. Credit card and adult access code requirements will deprive adults, such as those without credit cards, of access to constitutionally protected speech. Farmer Testimony; s*ee Reno v. ACLU*, 117 S.Ct. at 2346.

b. Credit card and adult access code requrements will force Web speakers to segregate material into sections that are "harmful" and sections that are not. Defendant is likely to argue that the burden of doing this task will be minimal. Plaintiffs' evidence will show that it can be extensive for many speakers.

c. Neither technique is available without cost to either the speaker or the user. Credit card verification will cost either the speaker or the user. Adult identification systems generally cost the user, and will economically burden the speaker because they will deter access to the site.

In addition, Plaintiffs' evidence will show that credit card or adult access code requirements will severely burden even those Web speakers and viewers who can comply, in several respects:

(1) It will deter users who do not want to register in any way to access speech otherwise provided for free. *See* Hoffman Anticipated Testimony; Plaintiffs' Testimony; s*ee also ACLU I*, 117 S.Ct. at 2337 n.23 (citing *ACLU I*, 929 F.Supp. at 847, ¶ 106); Pls. Initial Br. at p. 38).

(2) It will deter users who do not want to be associated with existing adult identification companies. *See Fabulous*, 896 F.2d at 785 (striking down dial-a-porn restrictions because "access codes impose a self-identification process, which carries with it 'the social opprobrium associated with dial-a-porn messages and the probable undesireability of having one's name and address at the disposal of message providers and other third parties.").

(3) It will deter users who wish to gather information anonymously either due to the subject matter of the speech which they are accessing, to avoid the risk of unwanted advertising, or for other privacy reasons. *See* Hoffman Anticipated Testimony; Plaintiffs' Testimony; *see also McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1524 (1995) (striking down Ohio statute prohibiting anonymous distribution of campaign literature and stating that anonymity "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation -- and their ideas from suppression -- at the hand of an intolerant society"); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965); *Talley v. California*, 362 U.S. 60, 64-65 (1960); *ACLU of Georgia v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997).

(4) It will cause loss of users who will instead visit non-profit sites, overseas sites, and sites using protocols such as ftp, non-Web based email, newsgroups, and bulletin boards that are not covered by the law. Farmer Anticipated Testimony.

(5) Loss of users will result in loss of revenue to speakers, which may in some instances be sufficient to drive the speaker out of business. Hoffman Anticipated Testimony; Farmer Anticipated Testimony.

(6) Creating the necessary screens will cost money that would be unaffordable for many speakers. Hoffman Anticipated Testimony; *see Fabulous*, 896 F.2d at 786 (unconstitutional burden where "providers ... will be obligated to spend substantial sums for different technology, to change their methods of operation, and to incur substantially higher ongoing costs which could threaten the continuation of their services").

(7) Other speakers will choose to self-censor (*i.e.,* deprive both adults and minors of "harmful" material)

rather than shoulder the larger economic burden of setting up age verification. Farmer Anticipated Testimony; *see* Plaintiffs Testimony; *see also Fabulous*, 896 F.2d at 786 ("When the access code requirement went into effect, Fabulous changed its business to produce tapes that are 'non-sexually explicit' to avoid ... costs.").

(8) Mandatory registration systems will stifle new business models being developed on the Web. Hoffman Anticipated Testimony. *See Reno v. ACLU*, 117 S.Ct. at 235 (noting "the dramatic expansion of [the Internet's] new marketplace of ideas," and holding that "governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas that to encourage it.").

(9) Registration systems will seriously increase the security problems of Web speakers and users. Farmer Anticipated Testimony.

(10) Registration systems will affect the overall functioning of the Internet backbone and essential Internet functions such as search engines. Farmer Anticipated Testimony.

III.The Statute Is Neither Narrowly Tailored Nor Effective

Defendant has the burden of establishing that the COPA is narrowly tailored to achieve a compelling governmental interest and will be effective. Defendant will be unable to prove a compelling interest in protecting children from material on the Web that is harmful to minors. The testimony will demonstrate that, in fact, the "odds are slim" that a child will accidentally run across such material on the Web. Hoffman Anticipated Testimony. Even if the governmental interest were compelling, however, Defendant will not be able to establish that the COPA is narrowly tailored or will be effective at addressing its asserted concern. The government must not only show that a content-based restriction is necessary, but that "no adequate alternatives" would be less restrictive of speech. *See e.g. Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 74 (1981); *Carey v. Brown,* 447 U.S. 455, 465 (1980); *Fabulous Assocs. v. Penn. Public Util. Comm'n*, 896 F.2d 780, 787 (3rd Cir. 1990); *Sable Communications v. FCC*, 492 U.S. 115 (1989). More specifically, Plaintiffs expect there will be no dispute that:

a. There are forms of user-based screening software, available from Internet Service Providers or private companies that Internet users may utilize to block material they find objectionable for themselves or for their children (including but not limited to material that is "harmful to minors"). *See generally ACLU v. Reno*, 929 F. Supp. at 838-842; *Reno v. ACLU*, 117 S.Ct. at 2336, 2347.

b. Parents and other users can set this software in a variety of ways to fit the age and maturity of their children and their own values.

c. User-based software blocks material on servers overseas as well as on domestic servers. Even if the COPA went into effect, the statute would not prevent minors from obtaining access to material that is "harmful to minors" overseas.

d. User-based software blocks material from non-profit sites as well as commercial sites. Even if the COPA went into effect, the statute would not prevent minors from obtaining access to material communicated with no profit motive that is "harmful to minors."

e. User-based software blocks material that is provided on the Internet using protocols other than hypertext transfer protocol. This would include email, chat, newsgroups such as USENET, bulletin boards, ftp, gopher, and others. Even if the COPA went into effect, the statute would not prevent minors from obtaining access from any of these sources to material that is "harmful to minors."

f. User-based software can be configured so that instead of blocking access to certain sites on the Web, it allows access only to a pre-selected set of sites, and blocks access to all other sites on the Internet. This method would reasonably assure that no minor would obtain access to any material that is "harmful to minors," whereas the COPA cannot provide such assurance.[8]

As compared to the COPA, user-based filtering software, even if flawed, is more effective and certainly less restrictive than the grossly ineffective statute. Defendant's law enforcment witness, Mr. Hecker, is expected to testify that there are many "pornography" sites on the Web to support Defendant's "compelling interest" in the COPA. The evidence will show that all of the sites identified by Mr. Hecker were found to be blocked by more than one of the user-based filtering programs. Moreover, Plaintiffs expect to show that Defendant's witness lacks sufficient expertise, or sufficient factual basis, for criticizing the software.

In addition to user-based filtering software, there are obviously other alternatives that the government could pursue to address its interest in protecting minors. It could sponsor educational programs to teach users how to avoid unwanted content, and can rigorously enforce other statutes, such as those prohibiting child pornography, obscenity, and child solicitation on the Internet. *See, e.g., Denver Area*, 116 S. Ct. at 2329 (listing "informational requirements" as less restrictive alternatives).

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for a Preliminary Injunction to bar enforcement of 47 U.S.C. Sect.231.

Respectfully submitted,

_____

Ann Beeson
Christopher A. Hansen
J.C. Salyer
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Stefan Presser
ACLU of Pennsylvania
125 South Ninth Street, Suite 701
Philadelphia, PA 19107

David L. Sobel
Electronic Privacy Information Center
666 Pennsylvania Ave. SE, Suite 301
Washington, D.C. 20003

Shari Steele
Electronic Frontier Foundation
6999 Barry's Hill Road
Bryans Road, MD 20616

Attorneys for All Plaintiffs

Catherine E. Palmer
Christopher R. Harris
Michele M. Pyle
Douglas A. Griffin
Latham & Watkins
885 Third Avenue, Suite 1000
New York, NY 10022

Of Counsel to American Civil Liberties Union Foundation on behalf of plaintiffs American Civil Liberties Union, Androgyny Books, Inc. d/b/a A Different Light Bookstores, Artnet Worldwide Corporation, BlackStripe, Adazzi, Inc. d/b/a Condomania, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, OBGYN.net, Philadelphia Gay News, Planetout Corporation, Powell's Bookstore, Riotgrrl, Salon Internet, Inc. and West Stock, Inc.

NOTES

1 Today, plaintiffs and defendant will also file a joint stipulation, setting forth those general facts about the Internet on which the parties agree.

2Prior to COPA's enactment, Defendant informed Congress that the statute was vague; now she argues that it is not. Compare Pls. Initial Brief, Attachment B, Letter from DOJ to Rep. Bliley, dated October 5, 1998 with Brief in Support of Defendant's Motion to Dismiss, dated December 29, 1998. See Pls. Initial Br. at p. 46.

3 Because plaintiffs clearly have standing to bring a facial challenge, the Court need not resolve at the preliminary injunction hearing whether plaintiffs have standing to challenge the statute as applies to each of them individually. Of course, in considering the motions of both parties, the Court should consider all of the evidence, not just the portions of the declarations referenced by Defendant.

4See also Blount v. Rizzi, 400 U.S. 410, 419 (1971) (refusing to salvage a federal obscenity law by adopting a narrowing construction because it was "for Congress, not this Court, to rewrite the statute."); United States v. Reese, 92 U.S. 214, 221 (1875) ("It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government.").

5The statute attempts to exempt anyone "similarly engaged in the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication made by another," but only when the speaker played no role in the "selection or alteration of the content of the communication." Sect.231(b)(4).

6See also Boos v. Barry, 485 U.S. 312, 321-22 (1988); Airport Comm'rs for Los Angeles v. Jews for

Jesus, 482 U.S. 569, 573 (1987) (citing Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 45-46 (1983).

7See also Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 115 (1991) (stating that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech," because such a regulation "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."); Meyer v. Grant, 486 U.S. 414, 424 (1988).

8Defendant is likely to argue that this configuration of the software would block minors from many "non-harmful" sites. That is correct. However, that choice would have been made by the parent, not the government. Moreover, unlike the COPA, it would not deprive adult Web users of access to material they are constitutionally entitled to receive.