

TESTIMONY ON SENATE BILL 170

**PRESENTED BY
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TO

**THE PENNSYLVANIA SENATE JUDICIARY COMMITTEE
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Good afternoon Senator Greenleaf, Senator Costa and other members of the Senate Judiciary Committee. My name is Larry Frankel and I am the Legislative Director of the American Civil Liberties Union of Pennsylvania. Thank you for inviting us to present testimony at today's public hearing on Senate Bill 170.

This legislation would amend two criminal statutes: (a) Obscene and other sexual materials and performances (Section 5903 of Title 18); and (b) Sexual abuse of children (Section 6312 of Title 18). The ACLU of Pennsylvania takes no position on the proposed amendment to Section 5903. My testimony will focus on the proposed changes to Section 6312 that relate to what is called "virtual child pornography." I will also discuss how Pennsylvania's existing laws regulating communications via the Internet probably violate the Commerce Clause of the United States Constitution.

The proposed changes to Section 6312 would add to the existing prohibitions on knowingly photographing, videotaping, depicting on computer or filming children engaged in sexual acts or in the simulation of such acts. Senate Bill 170 would expand that crime to include the creation of any obscene computer-generated image depicting what appears to be a child. Senate Bill 170 also expands the crime of dissemination of photographs, videotapes, computer depictions and films of child pornography by

additionally prohibiting any obscene computer-generated image depicting what appears to be a child under the age of 18 years.

Senate Bill 170 is a carefully crafted response to the recent United States Supreme Court decision, Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002). There, the Supreme Court struck down the ban on virtual child pornography that was among the provisions of the federal Child Pornography Prevention Act of 1996. The basis for the decision was the fact that the ban extended to images that were not obscene. The Supreme Court found that the Child Pornography Prevention Act could not be read as prohibiting only obscene images and lacked any exception for works of literary, artistic, political, educational or scientific value. The Supreme Court also held that the prohibition was overbroad.

That opinion demonstrates how important it is to distinguish constitutionally protected speech from obscenity and child pornography that harms actual children. The provisions of the Act were deemed to be unconstitutional because they barred material that depicted what “appear(s) to be a minor” or that was advertised in a way that conveyed the impression that a minor was involved in its creation.

The groups that brought this successful lawsuit did not challenge the Act’s provision banning the use of identifiable children in computer-altered sexual images. Nor did this decision affect the state of the law regarding child pornography that involves real children. Child pornography involving real children has been illegal for many years. The Supreme Court did not address the issue of whether child pornography that does not involve real children falls outside the protections of the First Amendment.

Senate Bill 170 builds on what the Supreme Court decided in Ashcroft v. Free Speech Coalition. This bill clearly states that the virtual child pornography must be obscene. Therefore, literary or artistic works that depict sexual activity among teenagers are not covered. We should not see prosecutions of productions of Romeo and Juliet or showings of films like The Tin Drum, American Beauty or Traffic. We think that this proposal is crafted to overcome the specific problem identified in Ashcroft v. Free Speech Coalition.

However, as I previously noted, the issue of whether a state can expand the definition of child pornography to include materials that do not involve actual children was not before the Supreme Court. We still think that it is an open question as to whether any state or Congress can bar virtual child pornography if an actual child is not used in the production of such pornography.

Senate Bill 170 also implicitly raises questions as to state regulation of communications via the Internet. The bill amends subsections (b) and (c) of Section 6312. Those subsections cover depictions on computers and dissemination and transmission by computers. Because such activities inevitably cross state lines via the Internet, the ACLU believes that this Committee should consider the implications of the Commerce Clause of the United States Constitution on this legislation. Let me add, that the following discussion of this issue is relevant to existing state laws that seek to bar non-obscene communications via computer. Therefore, it may be prudent for this Committee to take a more comprehensive look at Pennsylvania laws regulating content on the Internet to make sure we are not running afoul of the United States Constitution.

The leading case on this topic is American Libraries Association v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) where the United States District Court held that a New York statute regulating Internet communications violated the Commerce Clause. The statute in question made it a crime to use a computer to initiate or engage in communication that is harmful to a minor because of its sexual content.

In its opinion, the District Court extensively described the Internet and how it works. The District Court repeatedly noted that the Internet functions without consideration of geography or state lines. In fact, the users of the Internet have no way of knowing who is accessing information on the Internet and where those individuals accessing information may be located. As the District Court wrote:

The Internet is wholly insensitive to geographic distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document geographic location; while computers on the network do have ‘addresses’ they are logical addresses on the network rather than geographic addresses in real space. The majority of Internet addresses contain no geographic clues and even where an Internet address provides such a clue, it may be misleading. . .

Moreover, no aspect of the Internet can feasibly be closed off to users from another state. An Internet user who posts a Web page cannot prevent New Yorkers or Oklahomans or Iowans from accessing that page and will not even know from what state the visitors to that site hail.

969 F. Supp. at 170-171.

With that understanding of how the Internet functions, the District Court analyzed the New York statute and found that it resulted in the extraterritorial application of New York law to citizens of other states. As the District Court aptly stated: “New York has

deliberately imposed its legislation on the Internet and, by doing so, projected its law into other states whose citizens use the Net.” 969 F. Supp. at 177.

The District Court also found that only the uniform national treatment of cyberspace would prevent states from enacting inconsistent regulatory schemes:

The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level. The Internet represents one of those areas; effective regulation will require national, and more likely global, cooperation. Regulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations.

969 F. Supp. at 181. For these reasons the District Court held that the New York law violated the Commerce Clause.

Other courts that have considered regulation of Internet communications have closely followed the decision in American Libraries Association v. Pataki. In ACLU v. Johnson, 194 F.3d 1149 (1999), the Tenth Circuit Court of Appeals struck down a New Mexico statute that was quite similar to the New York law. That Court found the New Mexico statute violated the Commerce Clause. A Michigan statute that added computers and the Internet as prohibited means for distribution of sexually explicit materials was also found to be unconstitutional on Commerce Clause grounds. Cyberspace Communications, Inc. v. Engler, 238 F. 3d 420 (6th Cir. 2000).

While there is this line of cases striking down laws that regulate the distribution of sexually explicit material on the Internet, there are cases that have upheld a very narrow range of communications on the Internet. For example, in State of Washington v. Heckel, 24 P.3d 404 (2001), the Supreme Court of Washington upheld a state law regulating unsolicited commercial e-mail (UCE), more popularly known as “spam.” The

law applied to e-mail communications initiated from a computer located in Washington or sent to an e-mail address that the sender knows, or has reason to know, is held by a Washington resident. The law specifically prohibited using a third party's domain name without permission, misrepresenting or disguising a message's point of origin or transmission, or using a misleading subject line.

The Washington Supreme Court found that this law did not violate the Commerce Clause. In its opinion, the Court distinguished the Washington law from the New York law invalidated in American Libraries Association v. Pataki:

At issue in *American Libraries* was a New York statute that made it a crime to use a computer to distribute harmful, sexually explicit content to minors. The statute applied not just to the initiation of e-mail messages but to all Internet activity including the creation of websites. Thus, under the New York statute, a website creator in California could inadvertently violate the law simply because the site could be viewed in New York. Concerned with the statute's "chilling effect," *id.* at 179, the court observed that, if an artist 'were located in California and wanted to display his work to a prospective purchaser in Oregon, he could not employ the virtual [Internet] studio to do so without risking prosecution under the New York law.' *Id.* At 174. In contrast to the New York statute, which could reach all content posted on the Internet and therefore subject individuals to liability based on unintended access, the Act reaches only those deceptive UCE messages directed to a Washington resident or initiated from a computer located in Washington.

While the decision in American Libraries Association v. Pataki, demonstrates the dangers of regulating Internet communications, the opinion in State v. Heckel, shows that in limited circumstances, state laws regulating communications that do not have extraterritorial reach and that avoid the possibility of inconsistent regulatory schemes among the states, may survive constitutional scrutiny. See, *State Internet Regulation and the Dormant Commerce Clause*, 17 Berkeley Technology Law Journal 379 (2002).

The ACLU believes that the existing laws in Pennsylvania that criminalize the communication of non-obscene text and visual images over the Internet are susceptible to legal challenge because they appear to be in violation of the Commerce Clause. We do not think that Pennsylvania's current laws in this area are sufficiently narrowly drafted and we believe that they suffer from the very defects discussed in American Libraries Association v. Pataki.

The ACLU suggests that the Senate and House Judiciary Committees undertake a review of the existing statutes before passing new laws, such as Senate Bill 170, that only compound this problem.

Thank you for your kind attention. I am ready to try to answer any questions you may have.