

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

AMERICAN CIVIL LIBERTIES UNION, et al.	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
JANET RENO, in her official capacity as Attorney General of the United States.	:	NO. 98-5591

MEMORANDUM

Reed, J.

November 20, 1998

The plaintiffs, representing individuals and entities who are speakers and content providers on the World Wide Web (the “Web”), many of whom are seeking to make a profit, and users of the Web who use such sites, filed a complaint in this Court challenging the constitutionality of the recently enacted Child Online Protection Act (“COPA”) under the First and Fifth Amendments.¹ The plaintiffs allege in their complaint that COPA infringes upon protected speech of adults and minors and that it is unconstitutionally vague. The plaintiffs sought a temporary restraining order to prohibit the Attorney General from enforcing COPA, which was to go into effect on November 20, 1998. See Attachment A. This memorandum sets forth pursuant to Federal Rule of Civil Procedure 65(d) the reasons for the issuance of the temporary restraining order yesterday. (Document No. 29).

COPA represents the efforts of Congress to remedy the constitutional defects in the Child Decency Act (“CDA”), the first attempt by Congress to regulate content on the Internet. The CDA was struck down by the Supreme Court in ACLU v. Reno, 117 S.Ct. 2329 (1997) as

¹ This Court has jurisdiction under 28 U.S.C. § 1331.

violative of the First Amendment. Resolution of the motion for temporary restraining order is the first stepping stone in determining the constitutionality of COPA.

To obtain a temporary restraining order, the plaintiffs must prove four elements: (1) likelihood of success on the merits; (2) irreparable harm; (3) that less harm will result to the defendant if the TRO issues than to the plaintiffs if the TRO does not issue; and (4) that the public interest, if any, weighs in favor of plaintiff. See Drysdale v. Woerth, 1998 WL 647281, *1 (E.D. Pa.) (citing Pappan Enterprises, Inc. v. Hardees's Food Systems, Inc., 143 F.3d 800, 803 (3d Cir. 1998)). The plaintiffs need not prove their whole case to show a likelihood of success on the merits. If the balance of hardships tips in favor of plaintiffs, then the plaintiffs must only raise “questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation.” ACLU v. Reno I, 1996 WL 65464, *2 (E.D. Pa.) (quoting Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953)).

For the purposes of the resolution of this motion for a temporary restraining order, I assume that strict scrutiny should be applied to COPA to determine if it is narrowly tailored to achieve a compelling governmental interest.² See ACLU v. Reno, 117 S.Ct 2329, 2344 (1996) (concluding that the case law provided “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium”). In addition, the parties are in agreement that the “harmful to minors” speech described in COPA is protected speech as to adults.

Nonobscene sexual expression is protected by the First Amendment. See Sable

² The government asserts in its brief that the statute may be subject to the lower level of scrutiny which has been applied to “commercial speech;” however, the government did not press that position for the purposes of the temporary restraining order at the hearing.

Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989). Thus, the content of such protected speech may be regulated in order to promote a compelling governmental interest “if it chooses the least restrictive means to further the articulated interest.” Id. at 126 (“It is not enough to show that the Government’s ends are compelling; the means must be carefully tailored to achieve those ends.”). Attempts of Congress to serve these compelling interest must be narrowly tailored to serve those interests without unnecessarily interfering with First Amendment freedoms. Id. The Supreme Court has repeatedly stated that the free speech rights of adults may not be reduced to allow them to read only what is acceptable for children. Id. at 127 (citing Butler v. Michigan, 352 U.S. 380, 383 (1957) (reversing a conviction under a statute which made it an offense to make available to the public materials found to have a potentially harmful influence on minors as an effort to “burn the house to roast the pig”)).

It is clear that Congress has a compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards. See id. at 126 (citing Ginsberg v. New York, 390 U.S. 629, 639-40 (1968)). Thus, the issue for which the plaintiffs must show a likelihood of success on the merits is whether COPA is narrowly tailored to this interest. The defendant argued that COPA on its face is not a total ban on speech that is protected for adults because commercial communicators may avail themselves of the affirmative defenses to prosecution. The plaintiffs argue that COPA is not narrowly tailored to this legitimate, compelling interest because the affirmative defenses provided by the statute are technologically and economically unavailable to many of the plaintiffs and overly burdensome on protected speech. The plaintiffs further argue that speech that is protected as to adults will be chilled on the Web and COPA in effect will reduce the content of the Web to the level of what is

acceptable for minors. Therefore, the plaintiffs argue, COPA unconstitutionally infringes upon speech that is protected as to adults.

A statute which has the effect of deterring of speech, even if not the total suppression of the speech, is a restraint on free expression. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 n.8 (1975) (considering the expense of erecting a wall around appellant’s drive-in theater in determining whether an ordinance prohibiting public display of films containing nudity was narrowly tailored) (citing Speiser v. Randall, 357 U.S. 513 (1958)). The Court in Erznoznik noted that the regulation on speech at issue left the plaintiff “faced with an unwelcome choice: to avoid prosecution of themselves and their employees they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable.” Erznoznik, 422 U.S. at 217.

The plaintiffs presented testimony from principals of two named plaintiffs, Norman Laurila, founder and owner of A Different Light, and David Talbot, CEO and editor of Salon Magazine, from which I find that they had conducted sufficient investigations which led them to the reasonable conclusion that attempting to avail themselves of the affirmative defenses provided in COPA would cause serious and debilitating effects on their businesses. Based on the evidence before me, I am satisfied that plaintiffs have raised serious and substantial questions as to the technological and economic feasibility of these affirmative defenses. (Testimony of Laurila; Testimony of Talbot). At least one other plaintiff reached the same conclusion. (Declaration of Barry Steinhardt).³ Without these affirmative defenses, COPA on its face would

³ The defendant objected to certain statements made by declarants which contained hearsay or lacked foundation. To the extent that any of the declarations contained statements that contained hearsay or lacked foundation, those statements were not relied on by the Court; the declarations submitted by the plaintiffs were only

prohibit speech which is protected as to adults. Thus, I am satisfied that plaintiffs have shown a likelihood of success on the merits on their claim that COPA violates the First Amendment rights of adults.⁴

The defendant notes that “it is far from clear that plaintiffs have standing” to pursue this litigation. (Def.’s Brief at 11). However, the defendant has suggested that for purposes of disposition of the motion for temporary restraining order, the Court should assume that some of the plaintiffs are entities covered by COPA that engage in activities regulated by COPA. (Def.’s Proposed Conclusions of Law ¶ 2). In addition, the Court concludes that for purposes of the temporary restraining order, the plaintiffs have raised serious and substantial questions as to whether some of the materials posted on their Web sites are covered by the Act as material harmful to minors.

Because the plaintiffs have established to the satisfaction of the Court a likelihood of success on the merits of their challenge, they clear the remaining legally imposed hurdles to injunctive relief with ease.

The plaintiffs have persuaded me that at least with respect to some plaintiffs, their fears of prosecution under COPA will result in the self-censorship of their online materials in an effort to avoid prosecution. This chilling effect will result in the censoring of constitutionally protected speech, which constitutes an irreparable harm to the plaintiffs. “It is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes

received for the purpose of determining whether the declarant conducted an investigation which lead him to a reasonable conclusion about the effect on his business of complying with COPA.

⁴ This opinion does not purport to address the myriad of arguments presented by both sides, nor to address each of the grounds presented by the plaintiffs for invalidating the statute. Those arguments and claims will be dealt with by the Court at a later time to the extent that they are necessary to a full resolution of this case.

irreparable injury.” Hohe v. Casey, 868 F.2d 69 at 72,73 (3d Cir. 1989). For plaintiffs who choose not to self-censor their speech, they face criminal prosecution and penalties for communicating speech that they have shown is likely to be protected under the First Amendment.

In deciding whether to issue injunctive relief, I must balance the interests and potential harm to the parties. It is well established that no one, the government included, has an interest in the enforcement of an unconstitutional law. See ACLU v. Reno, 929 F. Supp. 824, 849 (1996). It follows in this context that the harm to plaintiffs from the infringement of their rights under the First Amendment clearly outweighs any purported interest of the defendant.

While the public certainly has an interest in protecting its minors, the public interest is not served by the enforcement of an unconstitutional law. Indeed, to the extent that other members of the public who are not parties to this lawsuit may be effected by this statute, the interest of the public is served by preservation of the status quo until such time that this Court, with the benefit of a fuller factual record and thorough advocacy from the parties, may more closely examine the constitutionality of this statute.

Based on the foregoing findings and conclusions that the plaintiffs have established a likelihood of success on the merits and irreparable harm, and that the balance of interests, including the interest of the public, weighs in favor of enjoining the enforcement of this statute, the motion for a temporary restraining order was granted in an Order dated November 19, 1998 (Document No. 29), a copy of which is attached to this Memorandum as Attachment B.

Excerpts from the Child Online Protection Act

In what will be codified as 47 U.S.C. § 231, COPA provides that:

(1) **PROHIBITED CONDUCT.**-Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than \$50,000, imprisoned not more than 6 months, or both.

(2) **INTENTIONAL VIOLATIONS.**-In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than \$50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3) **CIVIL PENALTY.**-In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than \$50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

COPA specifically provides that a person shall be considered to make a communication for commercial purposes “only if such person is engaged in the business of making such communication.” 47 U.S.C. §231(e)(2)(A). A person will be deemed to be “engaged in the business” if the

person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

47 U.S.C. § 231(e)(2)(B).

Congress defined material that is harmful to minors as:

any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that-

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated 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; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. at § 231(e)(6). Under COPA, a minor is any person under 17 years of age. Id. at § 231(e)(7).

COPA provides communicators on the Web for commercial purposes affirmative defenses to prosecution under the statute. Section 231 (c) provides that:

(c) AFFIRMATIVE DEFENSE.-

(1) DEFENSE.-It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors-

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

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JANET RENO, in her official capacity as Attorney General of the United States	:	NO. 98-5591

ORDER

AND NOW, this 19th day of November, 1998, upon consideration of the motion of plaintiffs for a temporary restraining order, the response of the defendant, the exhibits and declarations submitted by the parties, having held a hearing on this date in which counsel for both sides presented evidence and argument, and having found and concluded, for the specific reasons required under Federal Rule of Civil Procedure 65(b) set forth in a Memorandum to be issued forthwith, that plaintiffs have shown (1) a likelihood of success on the merits of at least some of their claims, (2) that they will suffer irreparable harm if a temporary restraining order is not issued, and (3) that the balance of harms and the public interest weigh in favor of granting the temporary restraining order, it is hereby **ORDERED** that the motion is **GRANTED** and defendant Janet Reno, in her official capacity as Attorney General of the United States, and, pursuant to Federal Rule of Civil Procedure 65(d), defendant's officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with defendant who receive actual notice of this Order, are **TEMPORARILY RESTRAINED** from enforcing or prosecuting matters premised upon 47 U.S.C. § 231 of the Child Online Protection Act at any

ATTACHMENT B

time¹ for any conduct² that occurs while this Order is in effect. This Order does not extend to or restrict any action by defendant in connection with any investigations or prosecutions concerning child pornography or material that is obscene under 47 U.S.C. § 231 or any other provisions of the United States Code.

IT IS FURTHER ORDERED that the filing of a bond is waived.³

IT IS FURTHER ORDERED that this temporary restraining order shall remain in effect for ten days which, calculated according to Federal Rule of Civil Procedure 6(a), expires on Friday, December 4, 1998.

The Court may modify this Order as the ends of justice require.

LOWELL A. REED, JR., J.

¹ It appears from the arguments of the parties and research conducted by this Court that it is unclear whether a federal court has the power to enjoin prosecution under a statute for acts that occur during the pendency of the injunctive relief if the decision to enjoin enforcement of the statute is later reversed on appeal. See Edgar v. MITE Corporation, 457 U.S. 624, 647, 655 (1982) (Stevens, J., concurring) (asserting that a federal judge lacked the authority to enjoin later state prosecution under a state statute) (Marshall, J., dissenting) (asserting that federal judges have the power to grant such injunctive relief and if the order is ambiguous, it should be presumed to grant such relief). While there is no binding precedent that affirmatively establishes the power of a court to enter such an injunction, there is an indication in the case law that plaintiffs who rely in their actions on judgments of the court and are later prosecuted for their actions after the judgment is reversed can be successful in raising the judgment of the court as a defense to prosecution. See Clarke v U.S., 915 F.2d 699 (D.C. Cir. 1990) (citing cases and noting that a federal judge enjoining a federal prosecution does not present the federalism concerns that were present in Edgar). Granting injunctive relief to the plaintiffs, who are raising a constitutional challenge to a criminal statute that imposes imprisonment and fines on its violators, that only immunizes them for prosecution during the pendency of the injunction, but leaves them open to potential prosecution later if the Order of this Court is reversed, would be hollow relief indeed for plaintiffs and members of the public similarly situated. Thus, the Court enjoins the defendant from enforcing COPA against acts which occur during the pendency of this Order, in an effort to tailor the relief to the realities of the situation facing the plaintiffs.

² The defendant urges this Court to bar enforcement of COPA, if at all, only as to the plaintiffs. However, the defendant has presented no binding authority or persuasive reason that indicates that this Court should not enjoin total enforcement of COPA. See ACLU v. Reno, 929 F. Supp. 824, 883 (1996); Virginia v. American Booksellers Association, 484 U.S. 383, 392 (1988) (noting that in the First Amendment context, “litigants . . . are permitted to challenge a statute not because of their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression”)(internal quotations omitted).

³ See ACLU v. Reno, 929 F. Supp. at 884 (citing Temple University v. White, 941 F.2d 201, 220 (3d Cir. 1991)).