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

AMERICAN CIVIL LIBERTIES : CIVIL ACTION
UNION, ET AL :
 :
 PLAINTIFF :
 :
 :
 VS. :
 :
 :
 ALBERTO R. GONZALES, :
 IN HIS OFFICIAL CAPACITY AS :
 ATTORNEY GENERAL OF THE :
 UNITED STATES :
 :
 DEFENDANT : NO. 98-05591

MONDAY, NOVEMBER 20, 2006
COURTROOM 17-A
PHILADELPHIA, PA 19106

BEFORE THE HONORABLE LOWELL A. REED, JR. SJ

NON-JURY TRIAL
DAY 16

APPEARANCES:

CHRISTOPHER A. HANSEN, ESQUIRE
ADEN J. FINE, ESQUIRE
BEN WIZNER, ESQUIRE
CATHERINE CRUMP, ESQUIRE
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PROCEEDINGS RECORDED BY STENOGRAPHY-COMPUTER,
TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

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3 KATHARINE MARSHALL, ESQUIRE
4 JEROEN VAN KWAWEGEN, ESQUIRE
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8

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FOR THE DEFENDANT

23

24

25

1 (THE CLERK OPENS COURT.)

2 THE COURT: GOOD MORNING, EVERYONE.

3 ALL COUNSEL: GOOD MORNING, YOUR HONOR.

4 THE COURT: GOOD MORNING, MISS WHITE.

5 THE COURT REPORTER: GOOD MORNING, YOUR
6 HONOR.

7 THE COURT: TECHNICAL POINT BEFORE WE
8 MOVE ALONG. I THINK WE HAVE NOW -- WE ARE NOW IN A
9 POSITION TO CLOSE THE EVIDENTIARY RECORD. I MADE SOME
10 RULINGS LAST THURSDAY THAT COVERED THE OPEN ITEMS, I
11 THINK. SO SUBJECT TO GOOD CAUSE SHOWN TO OPEN THE
12 RECORD, THE EXISTENCE OF WHICH I KNOW NOT AT THIS POINT,
13 THE EVIDENTIARY RECORD IS CLOSED.

14 THE PARTIES HAVE COMPLETED THEIR
15 SUBMISSIONS AND WE ARE READY FOR CLOSING ARGUMENTS. WE
16 PLAN THAT THE MAIN ARGUMENTS FOR THE PARTIES BE
17 APPROXIMATELY AN HOUR, BUT WE HAVE AN AGREEMENT THAT IF
18 IT GOES AS LONG AS AN HOUR AND-A-HALF THAT NO ONE WILL
19 GET REMOVED FROM THE COURTROOM. WE DON'T EXPECT TO GO
20 THAT LONG. HAVE I STATED THAT CORRECTLY?

21 MR. GOMEZ: YES, YOUR HONOR. YOUR HONOR,
22 I DON'T KNOW IF YOU WERE PLANNING, THERE IS ONE
23 DEMONSTRATIVE EXHIBIT THAT WE WANTED TO ADDRESS.

24 THE COURT: I WOULD BE MORE THAN HAPPY TO
25 CONSIDER IT.

1 MR. GOMEZ: SHOULD WE ADDRESS THAT AT
2 THIS POINT?

3 THE COURT: SURE.

4 MR. GOMEZ: MR. MCELVAIN WILL ADDRESS
5 THAT.

6 MR. MCELVAIN: YOUR HONOR, THERE IS ONE
7 DEMONSTRATIVE EXHIBIT THAT PLAINTIFFS INTEND TO USE THAT
8 WE HAVE AN OBJECTION TO. WE PREPARED A MOTION THAT WE
9 TRIED TO FILE LAST NIGHT BUT WE HAD AN ECF PROBLEM. I
10 HAVE A PAPER COPY FOR YOU. THERE WAS A PROBLEM WITH
11 ELECTRONIC FILING SO WE E MAILED IT TO MR. LANG, BUT I
12 DON'T KNOW IF YOU'VE SEEN IT.

13 THE CLERK: OUR E-MAIL IS NOT WORKING.

14 THE COURT: OUR COMPUTER IS DOWN THIS
15 MORNING. WHEN YOU WALK INTO THE BANK YOU CAN'T DO ANY
16 BANKING.

17 MR. MCELVAIN: MAY I APPROACH?

18 THE COURT: YES, INDEED.

19 I THOUGHT IT WAS A MOTION TO SUPPORT THE
20 USE OF A DEMONSTRATIVE EXHIBIT. HAVE YOU SEEN THIS, MR.
21 HANSEN?

22 MR. HANSEN: I WAS GIVEN A COPY FIRST
23 THING THIS MORNING, YOUR HONOR.

24 (PAUSE.)

25 THE COURT: MR. HANSEN, WHAT'S YOUR

1 RESPONSE TO ALL THIS?

2 MR. HANSEN: YOUR HONOR, PLAINTIFFS FIND
3 THIS MOTION A LITTLE PECULIAR THAT THEY ARE TRYING
4 EXCLUDE ME FROM DOING MY VERSION OF THE FACTS. I THINK
5 THAT IS THE WHOLE POINT OF CLOSING IS TO LET ME DO MY
6 VERSION OF THE FACTS. WE THINK THE DEMONSTRATIVE IS
7 ACCURATE. I HAVE A COPY WHICH I CAN SHOW TO THE COURT
8 IF YOU WOULD LIKE TO SEE IT, BUT A MOTION TO PRECLUDE A
9 PARTY FROM PROVIDING FACTS THAT THE PARTY BELIEVES TO BE
10 ACCURATE JUST BECAUSE THE OTHER SIDE THINKS THEY'RE
11 INACCURATE DOES NOT SEEM TO BE APPROPRIATE.

12 THE COURT: ANY COMMENT, MR. MCELVAIN?

13 MR. MCELVAIN: THERE IS NO RECORD
14 EVIDENCE FOR THESE PARTICULAR STATISTICS AND WHEN MR.
15 HANSEN TRIED TO ASK DR. STARK ABOUT THESE STATISTICS ON
16 CROSS EXAMINATION, HE EXPLAINED THAT YOU COULD NOT
17 PERFORM THE CALCULATIONS THIS WAY. HE WOULD HAVE TO GO
18 THROUGH AND PERFORM CERTAIN CALCULATIONS AS A
19 STATISTICIAN THROUGH THE DATABASE. IT'S NOT JUST A
20 SIMPLE MATH MATTER BECAUSE THERE ARE WEIGHTINGS INVOLVED
21 THAT THE DIFFERENT STATISTICS ARE GENERATED IN DIFFERENT
22 WAYS. IT'S NOT JUST A SIMPLE MATH MATTER THAT SOMEONE
23 NOT TRAINED IN STATISTICS COULD PERFORM. THEIR ARGUMENT
24 THAT IT IS A FAIR REFUTATION OF THE RECORD IS SIMPLY NOT
25 CORRECT. THERE WAS NO RECORD OF IT IN SUPPORT OF THESE

1 NUMBERS ANYWHERE IN THE TRIAL TRANSCRIPT, YOUR HONOR.

2 THE COURT: MR. HANSEN, I DON'T
3 UNDERSTAND WHAT THIS DOCUMENT IS, A SO-CALLED
4 DECLARATION OF PHILIP STARK. IS THAT SOMETHING YOU
5 GENERATED?

6 MR. HANSEN: NO, THAT IS THEIR EXPERT,
7 MR. STARK, WHO'S CLAIMING THAT MY VERSION OF THE FACTS
8 IS WRONG. HE IS BRINGING IN BRAND NEW TESTIMONY TO
9 CLAIM THAT MY VERSION OF THE FACTS ARE WRONG. IT MIGHT
10 BE HELPFUL -- HERE ARE THE FOUR DEMONSTRATIVE EXHIBITS
11 THAT WE ARE GOING TO USE AND I HAVE OPENED IT TO THE ONE
12 THAT IS AT ISSUE.

13 THE COURT: I WON'T BE ABLE TO GAIN SAY
14 WHAT THE RECORD SHOWS BY LOOKING AT THESE PERCENTAGES.
15 I'M NOT GOING TO TAKE THE TIME TO COMPARE IT TO THE
16 RECORD FOR THE FOLLOWING REASON. THE DEFENDANT'S MOTION
17 TO EXCLUDE DEMONSTRATIVE EXHIBIT PRESENTED TO THE COURT
18 AT THE BAR OF THE COURT THIS MORNING IS DENIED ON THE
19 GROUND THAT ANY ARGUMENT BY THE PLAINTIFFS' COUNSEL HAS
20 TO BE BASED ON A FAIR INFERENCE FROM THE FACTS IN THE
21 RECORD. AND IF THEY ARE NOT, IF THE ARGUMENT IS NOT SO
22 BASED, TWO OCCURRENCES MAY COME TO PASS: ONE, THE
23 FACT-FINDER CAN IGNORE THE ARGUMENT AS BEING NOT BASED
24 ON ANY EVIDENCE IN THE RECORD; AND PERHAPS IN REVERSE
25 ORDER, DEFENSE COUNSEL IN HIS OR HER CLOSING CAN POINT

1 THIS OUT TO THE COURT. THE COURT WILL DECIDE WHAT
2 PERMISSIBLE INFERENCES CAN BE DRAWN FROM THE RECORD.
3 THAT IS THE COURT'S RULING.

4 I WANT TO BE CLEAR THAT I'M NOT ACCEPTING
5 MR. HANSEN'S EXHIBIT AS BEING EVIDENTIARY IN ANY WAY.
6 IT'S NOT EVIDENTIARY. IT'S AN EXHIBIT TO SUPPORT THE
7 CLOSING ARGUMENT. THE PLAINTIFFS HAVE AGREED TO THAT,
8 FOR MR. HANSEN'S PRESENTATION.

9 ALL RIGHT. MR. HANSEN, WHAT DID WE
10 DECIDE TO DO, ALLOW ABOUT 15 MINUTES FOR REBUTTAL?

11 MR. HANSEN: YES, I THINK THAT IS WHAT WE
12 ROUGHLY DECIDED. YES, YOUR HONOR.

13 THE COURT: YOU ARE WELCOME TO PROCEED.
14 IT'S 10 PAST 9.

15 MR. HANSEN: THANK YOU, YOUR HONOR.

16 YOUR HONOR, WE SAID AT THE OPENING THAT
17 THERE WERE THREE BASIC FACTUAL ISSUES THAT OVERARCHED
18 THIS ENTIRE CASE. THOSE THREE ISSUES REMAIN THE THREE
19 ISSUES THAT ARE STILL THE FACTUAL ISSUES THAT THE COURT
20 IS GOING TO HAVE TO ADDRESS. TO REMIND THE COURT, THOSE
21 ARE THE NATURE OF THE SPEECH THAT IS AFFECTED BY COPA,
22 WHETHER COPA IS NARROWLY TAILORED TO ACHIEVE A
23 GOVERNMENTAL INTEREST, AND WHETHER THE DEFENSES THAT ARE
24 PROVIDED IN COPA SAVE THE UNCONSTITUTIONALITY OF THE
25 STATUTE. I'M GOING TO ADDRESS IN THE CLOSING EACH OF

1 THOSE AT SOME LENGTH.

2 WHAT IS STILL CLEAR AND WAS CLEAR AT THE
3 OPENING AND IS CLEAR AT THE CLOSING IS THAT EVERYONE
4 AGREES COPA IS NOT PERFECT. EVERYONE AGREES THAT COPA
5 WILL NOT PROTECT CHILDREN FROM ALL SEXUAL SPEECH ON THE
6 INTERNET. EVERYONE AGREES THAT FILTERS ARE NOT PERFECT.
7 FILTERS WILL NOT PROTECT EVERY CHILD ON EVERY OCCASION
8 FROM EVERY SEXUAL SPEECH ON THE INTERNET. THAT IS NOT
9 REALLY THE QUESTION. ALTHOUGH DEFENDANTS MAY TRY TO
10 MAKE THE QUESTION COPA VERSUS FILTERS, THAT IS NOT
11 REALLY THE QUESTION. THE QUESTION IS WHICH IS GOING TO
12 BE MORE EFFECTIVE AND WHICH IS MORE NARROWLY TAILORED TO
13 THE GOVERNMENTAL INTEREST. WHAT IS STRIKING I THINK
14 AFTER FOUR WEEKS OF TRIAL IS THAT THERE ARE FEWER
15 FACTUAL DISPUTES THAN ONE MIGHT HAVE ANTICIPATED.
16 INDEED, WITH RESPECT TO THE NARROW TAILORING FACTS AND
17 WITH RESPECT TO WHETHER THE DEFENSES SAVE THE
18 CONSTITUTIONALITY OF THE STATUTE, AS I WILL DISCUSS
19 LATER, THERE ARE REALLY VERY FEW FACTUAL DISPUTES THAT
20 THE COURT IS GOING TO BE CALLED UPON TO RESOLVE.

21 LET'S START WHERE WE OUGHT TO START IN A
22 FIRST AMENDMENT CASE WITH THE NATURE OF THE SPEECH THAT
23 IS AFFECTED BY COPA. COPA CONTAINS A DEFINITION OF
24 SPEECH THAT IS MADE CRIMINAL. IT HAS THREE ESSENTIAL
25 PIECES TO IT. FIRST IS THAT THE SPEECH MUST BE

1 PRURIENT. MORE SPECIFICALLY SECTION 231(E)(6)(A), SAYS
2 THAT THE SPEECH THE AVERAGE PERSON APPLYING CONTEMPORARY
3 COMMUNITY STANDARDS WOULD FIND TAKING THE MATERIAL AS A
4 WHOLE AND WITH RESPECT TO MINORS, IS DESIGNED TO APPEAL
5 TO OR IS DESIGNED TO PANDER TO THE PRURIENT INTEREST.
6 IN YOUR HONOR'S OPINION OF OCTOBER 11TH, 2006, AT PAGE
7 5, YOUR HONOR QUOTES THE SUPREME COURT AS DEFINING THE
8 PRURIENCE PRONG AS MEANING THAT THE SPEECH MUST BE "IN
9 SOME SENSE EROTIC." ALL OF THE SPEECH PLAINTIFFS AND
10 ALL OF THE SPEAKERS THAT YOUR HONOR HEARD FROM ENGAGED
11 IN SPEECH THAT EASILY MEETS THAT DEFINITION. JUST TO
12 TAKE A COUPLE OF EXAMPLES. ON OCTOBER 23RD, THE EDITOR
13 OF NERVE TESTIFIED, AT PAGES 68 TO 74, TO A LENGTHY
14 SERIES OF EXHIBITS ALL OF WHICH INVOLVE EROTIC FICTION.
15 MARILYN LEWIS, THE EXECUTIVE DIRECTOR OF THE EROTIC
16 AUTHORS ASSOCIATION, TESTIFIED ON OCTOBER 31ST AT PAGE
17 95 TO A SERIES TO EXAMPLES OF EROTIC FICTION, ALL OF
18 WHICH ARE PATENTLY PRURIENT.

19 NOW, THE PRURIENCE PRONG CONTAINS THE
20 COMMUNITY STANDARDS -- PART OF IT INVOLVES THE
21 APPLICATION OF CONTEMPORARY COMMUNITY STANDARDS. AND AS
22 YOUR HONOR IS AWARE, THE DEFINITION OF CONTEMPORARY
23 COMMUNITY STANDARDS HAS BEEN HOTLY DEBATED IN THIS CASE
24 THROUGHOUT THE APPELLATE PROCESS. IT WAS THE BASIS FOR
25 THE 3RD CIRCUIT'S ORIGINAL DECISION. IT WAS THE BASIS

1 FOR THE SUPREME COURT'S REMAND OF THE ORIGINAL DECISION.

2 THERE IS -- STRIKINGLY, THERE ARE SOME
3 FACTS NOW IN THE RECORD ON CONTEMPORARY COMMUNITY
4 STANDARDS. FIRST, THERE IS DEFENDANT'S EXPERT, MR.
5 MEWETT, WHO AGREES THAT COMMUNITY STANDARDS VARY FROM
6 REGION TO REGION. HE SO TESTIFIED ON NOVEMBER 7 AT PAGE
7 201. MR. SNELLEN FROM THE LESLIE LOHMAN ART GALLERY
8 TESTIFIED ON NOVEMBER 2 AT PAGE 151 THAT COMMUNITY
9 STANDARDS DIFFER. SO THERE IS SOME EVIDENCE IN THE
10 RECORD THAT COMMUNITY STANDARDS DIFFER AND THERE IS NO
11 EVIDENCE TO THE CONTRARY.

12 NOW, APPARENTLY DEFENDANT'S RESPONSE TO
13 THE CONTEMPORARY COMMUNITY STANDARDS PROBLEM OF THE
14 PRURIENCE PRONG OF COPA WAS QUOVA. YOUR HONOR WILL
15 RECALL WE HEARD FROM MARIE ALEXANDER, THE CEO OF QUOVA,
16 WHICH IS A GEOLOCATION SERVICE. AND SHE PURPORTED TO
17 SAY, WE -- SHE, THE QUOVA PEOPLE, CAN DETERMINE WHERE
18 SPEECH COMES FROM AND WHERE THE READERS ARE COMING FROM.
19 HOWEVER, SHE TESTIFIED THAT THERE WAS EXTENSIVE COST
20 INVOLVED IN USING THE PRODUCT, AT LEAST 6 TO \$12,000 A
21 YEAR. IN ADDITION, SHE TESTIFIED THAT THERE WERE
22 MASSIVE FLAWS TO THE PRODUCT. HER TESTIMONY WAS ON
23 NOVEMBER 13TH. THE COST TESTIMONY WAS AT PAGE 24. THE
24 FLAW TESTIMONY WAS AT PAGES 35 TO 36. SHE TESTIFIED
25 THAT IN ORDER TO USE QUOVA SPEAKERS WOULD HAVE TO BLOCK

1 ALL PEOPLE COMING FROM PROXY SERVERS. IN ORDER TO USE
2 QUOVA, SPEAKERS WOULD HAVE TO BLOCK ALL PEOPLE COMING
3 FROM CORPORATE SERVERS. IN ORDER TO USE QUOVA, PEOPLE
4 WOULD HAVE TO BLOCK ANYONE COMING TO THE WEB FROM A
5 MOBILE DEVICE OR FROM LONG DISTANCE DIAL UP DEVICES.

6 IN SHORT, VAST NUMBERS OF ADULTS AND
7 MINORS WOULD HAVE TO BE BLOCKED IN ORDER TO USE THE
8 QUOVA PRODUCT TO DETERMINE CONTEMPORARY COMMUNITY
9 STANDARDS. BUT THOSE WEREN'T THE ONLY FLAWS SHE
10 TESTIFIED TO. SHE ALSO TESTIFIED THAT YOU CAN'T
11 DISTINGUISH STATE BOUNDARIES USING QUOVA. SHE TESTIFIED
12 TO THAT ON NOVEMBER 13TH AT PAGE 28. AND MOST
13 IMPORTANTLY, PERHAPS, SHE TESTIFIED THAT YOU CAN'T BLOCK
14 MINORS ONLY. SO IN ORDER TO USE QUOVA AND APPLY
15 CONTEMPORARY COMMUNITY STANDARDS, YOU WOULD HAVE TO
16 BLOCK ALL ADULTS IN THE STATE OF MISSISSIPPI IF YOU
17 THOUGHT THAT MISSISSIPPI HAD DIFFERENT STANDARDS THAN
18 NEW YORK, NOT JUST MINORS, BUT ALL ADULTS. IT IS
19 PATENTLY CLEAR THAT THE QUOVA PRODUCT DOES NOT PROVIDE A
20 SOLUTION TO THE COMMUNITY STANDARDS PROBLEMS PRESENTED
21 BY COPA.

22 THE SECOND PART OF THE COPA DEFINITION IS
23 THE DEPICTS OR DESCRIBES PORTION AT 231 USC(E)(6)(B).
24 THE PRECISE LANGUAGE IS THAT THE SPEECH MUST DEPICT,
25 DESCRIBE OR REPRESENT IN A MANNER PATENTLY OFFENSIVE

1 WITH RESPECT TO MINORS, AN ACTUAL OR SIMULATED SEXUAL
2 ACT OR SEXUAL CONTACT, AN ACTUAL OR SIMULATED NORMAL OR
3 PERVERTED SEXUAL ACT OR A LEWD EXHIBITION OF THE
4 GENITALS OR POST-PUBESCENT FEMALE BREAST. IT IS QUITE
5 CLEAR THAT ALL OF THE SPEECH WITNESSES THAT TESTIFIED
6 BEFORE YOUR HONOR MET THIS -- MET THE PRECISE LANGUAGE
7 OF THIS SECTION. FOR EXAMPLE, ON OCTOBER 23RD, AT PAGES
8 68 TO 79, THE EDITOR OF NERVE TESTIFIED TO SPEECH THAT
9 MEETS THIS DEFINITION. ON OCTOBER 23RD, AT PAGES 137 TO
10 154, THE EDITOR OF SALON TESTIFIED TO SPEECH THAT MEETS
11 THIS DEFINITION. ON OCTOBER 29TH, AT PAGE 184, THE RAP
12 ARTIST GOD-DES, ALICIA SMITH, TESTIFIED TO SPEECH THAT
13 MEETS THIS DEFINITION. ON OCTOBER 30TH, AT PAGE 109,
14 CONDOMANIA'S CEO TESTIFIED TO SPEECH THAT MEETS THE
15 DEFINITION. AND THE SEXUAL HEALTH NETWORK TESTIFIED TO
16 IT ON OCTOBER 30TH AT PAGE 205 AND AT PAGE 213. THERE
17 ARE MANY, MANY OTHER EXAMPLES.

18 THERE HAVE BEEN TWO COMPLICATIONS TO THE
19 DEPICTS OR DESCRIBES LANGUAGE. ALL OF THAT TESTIMONY
20 GOES TO THE PRECISE LANGUAGE ABOUT SEXUAL CONTACT --
21 ACTUAL OR SIMULATED NORMAL OR PERVERTED SEXUAL ACT, LEWD
22 EXHIBITION OF THE GENITALS OR POST-PUBESCENT FEMALE
23 BREAST. THE DEFINITION HAS ONE OTHER ASPECT TO IT. AND
24 THAT IS THE PATENT OFFENSIVENESS. IT IS NOT AT ALL
25 CLEAR WHAT THE PATENT OFFENSIVENESS LANGUAGE ADDS TO THE

1 MORE SPECIFIC DESCRIPTION OF THE KIND OF SPEECH THAT IS
2 CRIMINALIZED UNDER THIS SECTION. INDEED THE DEFENDANT
3 IN PLAINTIFFS' EXHIBIT 166, WHICH IS THE DEFENDANT'S
4 ANSWERS TO THE CONTENTION INTERROGATORIES, SAYS ---
5 QUOTES THE HOUSE REPORT AS SAYING THAT WHAT MATTERS IN
6 THIS SECTION IS THE PRECISE LANGUAGE, THE DEPICTS OR
7 DESCRIBES FEMALE BREAST AND SEXUAL ACT AND SO ON, MUCH
8 MORE THAN THE PATENT OFFENSIVENESS LANGUAGE.

9 AND THEN WE GET TO THE ISSUE OF THE
10 POST-PUBESCENT FEMALE BREAST, WHICH IS PART OF THE
11 LANGUAGE. THE GOVERNMENT HAS BEEN ENORMOUSLY
12 INCONSISTENT IN TRYING TO DETERMINE UNDER WHAT
13 CIRCUMSTANCES AN IMAGE OF THE POST-PUBESCENT FEMALE
14 BREAST FITS UNDER THIS DEFINITION AND WHEN IT DOES NOT
15 FIT UNDER THIS DEFINITION. PLAINTIFFS' EXHIBIT 166,
16 WHICH IS THE CONTENTION INTERROGATORIES, INTERROGATORY
17 NUMBER 15, THEY SAY THAT THE PLAYBOY PICTURES THERE
18 WHICH CONTAIN AN EXHIBITION OF THE POST-PUBESCENT FEMALE
19 BREAST, ARE NOT HARMFUL TO MINORS, BUT THEY DON'T REALLY
20 EXPLAIN IN WHAT WAY IT'S NOT HARMFUL TO MINORS. ONE OF
21 TWO POSSIBILITIES EXISTS. EITHER THEY ARE READING OUT
22 OF THE LANGUAGE OF COPA THE POST-PUBESCENT FEMALE BREAST
23 LANGUAGE OR THEY ARE SAYING THAT THERE ARE SOME NONLEWD
24 EXHIBITIONS OF THE POST-PUBESCENT FEMALE BREAST AND THAT
25 PLAYBOY IS A NONLEWD EXHIBITION. THAT WOULD SURELY BE

1 AN EXTRAORDINARY ARGUMENT FOR THEM TO BE MAKING. IN
2 SHORT, THE EFFORTS OF THE DEFENDANTS TO TRY AND EXPLAIN
3 WHAT THE DEPICT OR DESCRIBE PRONG OF COPA MEANS HAVE
4 ONLY GONE TO SHOW THAT THEY DON'T KNOW WHAT IT MEANS AND
5 THAT THEY CAN'T DEFINE IT AND THAT IT REMAINS ENORMOUSLY
6 VAGUE. WHAT WE DO KNOW IS THAT ALL OF THE SPEECH
7 WITNESSES IN THIS CASE ENGAGED IN SPEECH THAT MEETS THE
8 PRECISE LANGUAGE OF THAT SECTION.

9 FINALLY, THERE IS THE VALUE PRONG OF
10 COPA, THE LANGUAGE -- THE SPEECH MUST "TAKEN AS A WHOLE,
11 LACK SERIOUS LITERARY, ARTISTIC POLITICAL OR SCIENTIFIC
12 VALUE FOR MINORS," 231(E)(6)(C). IT'S NOT AT ALL CLEAR
13 WHAT THIS LANGUAGE MEANS EITHER. AND DEFENDANT'S
14 EFFORTS TO EXPLAIN IT HAVE ONLY ADDED TO THE CONFUSION.
15 THE MOST OBVIOUS EXAMPLE I THINK CAME DURING MR.
16 MEWETT'S TESTIMONY. MR. MEWETT, YOU WILL RECALL,
17 CATEGORIZED SPEECH AND THERE ARE A LOT OF PROBLEMS WITH
18 THE WAY HE CATEGORIZED THE SPEECH. I WILL TALK ABOUT
19 THE PROBLEMS WITH THE WAY HE CATEGORIZED SPEECH. BUT HE
20 CATEGORIZED SPEECH AND HE TRIED TO DISTINGUISH BETWEEN
21 WHAT HE DESCRIBED AS SEXUALLY EXPLICIT ADULT
22 ENTERTAINMENT AND THEN SPEECH THAT HAD VALUE, ARTISTIC
23 VALUE OR SCIENTIFIC VALUE OR SO ON. HE SEPARATED OUT
24 THOSE TWO CATEGORIES. SO IN A VERY CRUDE WAY HE WAS
25 TRYING TO GET AT THIS PARTICULAR PRONG OF COPA.

1 AND THEN, HE CLASSIFIED A WORLD FAMOUS
2 ARTIST, TOM FINLAND AS SEXUALLY EXPLICIT FOR ADULT
3 ENTERTAINMENT. SIMPLY GOT IT WRONG. THEN I PRESSED HIM
4 ON IT. I SAID, WHAT IF THIS IMAGE HAD BEEN DRAWN BY
5 MICHELANGELO? HE SAID, I STILL WOULD HAVE CALLED IT
6 SEXUALLY EXPLICIT FOR ADULT ENTERTAINMENT. HE SAID THAT
7 ON NOVEMBER 8TH AT PAGE 24. HE CAN'T AND NO ONE CAN
8 MAKE AN INTELLIGENT DECISION ABOUT ARTISTIC VALUE. IF
9 MICHELANGELO IS NOT ARTISTIC VALUE, I DON'T KNOW WHAT
10 IS. WHAT THAT POINTS OUT IS, WHEN PEOPLE THINK ABOUT
11 HARMFUL TO MINORS THEY DON'T THINK ABOUT ARTISTIC VALUE
12 AND SCIENTIFIC VALUE. THEY THINK ABOUT WHAT WOULD I
13 WANT MY KID TO SEE. MR. MEWETT WAS SAYING TO HIMSELF, I
14 WOULDN'T WANT ANY KID TO SEE THIS IMAGE AND I DON'T CARE
15 HOW ARTISTIC IT IS. I THINK WE HAVE TO REASONABLY
16 ASSUME THAT OTHER PEOPLE WOULD APPLY THE STATUTE THE
17 SAME WAY.

18 THE SECOND PLACE WHERE WE KNOW THAT THERE
19 IS CONFUSION ABOUT THIS SECTION IS IN THE
20 PLAYBOY/PENTHOUSE DESCRIPTION. AGAIN WE ARE BACK TO THE
21 CONTENTION INTERROGATORIES, WHICH IS PLAINTIFFS' EXHIBIT
22 166, CONTENTION INTERROGATORY ANSWER 15. THE DEFENDANTS
23 SAY THAT PLAYBOY IS NOT HARMFUL TO MINORS. I GUESS --
24 ALTHOUGH THEY ARE NOT VERY CLEAR IN THEIR ANSWER, I
25 GUESS THEY MEAN THAT THAT -- I GUESS THEY MEAN THAT

1 PLAYBOY HAS VALUE FOR MINORS. IT HAS EITHER ARTISTIC
2 VALUE FOR MINORS OR LITERARY VALUE FOR MINORS. REMEMBER
3 THE ONLY THING THEY HAD IN THAT EXHIBIT WAS TWO PAGES
4 FROM PLAYBOY WHICH CONSISTED ESSENTIALLY JUST OF
5 PICTURES OF WOMEN, SOME OF WHOM WERE NAKED FROM THE
6 WAIST UP. IF THAT IS SOMETHING THAT HAS VALUE, I NOW AM
7 TOTALLY CONFUSED ABOUT WHAT VALUE MEANS. AND MORE
8 IMPORTANTLY, MY CLIENTS AND OTHER SPEAKERS ON THE WEB
9 HAVE TO BE TOTALLY CONFUSED ABOUT WHAT THE VALUE PRONG
10 MEANS.

11 NOW, THERE ARE TWO SORT OF OVERARCHING
12 ISSUES THAT COME UP WHEN WE ARE TRYING TO INTERPRET THE
13 PRECISE STATUTORY LANGUAGE OF COPA. THE FIRST IS THE
14 "AS A WHOLE" LANGUAGE AND THE SECOND IS THE "FOR MINORS"
15 LANGUAGE. I WOULD LIKE TO TALK JUST FOR A SECOND ABOUT
16 EACH OF THOSE.

17 FIRST, THE "AS A WHOLE" LANGUAGE. YOUR
18 HONOR IS AWARE THERE HAS BEEN -- ONE OF THE REALLY
19 SERIOUS DISPUTES BETWEEN THE PARTIES IN THIS CASE HAS TO
20 DO WITH THE MEANING OF THE "AS A WHOLE" LANGUAGE. IT
21 HAS BEEN THE PLAINTIFFS' CONSISTENT POSITION THAT THE
22 "AS A WHOLE" LANGUAGE APPLIES TO A PAGE, A WEB PAGE.
23 IT'S BEEN THE DEFENDANT'S FAIRLY CONSISTENT POSITION
24 THAT IT APPLIES TO A WEBSITE, NOT A WEB PAGE. THIS IS
25 AN ISSUE THAT THE COURT HAS RESOLVED ONCE ALREADY AND IS

1 GOING TO HAVE TO FACE AGAIN IN WRITING ITS OPINION AFTER
2 THE TRIAL.

3 AS I SAY, YOU HAVE ALREADY ADDRESSED THIS
4 ISSUE ON ONE OCCASION. AT 31 FEDERAL SUPP. AT 480, YOU
5 NOTED THAT THE LANGUAGE OF COPA SAYS THAT MATERIAL IS
6 HARMFUL -- ANY COMMUNICATION IS HARMFUL TO MINORS THAT
7 INCLUDES SPEECH THAT IS HARMFUL TO MINORS. AND BASED ON
8 THE "THAT INCLUDES SPEECH THAT IS HARMFUL TO MINORS"
9 LANGUAGE, OF 231 (A)(2), YOUR HONOR ALREADY FOUND THAT
10 PAGE IS THE APPROPRIATE WAY TO LOOK THE "AS A WHOLE"
11 LANGUAGE, NOT SITE. YOUR HONOR'S FINDING IN THAT
12 RESPECT WAS SPECIFICALLY AFFIRMED BY THE COURT OF
13 APPEALS AT 322 F.3D AT 253 AND 268 BOTH.

14 THEN THERE IS -- AND SO THAT LAW IS STILL
15 I THINK GOOD LAW. THAT INTERPRETATION IS STILL A GOOD
16 INTERPRETATION. BUT NOW WE HAVE AN ADDITIONAL BASIS FOR
17 THE COURT TO RELY UPON. WE NOW HAVE FACTUAL EVIDENCE
18 ABOUT THIS QUESTION. IT NOW NEED NOT BE DECIDED SOLELY
19 AS A MATTER OF LAW. THE EVIDENCE WAS OVERWHELMING
20 DURING THIS CASE THAT THE UNIT OF ANALYSIS OF THE WEB IS
21 THE PAGE, NOT THE SITE.

22 TO TAKE A NUMBER OF EXAMPLES. FIRST OF
23 ALL, JOINT EXHIBIT 1, WHICH IS THE STIPULATION,
24 STIPULATION 79 THROUGH 84, TALK AT LENGTH ABOUT THE FACT
25 THAT THE WAY PEOPLE GET TO THE WEB IS THROUGH PAGES, NOT

1 SITES. THE TESTIMONY OF URBAN DICTIONARY ON OCTOBER 31
2 AT PAGES 48 AND 51, HE SAID, 60 PERCENT OF THE PEOPLE
3 WHO GO TO HIS WEBSITE DON'T EVEN GO THROUGH HIS HOME
4 PAGE. THEY GO DIRECTLY TO THE PAGE THAT THEY WANT TO
5 LOOK AT. 50 PERCENT OF THE PEOPLE WHO VISIT HIS WEBSITE
6 ONLY GO TO ONE PAGE, THUS SUGGESTING THAT PAGE IS THE
7 APPROPRIATE ANALYSIS FOR URBAN DICTIONARY. PROFESSOR
8 FELTEN, PLAINTIFFS' EXPERT PROFESSOR FELTEN, TESTIFIED
9 ON OCTOBER 24TH AT PAGES 30 AND 35 THAT THE UNIT OF
10 ANALYSIS FOR THE WEB IS THE PAGE. MR. MEWETT,
11 DEFENDANT'S EXPERT, TESTIFIED ON NOVEMBER 7TH AT PAGES
12 206 TO 207 THAT HE USED PAGE AS THE UNIT OF ANALYSIS --
13 UNIT OF ANALYSIS BECAUSE THAT IS THE PROPER UNIT OF
14 ANALYSIS WHEN YOU ARE LOOKING AT THE WEB. THAT IS THE
15 UNIT OF ANALYSIS, HE SAID, THAT FILTERS USE.

16 AND THEN THERE IS PROFESSOR STARK.
17 PROFESSOR STARK SAID ON NOVEMBER 8TH AT 164 AND I
18 QUOTE "THE UNIT OF CONTENT ON THE WEB" -- A PAGE IS "THE
19 UNIT OF CONTENT ON THE WEB. IT IS WHAT WEB BROWSERS
20 DISPLAY. IT IS WHAT FILTERS BLOCK."

21 SO THAT WHAT WE KNOW NOW IS THAT NOT ONLY
22 IS THERE A LEGAL BASIS FOR CONCLUDING THAT "AS A WHOLE"
23 APPLIES TO WEB PAGES, NOT WEBSITES, BUT THERE IS AN
24 OVERWHELMING INDEED UNDISPUTED FACTUAL BASIS FOR
25 CONCLUDING THAT "AS A WHOLE" APPLIES TO WEB PAGES, NOT

1 WEBSITES. THAT RAISES YET AN ADDITIONAL COMPLICATION
2 FOR THE DEFENDANTS, I THINK. IN RESPONSE TO THE
3 CONTENTION INTERROGATORIES, THIS TIME PLAINTIFFS'
4 EXHIBIT 167, QUESTION 13, DEFENDANTS TRIED TO
5 DISTINGUISH BETWEEN THE PLAYBOY EXAMPLE AND THE
6 PENTHOUSE EXAMPLE AND THE OTHER EXAMPLES THAT THEY WERE
7 GIVEN FOR THE MOST PART BY CLAIMING, WELL, IN THE
8 CONTEXT OF THE ENTIRE WEBSITE, WE WOULD FIND ONE HARMFUL
9 TO MINORS AND ONE NOT HARMFUL TO MINORS.

10 VIRTUALLY ALL OF THE DISTINCTIONS THEY
11 DREW IN TRYING TO DRAW THE VERY FINE AND VERY CONFUSING
12 LINES THEY TRIED TO DRAW IN THE CONTENTION
13 INTERROGATORIES, THEY DREW ALMOST EXCLUSIVELY ON THE
14 BASIS THAT YOU HAVE TO LOOK AT THE ENTIRE SITE. WELL,
15 NOW WE KNOW THAT BOTH LEGALLY AND FACTUALLY THAT IS
16 WRONG, WHICH MEANS ALL OF THEIR EFFORTS TO EXPLAIN WHAT
17 COPA MEANS IN THE CONTENTION INTERROGATORIES ARE REALLY
18 ESSENTIALLY NO LONGER OPERATIVE AND WE ARE LEFT IN FACT
19 MORE CONFUSED THAN WE WERE BEFORE. THE ONLY THING WE
20 KNOW FOR SURE IS THAT THE DEFENDANTS CAN'T DEFINE WHAT
21 IS COVERED BY COPA AND THAT THE "AS A WHOLE" LANGUAGE
22 APPLIES TO WEB PAGES.

23 NOW FINALLY THERE IS THE -- NOT FINALLY,
24 BUT NEXT THERE IS THE ISSUE OF THE "FOR MINORS"
25 LANGUAGE. ALL THREE OF THE PRONGS OF COPA SAY, IT MUST

1 FOR EXAMPLE BE DESIGNED TO APPEAL TO OR PANDER TO THE
2 PRURIENT INTEREST OF MINORS, DEPICTS OR DESCRIBES
3 SOMETHING THAT IS PATENTLY OFFENSIVE "FOR MINORS" AND SO
4 ON. SO THE QUESTION IS WHAT IS THAT PHRASE FOR MINORS
5 ADD. BECAUSE AS WE POINTED OUT BEFORE THE LANGUAGE OF
6 COPA IS STRIKINGLY SIMILAR TO THE MILLER LANGUAGE
7 DEFINING OBSCENITY. THERE ARE ONLY REALLY TWO
8 SIGNIFICANT DIFFERENCES BETWEEN THE DEFINITION IN COPA
9 AND THE DEFINITION OF OBSCENITY. THE FIRST IS, COPA HAS
10 A MUCH MORE SPECIFIC DEFINITION OF THE KINDS OF SPEECH.
11 ALTHOUGH THE LANGUAGE ABOUT GENITALIA AND THE
12 POST-PUBESCENT FEMALE BREAST IS NOT IN THE OBSCENITY
13 DEFINITION, IT IS HERE, SUGGESTS THAT CONGRESS THOUGHT
14 THAT WAS ONE OF THE REALLY CRITICAL DIFFERENCES, ONE OF
15 THE WAYS IN WHICH THEY WERE TRYING TO REACH SPEECH THAT
16 WAS NOT COVERED BY OBSCENITY.

17 AND THE OTHER THING, OF COURSE, IS THE
18 "FOR MINORS" LANGUAGE. AGAIN, IT'S STRIKING THAT
19 DEFENDANT'S EXPERT, MR. MEWETT, TRIED TO CREATE A SERIES
20 OF VALUE CATEGORIES, ARTISTIC AND SCIENTIFIC AND SO ON,
21 WHEN HE WAS DISTINGUISHING ADULT ENTERTAINMENT, SEXUALLY
22 EXPLICIT FROM STUFF THAT HAD VALUE. AGAIN, HE IS USING
23 SLIGHTLY DIFFERENT DEFINITIONS. I'M NOT ENDORSING WHAT
24 HE DID, BUT CLEARLY HE WAS MAKING AN EFFORT TO DO IT.
25 BUT HE EXPLICITLY DISAVOWED THE NOTION THAT HE DID ANY

1 EFFORT TO DO IT FOR MINORS.

2 HE WAS TRYING TO DECIDE ON ARTISTIC VALUE
3 JUST AS A GENERAL PROPOSITION, NOT ARTISTIC VALUE FOR
4 MINORS. I WOULD SUGGEST TO YOUR HONOR THAT THE REASON
5 HE WAS DOING IT THAT WAY IS BECAUSE HE, LIKE EVERYBODY
6 ELSE IN THE WORLD, IS TOTALLY CONFUSED BY WHAT HAS
7 ARTISTIC VALUE FOR ADULTS VERSUS WHAT HAS ARTISTIC VALUE
8 FOR MINORS, WHAT HAS SCIENTIFIC VALUE FOR ADULTS VERSUS
9 SCIENTIFIC VALUE FOR MINORS. IT WAS BECAUSE OF OUR
10 CONFUSION, BECAUSE OF EVERYONE'S CONFUSION ABOUT THIS
11 ISSUE, THAT WE ASK THE CONTENTION INTERROGATORIES TO ASK
12 THE DEFENDANTS TO EXPLAIN WHAT IS THE DIFFERENCE HERE.
13 WHAT IS THE DIFFERENCE BETWEEN SOMETHING THAT HAS
14 ARTISTIC VALUE FOR MINORS AND SOMETHING THAT HAS
15 ARTISTIC VALUE FOR ADULTS? WHAT DOES THIS LANGUAGE THAT
16 CONGRESS HAS ADDED TO COPA MEAN?

17 SOMEWHAT TO MY SURPRISE, IN THE
18 CONTENTION INTERROGATORIES, WHICH ARE PLAINTIFFS'
19 EXHIBIT 167, THE DEFENDANT SAID THAT LANGUAGE DOES NOT
20 MEAN ANYTHING. THAT LANGUAGE HAS NO MEANING WHATSOEVER.
21 YOU CAN WRITE THAT LANGUAGE OUT OF THE STATUTE ENTIRELY.
22 WHAT THEY SAID IS, WE AGREE THAT CONGRESS HAS DEFINED
23 MINORS AS 16-YEAR-OLDS. THEREFORE ALMOST BY DEFINITION,
24 CONGRESS HAS DEFINED ADULTS AS 17-YEAR-OLDS. IN OUR
25 MIND THERE IS NO DIFFERENCE BETWEEN WHAT HAS VALUE FOR A

1 16-YEAR OLD AND WHAT HAS VALUE FOR A 17-YEAR-OLD. THEY
2 DID THE SAME ANALYSIS WITH RESPECT TO THE OTHER TWO
3 PRONGS OF COPA. WHAT THEY HAVE ESSENTIALLY SAID THAT IS
4 THAT THE "FOR MINORS" LANGUAGE IS MEANINGLESS IN THE
5 CONTEXT OF COPA. THAT OF COURSE TURNS COPA ALMOST INTO
6 AN OBSCENITY LAW. THAT MAKES COPA ALMOST
7 INDISTINGUISHABLE FROM OBSCENITY. AS I WILL TALK ABOUT
8 IN A MINUTE, YOU HAVE TO WONDER THEN WHY DON'T THEY JUST
9 ENFORCE THE OBSCENITY LAWS, AND WHAT IT IS THAT COPA
10 ADDS TO THE MIX.

11 BUT THE CRUCIAL QUESTION WITH RESPECT TO
12 THE SPEECH WITNESSES AND WITH RESPECT TO SPEECH IN COPA
13 IS NOT THESE FINE POINTS OF STATUTORY INTERPRETATION
14 THAT I HAVE BEEN TALKING ABOUT, ALTHOUGH I THINK THEY
15 ARE IMPORTANT. THE CRUCIAL QUESTION, I THINK, IS
16 WHETHER THERE IS CHILL AND WHETHER THERE IS OVERBREADTH,
17 WHICH I THINK ULTIMATELY END UP TURNING OUT TO BE THE
18 SAME QUESTION.

19 YOUR HONOR HAS NOTED -- LET ME SAY FIRST,
20 IT IS VERY DIFFICULT TO PROVE CHILL IN A PREENFORCEMENT
21 CASE FOR OBVIOUS REASONS. IT IS PREENFORCEMENT. NOBODY
22 HAS EVER TRIED TO DEFINE WHAT THE SPEECH IS THAT IS
23 COVERED BY THE STATUTE. AND THEREFORE, IT'S
24 PARTICULARLY DIFFICULT. IN THIS INSTANCE WE HAVE SIX OR
25 SEVEN OTHER LAWS, VIRTUALLY IDENTICAL TO COPA, THAT HAVE

1 BEEN PASSED ALL OVER THE COUNTRY BY STATE LEGISLATURES.
2 ALL OF THOSE HAVE BEEN ENJOINED BEFORE THEY WENT INTO
3 EFFECT. SO WE DON'T HAVE ANY MODELS TO LOOK AT TO
4 DETERMINE WHAT IT IS THAT THE STATUTE COVERS, WHO SHOULD
5 BE CHILLED, WHAT LEVEL OF OVERBREADTH THERE ARE.

6 WHAT WE KNOW IS THAT IN SIX OR EIGHT
7 OTHER CASES, ALL OTHER FEDERAL COURTS, INCLUDING THE
8 10TH CIRCUIT, HAVE HELD THAT STATUTES LIKE THIS ARE
9 UNCONSTITUTIONAL BECAUSE OF CHILL AND BECAUSE OF
10 OVERBREADTH. THOSE CASES ARE ALL REFERRED TO IN DR.
11 CRANOR'S TESTIMONY ON OCTOBER 23RD AT PAGE 223 AND THEY
12 ARE REFERRED TO IN PLAINTIFFS' PRETRIAL MEMORANDA. WE
13 ALSO KNOW FROM YOUR DECISION ON THE PRELIMINARY
14 INJUNCTION CASE, THIS IS 31 FEDERAL SUPP. 2ND AT 480,
15 THAT IN PREENFORCEMENT FIRST AMENDMENT CASES, YOU
16 PRESUME AND I QUOTE "CREDIBLE THREAT OF PROSECUTION IN
17 THE ABSENCE OF COMPELLING CONTRARY EVIDENCE."

18 WE CERTAINLY HAVE NOT SEEN ANY CONTRARY
19 EVIDENCE, MUCH LESS COMPELLING CONTRARY EVIDENCE, THAT
20 THE PLAINTIFFS AND OTHER SPEAKERS ARE NOT REASONABLY
21 CHILLED. THE COURT HAS FOUND THAT THE PLAINTIFFS HAVE
22 STANDING AND IT HAS FOUND IT ON SEVERAL OCCASIONS. IT
23 FOUND IT AT THE PRELIMINARY INJUNCTION STAGE FOR THOSE
24 PLAINTIFFS, THAT IS -- AND COURT OF APPEALS HAS AGREED.
25 THE COURT OF APPEALS FOUND AT 217 F.3D AT 171 THAT THERE

1 WAS A CREDIBLE THREAT HERE.

2 THEN THERE IS SOME FACT EVIDENCE TO
3 SUPPORT THE CREDIBLE -- TO SUPPORT THE CHILL, TO SUPPORT
4 THE NOTION OF OVERBREADTH. I REFERRED IN THE OPENING TO
5 UNITED STATES VERSUS ECKERT, AN OPINION OF THE COURT OF
6 APPEALS FROM THE 11TH CIRCUIT IN OCTOBER OF 2006.
7 ECKERT WAS AN OBSCENITY CASE, SO IT'S SPEECH THAT IS
8 PRESUMABLY SUBSTANTIALLY MORE EXPLICIT, SUBSTANTIALLY
9 MORE GROSS, SUBSTANTIALLY LESS VALUE THAN WHAT IS
10 COVERED BY COPA. THE ECKERT LANGUAGE CONSISTED OF A MAN
11 WHO LEFT VOICE MAIL MESSAGES ON HIS EX-GIRLFRIEND'S
12 PHONE MACHINE THAT ESSENTIALLY SAID, USING SOME SWEAR
13 WORDS, BAD THINGS SHOULD HAPPEN TO YOU. BAD THINGS
14 SHOULD HAPPEN TO YOU SEXUALLY. BAD THINGS SHOULD HAPPEN
15 TO YOU IN ANY OTHER WAY. IT WAS SIMPLY THAT PHONE
16 MESSAGE LEFT ON HIS GIRLFRIEND'S MACHINE, RECITING WORDS
17 THAT REFER TO SEXUAL ACTS, THAT THE 11TH CIRCUIT FOUND
18 TO BE OBSCENE. IF THOSE ARE OBSCENE, THEN SURELY ALL OF
19 THE SPEECH THAT YOU HEARD OVER THE MANY SPEECH WITNESSES
20 ARE AT RISK UNDER COPA.

21 WE ALSO KNOW NOW, AS A FACTUAL MATTER,
22 THAT ALL OF THE PLAINTIFFS HAVE HAD SOME OF THEIR SPEECH
23 BLOCKED BY INTERNET CONTENT FILTERS. MR. MEWETT
24 TESTIFIED TO THAT EFFECT ON NOVEMBER 7TH AT PAGE 132,
25 AND DEFENDANTS INDEED PRESENTED AN ENTIRE EXHIBIT,

1 DEFENDANT EXHIBIT 89, TALKING ABOUT HOW THE PLAINTIFFS'
2 SPEECH IS BLOCKED BY INTERNET CONTENT FILTERS.

3 LET'S BACK UP A SECOND. THEY WANT TO
4 MAKE A POINT THAT THAT MEANS FILTERS OVERBLOCK. BUT
5 THAT IS NOT THE POINT. THE POINT HERE OF COURSE IS THAT
6 THE FILTERING COMPANIES ARE TRYING TO PREDICT WHAT
7 SPEECH IS IT THAT PARENTS WOULD FIND OFFENSIVE IF THEIR
8 CHILDREN SAW IT. THE FILTERING COMPANIES CONCLUDED THAT
9 THERE WERE PLAINTIFFS' SPEECH THAT PARENTS WOULD FIND
10 OFFENSIVE IF THEIR CHILDREN SAW IT. FILTERING COMPANIES
11 HAVE DETERMINED THAT THE CONSENSUS OF THIS COUNTRY IS
12 THAT THAT SPEECH IS INAPPROPRIATE FOR MINORS. THAT
13 SEEMS TO ME VERY STRONG EVIDENCE THAT THE PLAINTIFFS IN
14 THIS CASE HAVE A CHILL AND THAT THE SPEECH THAT IS
15 CRIMINALIZED BY COPA IS OVERBROAD.

16 FINALLY, I THINK THE OVERBREADTH AND
17 CHILL ISSUES TURN A BIT ON THE VAGUENESS OF THE STATUTE.
18 THE MORE VAGUE THE STATUTE IS, THE MORE LIKELY IT IS
19 THAT THE PLAINTIFFS ARE GOING TO BE CHILLED BECAUSE THEY
20 CAN'T DETERMINE WHAT IS COVERED BY THE STATUTE AND WHAT
21 IS NOT COVERED BY THE STATUTE. THERE IS A TON OF
22 EVIDENCE IN THIS RECORD ABOUT THE VAGUENESS OF THE
23 STATUTE.

24 FIRST, THERE IS THE DEFENDANT'S OWN
25 WORDS. IN PLAINTIFFS' EXHIBIT 55, WHICH IS A LETTER

1 WRITTEN BY THE DEPARTMENT OF JUSTICE TO THE CONGRESS
2 URGING THE CONGRESS NOT TO PASS COPA, ONE OF THE REASONS
3 THAT THE DEFENDANTS URGE CONGRESS NOT TO PASS COPA
4 BECAUSE COPA IS VAGUE.

5 SO FIRST OF ALL WE HAVE ADMISSION FROM
6 THE DEFENDANT THEMSELVES THAT THE LANGUAGE OF COPA IS
7 VAGUE. SECOND, WE HAVE THE TESTIMONY OF VIRTUALLY EVERY
8 ONE OF THE SPEECH WITNESSES THAT THEY CAN'T TELL WHAT'S
9 COVERED BY COPA AND WHAT IS NOT COVERED BY COPA. JUST
10 TO GIVE A COUPLE OF EXAMPLES AND THERE ARE MANY, SEXUAL
11 HEALTH NETWORK TESTIFIED ON OCTOBER 31 AT PAGE 195 THAT
12 HE COULD NOT TELL WHAT WAS COVERED BY COPA. URBAN
13 DICTIONARY TESTIFIED ON OCTOBER 31 AT PAGE 27 HE COULD
14 NOT DETERMINE WHAT WAS COVERED BY COPA. HEATHER CORINNA
15 TESTIFIED ON NOVEMBER 2ND AT PAGE 75 THAT SHE COULDN'T
16 DETERMINE WHAT WAS COVERED BY COPA. VIRTUALLY EVERY
17 WITNESS THAT TALKED ABOUT HIS OR HER SPEECH TESTIFIED TO
18 THAT EFFECT.

19 BUT IT WAS NOT JUST THAT THEY WERE MAKING
20 WHAT MIGHT BE ARGUABLY A SELF-SERVING
21 I-DON'T-KNOW-WHAT-THIS-LAW-MEANS ARGUMENT. MANY OF THEM
22 HAVE RECEIVED COMPLAINTS ABOUT THE SEXUAL NATURE OF
23 THEIR SPEECH, SUGGEST -- AND THOSE COMPLAINTS
24 SPECIFICALLY SUGGESTING THAT THE SPEECH WAS
25 INAPPROPRIATE FOR MINORS.

1 SALON HAS RECEIVED SUCH COMPLAINTS, AS
2 THE WITNESS TESTIFIED ON OCTOBER 23RD AT PAGE 156.
3 CONDOMANIA HAS RECEIVED SUCH COMPLAINTS AS THE WITNESS
4 TESTIFIED ON OCTOBER 30TH AT 133. MISS DEGENEVIEVE LOST
5 AN NEA GRANT BECAUSE OF THE SEXUALLY EXPLICIT NATURE OF
6 HER SPEECH, WHICH SHE TESTIFIED TO ON NOVEMBER 1ST AT
7 PAGE 21.

8 MR. SNELLEN OF THE LESLIE LOHMAN GALLERY
9 TESTIFIED ON NOVEMBER 2ND AT 153 TO 154 THAT HE HAS
10 RECEIVED COMPLAINTS ABOUT THE GAY AND LESBIAN ART THAT
11 THEY PROVIDE AND THE FACT THAT IT IS INAPPROPRIATE FOR
12 MINORS. SO WE HAVE A FAIR AMOUNT OF FACTUAL BASIS FOR
13 THE PLAINTIFFS TO BE THINKING THAT THEIR SPEECH IS AT
14 RISK.

15 THE QUESTION THEN IS WHETHER THIS CONCERN
16 IS -- WHETHER THERE IS OTHER EVIDENCE THAT THIS CONCERN
17 IS REASONABLE AND THE ANSWER IS YES. PROFESSOR REICHMAN
18 TESTIFIED ON OCTOBER 30TH, AT PAGES 19 TO 52, GOING
19 THROUGH A WHOLE SERIES OF EXAMPLES OF SPEECH THAT WAS
20 EITHER -- WHERE OFFICIAL GOVERNMENT ENTITIES TRIED TO
21 BLOCK SPEECH THAT WAS VERY SIMILAR TO THAT PROVIDED BY
22 THE PLAINTIFFS.

23 THE MOST COMMON COMPLAINTS HE SAID BY
24 GOVERNMENTAL ENTITIES AND BY PRIVATE CITIZENS HAVE TO DO
25 WITH SEX EDUCATION, FICTION AND SPEECH ABOUT GAY AND

1 LESBIAN PEOPLE, ALL OF WHICH ARE WELL ILLUSTRATED BY THE
2 PLAINTIFFS AND THE OTHER SPEAKERS WHO TESTIFIED.

3 THAT IS PRECISELY IN FACT WHAT THE
4 PLAINTIFFS AND THE OTHER SPEECH WITNESSES WHO TESTIFIED
5 DO. AND PROFESSOR REICHMAN TESTIFIED THAT THE REASON
6 THOSE ARE THE CATEGORIES OF SPEECH -- THE REASON HE USES
7 SCHOOLS AS ONE OF HIS SOURCES OF INFORMATION ABOUT WHAT
8 CATEGORY OF SPEECH IS OR IS NOT INAPPROPRIATE FOR
9 MINORS, WHAT PEOPLE COMPLAIN ABOUT IS INAPPROPRIATE FOR
10 MINORS, IS SCHOOLS WHERE MINORS ARE. SO IT'S LOGICAL TO
11 LOOK AND SEE IN THE CONTEXT OF SCHOOLS WHAT ARE PEOPLE
12 COMPLAINING ABOUT, WHAT KIND OF SPEECH DO PEOPLE SAY IS
13 INAPPROPRIATE FOR MINORS. HE GAVE A LOT OF EXAMPLES, OF
14 SPEECH THAT WERE CHALLENGED IN SCHOOLS AND IN PUBLIC
15 LIBRARIES AS INAPPROPRIATE FOR MINORS, ALL OF WHICH WAS
16 SIMILAR TO THE SPEECH WITNESSES.

17 THEN THERE IS MR. MEWETT. NOW ONCE
18 AGAIN, I WANT TO BE CLEAR THAT I'M NOT ENDORSING WHAT
19 MR. MEWETT AND DR. STARK DID, AND I FIND HIS CATEGORIES
20 DIFFICULT AND I'M GOING TO TALK ABOUT THAT IN A MINUTE.
21 BUT MR. MEWETT TESTIFIED THAT -- AT LEAST ONE INSTANCE
22 HE TESTIFIED ON NOVEMBER 8TH AT PAGE 16 THAT THE ONE
23 SINGLE IMAGE OF A FEMALE BREAST, A NAKED FEMALE BREAST,
24 WAS SUFFICIENT IN HIS MIND TO TIP A WEBSITE FROM A
25 NONSEXUALLY EXPLICIT FOR ADULT ENTERTAINMENT CATEGORY

1 INTO THE SEXUALLY EXPLICIT FOR ADULT ENTERTAINMENT
2 CATEGORY. IT'S A VERY CRUDE, I GRANT YOU, A CRUDE FACT,
3 A CRUDELY RELEVANT FACT, BUT IT SUGGESTS THAT AT LEAST
4 IN THE DEFENDANT'S MIND AND IN MR. MEWETT'S MIND THE
5 POST-PUBESCENT FEMALE BREAST IS SUFFICIENT TO PLACE
6 PEOPLE AT RISK. PLUS MR. MEWETT TESTIFIED ON NOVEMBER
7 8TH AT PAGE 58, "FILTERS ATTEMPT TO BLOCK TERMS LIKE GAY
8 AND LESBIAN." YOUR HONOR WILL RECALL HE PUT INTO HIS
9 SEX CATEGORY A LOT OF GAY AND LESBIAN POLITICAL SITES, A
10 LOT OF GAY AND LESBIAN HEALTH SITES. HE DID THAT, HE
11 SAID, BECAUSE IT'S REALLY IMPORTANT, FILTERS ARE TRYING
12 TO BLOCK ALL THINGS GAY AND ALL THINGS LESBIAN. WELL,
13 THAT IS INTERESTING IN TWO RESPECTS. IT'S INTERESTING
14 BECAUSE IT SUGGESTS THAT MR. MEWETT THINKS GAY AND
15 LESBIAN PAGES ARE SEX SITES, WHICH OF COURSE THEY ARE
16 NOT. BUT IT ALSO SUGGESTS THAT HE BELIEVES THAT FILTERS
17 ARE DRAWING THIS NATIONAL CONSENSUS, THAT GAY AND
18 LESBIAN SPEECH HAS TO BE BLOCKED. THAT IS ANOTHER
19 RATIONALE FOR THE NOTION THAT PLAINTIFFS HAVE SOME
20 REASON TO FEEL CHILL AND SOME REASON TO BE CONCERNED
21 ABOUT THE OVERBREADTH OF THIS STATUTE.

22 FINALLY, IN VAGUENESS -- NOT FINALLY IN
23 VAGUENESS -- NEXT IN VAGUENESS THE CONTENTION
24 INTERROGATORIES, AGAIN PLAINTIFFS 166, WHERE THE
25 DEFENDANTS TRY TO EXPLAIN WHAT IT IS ABOUT PLAYBOY THAT

1 MAKES IT NOT HARMFUL TO MINORS, WHAT IT IS ABOUT
2 PENTHOUSE THAT MAKES IT HARMFUL TO MINORS, WHAT IT IS
3 ABOUT THE OTHER EXHIBITS THAT MAKE THEM NOT HARMFUL TO
4 MINORS. YOUR HONOR WILL RECALL AT ONE EARLY ARGUMENT ON
5 THAT ISSUE, WE HAVE ARGUED THAT ISSUE A NUMBER OF TIMES.
6 BUT YOUR HONOR WILL RECALL THAT THE PICTURES OF WOMEN
7 WHOSE NIPPLES WERE COVERED BY STARS, THE DEFENDANTS SAY
8 THOSE ARE HARMFUL TO MINORS. THE PICTURES OF WOMEN
9 WHOSE BREASTS WERE NAKED AND THEIR NIPPLES WERE NOT
10 COVERED IN PLAYBOY, THE DEFENDANTS SAY THOSE ARE NOT
11 HARMFUL TO MINORS. I DON'T KNOW WHAT THESE TERMS MEAN
12 IF WE TRY AND RECONCILE ALL OF THESE VARIOUS CONFUSIONS
13 THAT HAVE BEEN CREATED BY THE DEFENDANTS ATTEMPTING TO
14 ANSWER THE CONTENTION INTERROGATORIES.

15 MR. MEWETT -- AGAIN, TO GO BACK TO MR.
16 MEWETT, USED -- AS I SAID, DID NOT USE THE CATEGORIES OF
17 THE STATUTE, WHICH IS WHY THIS IS -- USING HIM IN THIS
18 RESPECT IS A LITTLE BIT CRUDE, BUT HE DID ACKNOWLEDGE HE
19 SET HIS OWN CATEGORIES. HIS OWN CATEGORY WAS SEXUALLY
20 EXPLICIT ADULT ENTERTAINMENT. THAT WAS THE CATEGORY HE
21 WANTED TO TEST FILTERS AGAINST. WHAT WAS STRIKING ABOUT
22 HIS TESTIMONY WAS HE SAID, EVEN THOUGH IT WAS HIS OWN
23 DEFINED CATEGORY, IT WAS NOT DEFINED BY A STATUTE, IT
24 WAS NOT DEFINED BY CONGRESS OR SOME OUTSIDE ENTITY, IT
25 WAS HIS OWN CATEGORY, HE STILL HAD TROUBLE FIGURING OUT

1 WHERE TO PUT THINGS. HE SAID HE MOST DEFINITELY HAD TO
2 USE HIS OWN -- HAD TO USE JUDGMENT. HE SAID THAT ON
3 NOVEMBER 7 AT PAGE 118. HE CATEGORIZED THE SAME PAGE IN
4 DIFFERENT WAYS BECAUSE HE WAS SO -- HAD SO MUCH
5 DIFFICULTY APPLYING THE CATEGORIES. HE SAID THAT ON
6 NOVEMBER 7 AT 234. HE CHANGED SITES FROM CATEGORY TO
7 CATEGORY BECAUSE HE COULD NOT QUITE FIGURE OUT HOW TO DO
8 IT. HE SAID THAT ON NOVEMBER 7TH AT 233.

9 HE WAS ENORMOUSLY INCONSISTENT ABOUT HIS
10 APPLICATION. FOR EXAMPLE, HE SAID THAT AN OIL PAINTING
11 OF BESTIALITY WOULD NOT QUALIFY AS SEXUALLY EXPLICIT
12 BECAUSE HE WOULD PUT IT IN THE ARTISTIC CATEGORY, BUT A
13 DRAWING BY MICHELANGELO WOULD BE SEXUALLY EXPLICIT AND
14 HE WOULD NOT PUT IT IN THE ARTISTIC CATEGORY. I DON'T
15 KNOW WHAT THAT MEANS, BUT WHAT IT SUGGESTS IS THAT EVEN
16 WHEN SOMEONE LIKE MR. MEWETT DEFINES THE CATEGORIES FOR
17 HIMSELF, HE CAN'T APPLY THESE CATEGORIES WITH ANY DEGREE
18 OF RELIABILITY OR ACCURACY. AND WHAT THAT SAYS TO ME IF
19 HE CAN'T DO IT WHEN HE IS THE ONLY ONE MAKING THE
20 JUDGMENT, IT'S ALMOST IMPOSSIBLE FOR PLAINTIFFS TO MAKE
21 THAT JUDGMENT.

22 FINALLY, THERE IS MR. MEWETT'S CATEGORY
23 OF "OTHER." YOUR HONOR WILL RECALL I SPENT A LOT OF
24 TIME ON CROSS EXAMINATION ON THIS "OTHER" CATEGORY,
25 WHICH WAS 5G. FIRST HE CATEGORIZED SPEECH AS NONSEXUAL

1 OR SEXUAL. THEN WITHIN THE SEXUAL CATEGORY, HE HAD
2 THESE WHOLE SERIES OF CATEGORIES, ARTISTIC AND POLITICAL
3 AND SO ON, AND THEN THE ADULT ENTERTAINMENT SEXUALLY
4 EXPLICIT CATEGORY.

5 BUT HE ALSO HAD AN "OTHER" CATEGORY. HE
6 TESTIFIED THAT THERE WERE 6 TO 700 PAGES HE PUT IN THE
7 "OTHER" CATEGORY. AND WHEN HE TRIED TO DEFINE THE
8 "OTHER" CATEGORY, HE SAID IT WAS REALLY CLOSE TO THE
9 SEXUALLY EXPLICIT. HE SAID THAT AT PAGE 220. HE SAID
10 REASONABLE PEOPLE MIGHT CALL THEM SEXUALLY EXPLICIT. HE
11 SAID THAT AT 220. HE SAID HE THOUGHT FILTERS WOULD
12 MOSTLY BLOCK THEM. HE SAID THAT AT PAGE 209. HE CALLED
13 ONE OF THE SALON PAGES AN "OTHER" PAGE. HE SAID THAT AT
14 PAGE 224. HE CALLED -- THIS WAS THE ONE HE CALLED THE
15 DARK GRAY MEANING THEY WERE ALMOST BLACK BUT THEY WERE
16 REALLY CLOSE TO THE LINE, 6 TO 700 PAGES THAT HE THOUGHT
17 WERE ESSENTIALLY AT RISK UNDER HIS CATEGORIES, 6 TO 700
18 PAGES WHERE HE SAID REASONABLE PEOPLE MIGHT DEFINE THESE
19 AS SEXUALLY EXPLICIT.

20 WELL, THAT SOUNDS AN AWFUL LOT LIKE CHILL
21 TO ME. IF I WERE ONE OF THOSE 6 TO 700 PAGES, AND ONE
22 OF MY CLIENTS IS, BECAUSE HE CATEGORIZED SALON AS ONE OF
23 THOSE, IF MR. MEWETT WERE THE PROSECUTOR, I WOULD BE
24 PRETTY CONCERNED ABOUT MY SPEECH. BECAUSE MR. MEWETT IS
25 TELLING ME THAT IS SO CLOSE TO THE LINE THAT MAYBE HE

1 CAN GET A JURY TO BE CONVICTED ON THAT. MAYBE HE CAN
2 PROSECUTE THOSE SPEECH. HE FOUND ROUGHLY 1,350 SEXUALLY
3 EXPLICIT SPEECH. HE FOUND 6 TO 700 THAT WERE CLOSE TO
4 THE LINE. AT LEAST 50 PERCENT MORE THAN WHAT HE FOUND
5 AS SEXUALLY EXPLICIT HE FOUND WERE SO CLOSE TO THE LINE,
6 THAT REASONABLE PEOPLE COULD DIFFER. THOSE ARE THE
7 PEOPLE WHO NEED TO BE AFRAID. THAT IS I THINK THE MOST
8 DRAMATIC EXAMPLE THAT I HAVE EVER SEEN IN A FIRST
9 AMENDMENT CASE OF CHILL, OF THE FACT THAT CHILL DOES
10 EXIST, OF THE FACT THAT WHEN YOU TRY TO BAN SPEECH ON
11 THE BASIS OF -- TRY TO CRIMINALIZE SPEECH, THE
12 CATEGORIES ARE VAGUE AND THE CATEGORIES ARE IMPRECISE.
13 THERE ARE A LOT OF PEOPLE WHO WOULD HAVE TO BE AT RISK
14 WHOSE SPEECH MAY OR MAY NOT FALL INTO THE RIGHT
15 CATEGORIES. IN MY MIND THAT IS ABOUT AS DRAMATIC AN
16 EXAMPLE OF CHILL AND OVERBREADTH AS YOU CAN POSSIBLY
17 FIND.

18 NOW, THERE ARE A LOT OF -- THERE IS A LOT
19 OF SPEECH INVOLVED HERE AND A LOT OF READERS INVOLVED
20 HERE. NERVE GETS A MILLION READERS A MONTH. SALON GETS
21 3 MILLION A MONTH. CONDOMANIA GETS 5,000 A DAY. SEXUAL
22 HEALTH NETWORK GETS 150,000 A MONTH. URBAN DICTIONARY
23 HAS GOTTEN 40 MILLION READERS THUS FAR THIS YEAR. THAT
24 IS AN ENORMOUS AMOUNT OF SPEECH OUT THERE, MUCH OF
25 WHICH, AS YOUR HONOR HEARD, IS SEXUALLY EXPLICIT, MUCH

1 OF WHICH IS POTENTIALLY AT RISK UNDER COPA, MUCH OF
2 WHICH IS -- WILL BE CHILLED IF COPA GOES INTO EFFECT.

3 I THINK THAT IS ABOUT ALL I WANT TO SAY
4 WITH RESPECT TO SPEECH, BUT NOW LET ME TALK A LITTLE BIT
5 ABOUT THE ALTERNATIVES AND NARROW TAILORING. FIRST OF
6 ALL, THE ISSUE -- THE BURDEN OF PROOF AS THE SUPREME
7 COURT HAS SAID, THIS IS 124 SUPREME COURT AT 2791, IS ON
8 THE DEFENDANT TO PROVE THAT THE ALTERNATIVES ARE MORE
9 NARROWLY -- NOT MORE NARROWLY TAILORED. THE BURDEN OF
10 PROOF IS ON THE DEFENDANTS TO PROVE THAT THE
11 ALTERNATIVES DON'T WORK.

12 SO FIRST, LET'S LOOK AT COPA'S
13 UNDERINCLUSIVENESS BECAUSE THE ISSUE IS NOT REALLY, ARE
14 FILTERS PERFECT. THE ISSUE IS, LET'S COMPARE ALL OF THE
15 POTENTIAL ALTERNATIVES TO HOW EFFECTIVE FILTERS ARE. IN
16 THIS RESPECT -- THIS IS THE FIRST PLACE WHERE THE
17 PLAINTIFFS HAVE A DEMONSTRATIVE EXHIBIT, YOUR HONOR. I
18 WOULD LIKE TO REFER YOU TO THE FIRST PAGE OF THE FOUR
19 PAGES I GAVE YOU AT THE BEGINNING. THIS CHART REFLECTS
20 THE DEGREE TO WHICH FILTERS ARE GOING TO BE EFFECTIVE IN
21 BLOCKING VARIOUS FORMS OF INTERNET SPEECH VERSUS THE
22 DEGREE TO WHICH COPA IS GOING TO BE EFFECTIVE IN
23 BLOCKING VARIOUS FORMS OF INTERNET SPEECH. IT'S BASED
24 ON A NUMBER OF SOURCES IN THE RECORD, PRIMARILY DR.
25 FELTEN, WHO TESTIFIED TO THE ENORMOUS NUMBER OF NON-HTTP

1 PROTOCOLS THAT EXIST ON THE INTERNET AND ARE NOT COVERED
2 BY COPA. 47 USC 231(E)(1) IS THE SECTION THAT SAYS THAT
3 COPA ONLY REACHES HTTP SPEECH. DR. FELTEN WENT THROUGH
4 ON OCTOBER 24TH AT PAGES 193 TO 242 ALL OF THE VARIOUS
5 PROTOCOLS THAT ARE REFLECTED IN THIS DEMONSTRATIVE
6 EXHIBIT, E-MAIL, INSTANT MESSAGING, CHAT, PEER-TO-PEER,
7 VOICE OVER IP, STREAMING VIDEO AND AUDIO, USENET NEWS
8 GROUPS, AND FTP AND EXPLAINED WHY EACH ONE OF THOSE IS
9 NOT IN FACT COVERED BY COPA. THEY ARE COVERED BY
10 FILTERS. COPA WILL NOT REACH THEM. MR. RUSSO TESTIFIED
11 THAT IN EACH OF THOSE INSTANCES, THERE IS SEXUALLY
12 EXPLICIT MATERIAL CONTAINED IN ALL OF THOSE PROTOCOLS.
13 MR. RUSSO TESTIFIED TO THAT ON OCTOBER 25TH AT PAGE 101,
14 AGAIN AT 104 AND 210 TO 214. MR. MURPHY, WHOSE
15 DEPOSITION WAS READ, THE SURFCONTROL EXPERT, TESTIFIED
16 TO THE SAME EFFECT, AND TESTIFIED THAT FILTERS DO IN
17 FACT BLOCK ALL OF THOSE PROTOCOLS. THAT WAS ON NOVEMBER
18 1 AT 236 TO 237.

19 THE OTHER CATEGORIES HERE, THE DOMESTIC
20 WEBSITES, THE OVERSEAS WEBSITES, THE COMMERCIAL AND
21 NONCOMMERCIAL WEBSITES, THOSE ARE ALSO LANGUAGES
22 DIRECTLY FROM THE STATUTE. SO WHAT WE KNOW RIGHT OFF
23 THE BAT, BEFORE WE EVEN BEGIN CONSIDERING THE EFFECT OF
24 FILTERS VERSUS COPA, IS THAT THERE ARE HUGE AMOUNTS OF
25 SPEECH, INCLUDING SEXUAL SPEECH, THAT COPA DOES NOT

1 REACH. ITS UNDERINCLUSIVENESS IS STUNNING.

2 BUT LET'S TALK A LITTLE BIT ABOUT THE
3 OVERSEAS ONE, BECAUSE THAT IS AN AREA IN WHICH THERE
4 SEEMS TO BE DISPUTE BETWEEN THE PARTIES AND WHERE THE
5 COURT MAY NEED TO RESOLVE IT.

6 FIRST, THE SUPREME COURT HAS SLIGHTLY --
7 HAS ALLUDED TO THIS ISSUE. AT 542 U.S. AT 667 IN THIS
8 CASE THE SUPREME COURT SUGGESTED, ALTHOUGH IT DID NOT
9 EXPLICITLY HOLD, THAT THE COPA DID NOT REACH OVERSEAS
10 SITES. THE LAW IS THAT YOU DON'T PRESUME A CRIMINAL
11 STATUTE TO HAVE OVERSEAS EFFECT, THAT YOU PRESUME THAT
12 IT IS DOMESTIC ONLY. THE HOUSE REPORT, WHICH IS QUOTED
13 BY THE DEFENDANTS IN RESPONSE TO ONE OF THE CONTENTION
14 INTERROGATORIES, SAYS THAT THEY INTENDED IT TO REACH
15 ONLY DOMESTIC SPEECH. IN THE LAST BRIEF THAT THE
16 DEFENDANT SUBMITTED TO THE UNITED STATES SUPREME COURT
17 THEY SAID THAT THE POSSIBILITY OF PROSECUTING PEOPLE
18 OVERSEAS UNDER COPA WAS "PROBLEMATIC." AND THEY ADMIT
19 THAT CONGRESS INTENDED IT TO APPLY ONLY TO DOMESTIC
20 SITES. FINALLY IN THE BLILEY LETTER, WHICH IS
21 PLAINTIFFS' EXHIBIT 55, WHEN DEFENDANTS WERE URGING
22 CONGRESS NOT TO PASS COPA, THEY ALSO SAID THAT
23 APPLICATION OF THE LAW OVERSEAS WAS PROBLEMATIC. SO
24 THERE IS A FAIR AMOUNT JUST AT THE SHEER LEGAL ANALYSIS
25 LEVEL THAT SUGGESTS THAT APPLICATION OF THIS LAW

1 OVERSEAS IS PROBLEMATIC.

2 THEN WE HAVE THE FACTS OF OVERSEAS
3 SPEECH. PROFESSOR ZOOK USED REGISTRATION DATA LOOKING
4 AT WEBSITES TO DETERMINE WHETHER THEY ARE DOMESTIC OR
5 OVERSEAS. HE LOOKED SPECIFICALLY AT SEXUALLY EXPLICIT
6 WEBSITES, AND HE FOUND THAT 47 PERCENT OF ALL SEXUALLY
7 EXPLICIT WEBSITES ARE OVERSEAS. HE DID THAT AT PAGE 205
8 ON OCTOBER 29. HE FOUND THAT FREE SITES ARE ESPECIALLY
9 PREVALENT OVERSEAS, THAT'S AT PAGE 110, AND THAT THE
10 NUMBER OF OVERSEAS SEXUALLY EXPLICIT SITES IS
11 INCREASING. THAT IS AT PAGE 112. HIS 47 PERCENT NUMBER
12 HE SAID WAS BIASED IN THE SENSE THAT HE ONLY USED
13 ENGLISH LANGUAGE SITES, SO THERE ARE PROBABLY IN FACT
14 EVEN IN FACT MORE OVERSEAS. HE SAID THAT AT PAGE 88.

15 HE USED REGISTRATION BECAUSE HE SAID
16 REGISTRATION WAS A MORE ACCURATE WAY OF DOING IT. NOW
17 MR. MEWETT DISAGREED WITH THAT, ALTHOUGH MR. MEWETT DID
18 AGREE ON NOVEMBER 8TH AT PAGE 31 THAT REGISTRATION IS
19 MUCH HARDER TO CHANGE THAN HOSTING. YOU CAN MOVE YOUR
20 WEBSITE HOSTING ALL OVER THE PLACE IF YOU WANT TO. IF
21 YOU ARE A U.S. CITIZEN AND YOU WANT TO HOST IT OVERSEAS,
22 THAT IS INCREDIBLY EASY TO DO. MOVING YOUR
23 REGISTRATION, IF YOU ARE GOING TO TELL THE TRUTH,
24 REQUIRES YOU TO MOVE OVERSEAS. NEVERTHELESS, MR. MEWETT
25 USED HOSTING DATA TO DETERMINE WHERE OVERSEAS SITES

1 WERE -- WHERE OVERSEAS SEXUALLY EXPLICIT SITES WERE. HE
2 TESTIFIED TO THAT ON NOVEMBER 7TH AT 186. ACCORDING TO
3 PROFESSOR STARK, WHO DID THE STATISTICAL ANALYSIS OF MR.
4 MEWETT'S CATEGORIES, HE FOUND ROUGHLY 50 PERCENT OF
5 SEXUALLY EXPLICIT SITES ARE OVERSEAS. PROFESSOR STARK
6 TESTIFIED TO THAT ON NOVEMBER 9TH AT 170. SO IN SHORT,
7 THE COURT REALLY DOES NOT NEED TO RESOLVE THIS DISPUTE
8 BETWEEN REGISTRATION VERSUS HOSTING. WE THINK PROFESSOR
9 ZOOK WAS RIGHT. WE THINK MR. MEWETT WAS WRONG. BUT THE
10 COURT DOES NOT NEED TO RESOLVE IT, BECAUSE WHETHER YOU
11 LOOK AT REGISTRATION OR WHETHER YOU LOOK AT HOSTING, WE
12 KNOW THAT -- SOMEWHERE IN THE VICINITY OF 50 PERCENT OF
13 ALL SEXUALLY EXPLICIT SPEECH IS OVERSEAS. WE KNOW FROM
14 THE LAW I JUST DISCUSSED THAT COPA IS NOT GOING TO REACH
15 THAT.

16 SO RIGHT OFF THE BAT, WE START OUT, NOT
17 ONLY WITH ALL OF THE PROTOCOL HOLES THAT ARE REFLECTED
18 ON THIS FIRST DEMONSTRATIVE EXHIBIT, BUT THE OVERSEAS
19 SITES HOLES THAT TAKES 50 PERCENT OF ALL SEXUALLY
20 EXPLICIT SPEECH OFF THE MAP ALREADY THAT COPA IS NOT
21 GOING TO REACH. NOW, MR. MEWETT HAD ONE OTHER ANALYSIS
22 OF OVERSEAS SITES WHICH I'M NOT GOING TO ADDRESS WHICH
23 WAS THAT IF HE COULD FIND ANY LINK FROM AN OVERSEAS SITE
24 TO A CREDIT CARD HE COUNTED IT AS A U.S. SITE. I DON'T
25 THINK THAT REQUIRES MUCH COMMENT.

1 AND THE DEFENDANTS APPARENTLY HAVE AN
2 ADDITIONAL THEORY, BECAUSE THEY TESTED -- MR. CLARK
3 TESTIFIED THAT MAYBE THE CREDIT CARD COMPANIES WILL COME
4 IN AND ENFORCE COPA OVERSEAS. MAYBE WE CAN GET -- WE
5 CAN PERSUADE THE CREDIT CARD COMPANIES TO SOMEHOW IN
6 SOME MYSTERIOUS WAY ENFORCE COPA OVERSEAS. WELL, FIRST
7 OF ALL, EVEN IF THAT WERE TRUE, IT'S A PERFECT EXAMPLE
8 OF A LESS RESTRICTIVE ALTERNATIVE TO COPA. IF IN FACT
9 THE BEST WAY TO ACHIEVE THE GOAL OF PREVENTING CHILDREN
10 FROM HAVING SEXUALLY EXPLICIT SPEECH -- HAVING ACCESS TO
11 SEXUALLY EXPLICIT SPEECH IS TO ENFORCE IT THROUGH THE
12 CREDIT CARD COMPANIES, THEN CONGRESS SHOULD PASS THAT
13 LAW. CONGRESS HAS NOT PASSED THAT LAW. WHAT WE HAVE IS
14 A FAR MORE DRACONIAN CRIMINAL STATUTE THAT IS AT RISK IN
15 THIS CASE.

16 SECOND, IT'S NOT REALLY LIKELY THAT THE
17 CREDIT CARD COMPANIES ARE GOING TO GO IN THE PROCESS OF
18 ENFORCING COPA ON OVERSEAS SITES. PROFESSOR MANN
19 TESTIFIED TO THAT EFFECT ON NOVEMBER 6 AT PAGE 158.

20 AND THEN THERE WAS WHAT PROFESSOR CLARK
21 TALKED ABOUT WHEN HE TALKED ABOUT THIS ISSUE. HE SAID
22 HE CAME UP WITH THIS IDEA ABOUT HAVING THE CREDIT CARD
23 COMPANIES ENFORCE COPA OVERSEAS. AND THEN HE WAS ASKED
24 A WHOLE SERIES OF QUESTIONS. WELL, DID YOU ASK THE
25 CREDIT CARD COMPANIES IF YOU WOULD DO THAT? DID YOU

1 SUGGEST THAT THE DEPARTMENT OF JUSTICE ASK THE CREDIT
2 CARD COMPANIES IF THEY'D DO THAT? DID YOU SUGGEST THAT
3 THE DEPARTMENT OF JUSTICE ASK ANY QUESTION AT THE
4 DEPOSITIONS ABOUT WHETHER THEY WOULD DO THAT OR NOT?
5 HIS ANSWER TO ALL OF THOSE QUESTIONS WAS NO. HE
6 REMAINED STUDIOUSLY IGNORANT ABOUT WHETHER HIS THEORY
7 WAS VIABLE OR NOT. IN FACT, IT ALMOST LOOKS AS THOUGH
8 HE TRIED VERY HARD NOT TO FIND OUT WHETHER HIS THEORY
9 WAS VIABLE OR NOT. THIS IS HIS TESTIMONY ON NOVEMBER
10 14TH AT 225 TO 229.

11 AND THEN WHEN -- IT MAKES IT LOOK AS
12 THOUGH HE KNEW HIS THEORY WAS BOGUS. HE KNEW HIS THEORY
13 HAD NO LEGS. HE WAS AFRAID TO FIND OUT BECAUSE IF HE
14 FOUND OUT HE WOULD HAVE TO DISAVOW HIS OWN THEORY.
15 FINALLY WHEN HE WAS ASKED, DO YOU REALLY SERIOUSLY THINK
16 THAT AN EU BANK, A EUROPEAN UNION BANK, IS GOING TO LOOK
17 AT EVERY SITE IN FRANCE AND DECIDE WHETHER IT IS HARMFUL
18 TO MINORS UNDER U.S. DOMESTIC LAW? HE SAID, WELL, I
19 DON'T KNOW, BUT THEY WILL FIGURE IT OUT IF THEY HAVE TO.
20 THAT WAS ON NOVEMBER 14TH AT 231, AN UNIMPRESSIVE
21 RESPONSE TO SAY THE LEAST.

22 FINALLY, THE DEMONSTRATIVE EXHIBIT VERSUS
23 NONCOMMERCIAL SITES, THAT IS SIMPLY A MATTER OF
24 STATUTORY COMMAND. 47 USC 231 (A)(1) AND (E)(2)(A) AND
25 (B) BOTH SAY THAT COPA ONLY APPLIES TO COMMERCIAL SITES.

1 NOW, THE DEFENDANTS MAY TRY TO MAKE THIS
2 ABOUT COPA VERSUS FILTERS, BUT IT'S NOT. THERE ARE A
3 LOT OF OTHER ALTERNATIVES. IF WE CAN POINT TO THE
4 SECOND DEMONSTRATIVE EXHIBIT, PLEASE.

5 THE SECOND DEMONSTRATIVE EXHIBIT IS A
6 LIST OF ALL OF THE POSSIBLE -- NOT ALL -- MANY OF THE
7 LESS RESTRICTIVE ALTERNATIVES THAT ARE AVAILABLE THAT
8 COULD BE USED INSTEAD OF COPA. SOME OF THESE HAVE BEEN
9 TALKED ABOUT AT THE TRIAL. SOME OF BEEN REFERRED TO IN
10 BRIEFS. SOME OF THESE ARE REFERRED TO IN OPINIONS IN
11 THIS CASE. I'M NOT GOING TO GO THROUGH ALL OF THEM, BUT
12 IT'S WORTH POINTING OUT THAT ALL OF THESE ARE POTENTIAL
13 LESS RESTRICTIVE ALTERNATIVES. JUST FOR EXAMPLE,
14 MR. MURPHY OF SURFCONTROL TESTIFIED THAT IF THE
15 GOVERNMENT GAVE HIM A LIST OF SITES THAT THEY WANTED
16 MINORS TO BE PROTECTED FROM, HE WOULD PUT IT ON HIS
17 BLACK LIST. HE WOULD -- SURFCONTROL WOULD ADD TO THEIR
18 BLACK LIST ANY SITE THAT THE GOVERNMENT REASONABLY
19 WANTED TO HAVE PUT ON THE BLACK SITE -- THE BLACK LIST
20 SITE. HE SAID THAT ON NOVEMBER 1ST AT PAGE 234 TO 235.

21 I'M GOING TO TALK REALLY ONLY ABOUT TWO
22 OR THREE OF THE ALTERNATIVES THAT ARE ON THIS PAGE.
23 FIRST THE OBSCENITY LAWS.

24 THE GOVERNMENT COULD ENFORCE OBSCENITY
25 LAWS. IF THE GOVERNMENT WERE REALLY CONCERNED ABOUT

1 PROTECTING CHILDREN FROM VERY SEXUALLY EXPLICIT SPEECH
2 ON THE INTERNET, THEY COULD AND WOULD BE ENFORCING
3 OBSCENITY LAWS. THE SUPREME COURT REFERRED TO THIS AS A
4 LESS RESTRICTIVE ALTERNATIVE, 124 SUPREME COURT AT 2794.
5 WHAT IS STRIKING HERE IS THAT -- ARE TWO FACTS. FIRST,
6 MR. MEWETT TURNED UP MATERIAL THAT APPEARED PRETTY
7 CLEARLY TO FIT THE GOVERNMENT'S DEFINITION OF OBSCENITY.
8 NOVEMBER 8 AT PAGES 7 TO 10, WE WENT OVER FOUR EXHIBITS
9 WITH HIM OF BESTIALITY AND EXTREME SEXUAL VIOLENCE
10 TOWARD WOMEN. THE GOVERNMENT IN THEIR CONTENTION
11 INTERROGATORY, PLAINTIFFS' EXHIBIT 166, SAID THAT THOSE
12 FIT THE DEFINITION OF OBSCENITY. NOBODY APPARENTLY HAS
13 BOTHERED TO ENFORCE THOSE -- HAS BOTHERED TO PROSECUTE
14 THOSE FOUR WEBSITES THAT WE SHOWED, EVEN THOUGH THE
15 GOVERNMENT HAS KNOWN ABOUT IT FOR MONTHS AND MONTHS AND
16 MONTHS. IF THEY WERE REALLY SERIOUS ABOUT PROTECTING
17 CHILDREN, THOSE PEOPLE WOULD BE PROSECUTED UNDER
18 OBSCENITY LAWS. THE FACT THAT THEY HAVE NOT BEEN
19 SUGGESTS THAT THE GOVERNMENT'S PROTESTATIONS RING A BIT
20 HOLLOW.

21 THERE'S OTHER EVIDENCE ABOUT THE
22 HOLLOWNESS OF THE GOVERNMENT'S PROTEST. IN THE JOINT
23 EXHIBIT 1, AT PARAGRAPHS 121 AND 122, THE GOVERNMENT
24 STIPULATED THAT IT HAS DONE FEWER THAN 30 PROSECUTIONS
25 FOR OBSCENITY IN THE LAST SIX YEARS. DOES THAT SUGGEST

1 THAT THERE IS NO OBSCENITY ON THE INTERNET? I HARDLY
2 THINK SO. WE FOUND FOUR EXAMPLES JUST FROM MR. MEWETT'S
3 DATABASE.

4 HAS THE GOVERNMENT BEEN PROSECUTING
5 OBSCENITY ON THE INTERNET? NO, IT HAS NOT. SO WHEN
6 THEY GET UP AT CLOSING AND SAY, JUDGE, YOU HAVE TO
7 REMEMBER WE HAVE TO PROTECT CHILDREN FROM SEXUALLY
8 EXPLICIT WEB PAGES AND WEBSITES, THEY OUGHT TO EXPLAIN
9 WHY IT IS THEY HAVE NOT BEEN DOING THAT SO FAR, EVEN
10 FROM THE MOST EXTREME SPEECH THAT EXISTS ON THE
11 INTERNET.

12 THE NEXT ONE I WANT TO TALK ABOUT A
13 LITTLE BIT IS EDUCATION. THERE WAS A TON OF EVIDENCE
14 THAT EDUCATION IS AN EFFECTIVE ALTERNATIVE. DR. CRANOR
15 TESTIFIED ON OCTOBER 24TH AT 93 TO 94 THAT EDUCATION IS
16 EFFECTIVE. SHE CITED THE COPA COMMISSION REPORT WHICH
17 FOUND THAT EDUCATION WAS AN EFFECTIVE ALTERNATIVE. SHE
18 CITED THAT AT PAGES 95 TO 96. SHE CITED THE COMMERCE
19 DEPARTMENT REPORT THAT SAID EDUCATION WAS AN EFFECTIVE
20 ALTERNATIVE TO A CRIMINAL STATUTE. THAT IS AT HER
21 TESTIMONY AT PAGE 96.

22 THEN THERE ARE THE THREE LIBRARIANS. ALL
23 THREE LIBRARIANS, MISS KIRK, ON NOVEMBER 1ST AT PAGE 85,
24 MISS TAYLOR, ON NOVEMBER 1ST AT PAGE 167, AND MS.
25 SMATHERS ON NOVEMBER 2ND AT PAGE 14, ALL TESTIFIED THAT

1 IS THAT THEY SOLVE THE ONE-SIZE-FITS-ALL PROBLEM OF
2 COPA. ONE OF THE PROBLEMS WITH COPA, AND THIS IS A
3 PROBLEM WE HAVE RAISED AS BOTH A LEGAL ISSUE AND A
4 FACTUAL ISSUE, IS THAT IT APPLIES EQUALLY TO ALL MINORS.
5 IT TREATS YOUR 6-YEAR-OLD EXACTLY THE SAME AS YOUR
6 16-YEAR-OLD. IT IS ALL CRIMINAL. FILTERS, BY CONTRAST,
7 YOU CAN SET IT SO THAT YOUR 6-YEAR-OLD IS PROTECTED THE
8 WAY YOU WANT YOUR 6-YEAR-OLD AND YOUR 16-YEAR-OLD IS
9 PROTECTED THE WAY YOU WANT YOUR 16-YEAR-OLD PROTECTED.
10 AND THEY CAN BE PROTECTED IN DIFFERENT WAYS. IT'S A
11 VIRTUE. THERE WAS PLENTY OF TESTIMONY TO THAT. WHITTLE
12 TESTIFIED TO THAT ON OCTOBER 31 AT 203, MURPHY OF
13 SURFCONTROL ON NOVEMBER 1 AT 210 AND SO ON.

14 THEN THERE IS THE QUESTION OF DO FILTERS
15 ACTUALLY WORK? WE HAVE SEVEN SPECIFIC EXAMPLES THAT
16 FILTERS WORK EXTREMELY WELL. FIRST, THERE ARE THE THREE
17 LIBRARIANS. MISS KIRK TESTIFIED THAT IN KENTUCKY, THIS
18 IS HER TESTIMONY ON NOVEMBER 1ST AT 92, THERE HAVE BEEN
19 NO EXAMPLES OF OVERBLOCKING IN THE -- OR UNDERBLOCKING
20 IN THE LAST TWO TO THREE YEARS THAT SHE IS AWARE OF IN
21 HER SCHOOL. THIS IS A SCHOOL WHERE THERE ARE LOTS OF
22 KIDS USING THE INTERNET EVERYDAY AND THERE ARE NO
23 EXAMPLES OF UNDERBLOCKING AND OVERBLOCKING. MISS TAYLOR
24 IN VIRGINIA TESTIFIED TO THE SAME EFFECT. MISS SMATHERS
25 IN COLORADO TESTIFIED TO THE SAME EFFECT. AND THEN IN

1 THE STIPULATIONS -- JOINT STIPULATION WHICH IS -- JOINT
2 EXHIBIT 1 AT PARAGRAPHS 114, 115, 116 AND 124, FOUR
3 DIFFERENT UNITS OF THE DEPARTMENT OF JUSTICE TESTIFIED
4 THEY USE FILTERS AND THEY WORK GREAT. THEY ARE VERY
5 EFFECTIVE IN PREVENTING ACCESS TO INAPPROPRIATE
6 MATERIAL. SO WE HAVE SEVEN EXAMPLES OF FILTERS BEING
7 ACTUALLY USED IN THE REAL WORLD. IN EVERY SINGLE
8 INSTANCE NOBODY IDENTIFIED A SINGLE EXAMPLE OF
9 OVERBLOCKING OR A SINGLE EXAMPLE OF UNDERBLOCKING. THAT
10 IS PRETTY GOOD EVIDENCE ALL BY ITSELF.

11 THEN WE HAVE THE EXPERTS. WE HAVE DR.
12 CRANOR, WHO IS THE WORLD'S EXPERT ON INTERNET FILTERING.
13 SHE TESTIFIED IN SIX OR SEVEN CASES ON INTERNET
14 FILTERING. SHE HAS FOLLOWED INTERNET FILTERING FOR
15 ALMOST 10 YEARS. SHE HAS READ EVERY STUDY THAT HAS EVER
16 BEEN DONE ON INTERNET FILTERING AND IS FAMILIAR WITH
17 THEM. SHE TESTIFIED BEFORE THE COPA COMMISSION ON
18 FILTERING. SHE TESTIFIED BEFORE THE NRC COMMISSION ON
19 FILTERING. SHE TESTIFIED ON THE BASIS OF ALL OF THE
20 STUDIES AND ALL HER EXPERTISE THAT FILTERS ARE
21 EFFECTIVE, OCTOBER 23RD AT 231.

22 THEN WE HAVE PROFESSOR STARK AND
23 PROFESSOR MEWETT. THE INTERESTING THING ABOUT THEM IS
24 THAT ALL THEY REALLY DO, DESPITE ALL OF THE MONEY AND
25 ALL OF THE EFFORT AND ALL THE WORK THEY DID, ALL THEY

1 REALLY DO IS CONFIRM MISS CRANOR'S CONCLUSIONS. THERE
2 ARE A LOT OF PROBLEMS WITH THE STARK AND MEWETT STUDIES.
3 FIRST OF ALL, THEY DIDN'T USE HARMFUL TO MINORS AS THEIR
4 DEFINITION OR OBSCENITY AS THEIR DEFINITION. THE ISSUE
5 IN THIS CASE IS NOT DO FILTERS WORK WELL AT BLOCKING
6 SOME CATEGORY THAT MR. MEWETT DREAMED UP. THE ISSUE IN
7 THIS CASE DO FILTERS WORK WELL AT BLOCKING MATERIAL THAT
8 COPA WOULD BLOCK? MR. MEWETT DID NOT LOOK AT THAT
9 QUESTION. HE DIDN'T -- HE SPECIFICALLY DIS-- BOTH HE
10 AND STARK SPECIFICALLY DISAVOWED THE NOTION THAT THEY
11 TRIED TO DEFINE MATERIALS HARMFUL TO MINORS OR AS
12 OBSCENE. THEY ALSO EXPLICITLY DISAVOWED THE NOTION THAT
13 THEY TRIED TO APPLY THE DEFINITIONS THAT THE FILTERS
14 THEMSELVES USE. THEY WERE NOT JUDGING THE EFFECTIVENESS
15 OF THE FILTERS BASED ON THE DEFINITIONS THE FILTERS USE.
16 THEY WERE JUDGING THE EFFECTIVENESS OF FILTERS BASED ON
17 SOME DEFINITION THAT THEY MADE UP THEMSELVES. THAT
18 PRESENTS A LOT OF PROBLEMS WITH THE COPA -- WITH THE
19 STARK AND MEWETT DATA.

20 THERE ARE LOT OF OTHER PROBLEMS WITH THE
21 STARK AND MEWETT DATA. THEY COUNTED THINGS AS
22 OVERBLOCKING EVEN WHEN THE FILTER WAS WORKING EXACTLY AS
23 IT WAS SUPPOSED TO WORK. THAT IS MR. MEWETT'S TESTIMONY
24 ON NOVEMBER 7 AT 211. THEY HAD VERY SMALL SAMPLE SIZES
25 FOR SOME OF THEIR STATISTICS. FOR EXAMPLE, MR. MEWETT

1 TESTIFIES TO THAT EFFECT ON NOVEMBER 8TH AT 33 TO 34.
2 PROFESSOR STARK TESTIFIES TO THAT EFFECT ON NOVEMBER 8
3 AT 167. MR. MEWETT HAD A LOT OF DIFFICULTY APPLYING HIS
4 OWN DEFINITIONS. HE HAD SOME VERY ODD NOTIONS OF
5 DEFINITIONS. HE CALLED THE GAY AND LESBIAN HUMAN RIGHTS
6 SITE A SEX SITE, FOR EXAMPLE, NOVEMBER 8 AT 12. THEY
7 HAD LOT OF DUPLICATES IN THEIR DATABASE. THEY DON'T
8 KNOW HOW MANY DUPLICATES THEY HAVE. THAT IS TESTIFIED
9 TO AT NOVEMBER 8 AT 6. BUT EVEN IF YOU ASSUME THAT ALL
10 OF THE FLAWS, AND THERE ARE NUMEROUS FLAWS OF THEIR
11 STUDY ARE CORRECT -- SHOULD BE IGNORED, THEY STILL CAME
12 OUT WITH ESSENTIALLY RESULTS THAT ARE SUPPORTIVE OF THE
13 NOTION THAT FILTERS ARE SUBSTANTIALLY MORE EFFECTIVE
14 THAN COPA.

15 NOW WE TURN TO THE THIRD OF THE
16 DEMONSTRATIVE EXHIBITS.

17 MR. MEWETT AND MR. STARK TESTIFIED THAT 1
18 PERCENT OF ALL OF THE SPEECH ON THE INTERNET IS SEXUALLY
19 EXPLICIT. SOME PEOPLE FIND THAT A SCARY NUMBER. SOME
20 PEOPLE FIND IT A REASSURING NUMBER. WHAT IT MOSTLY IS
21 AN IRRELEVANT NUMBER. THE QUESTION IS NOT WHAT IS THE
22 PERCENTAGE OF SEXUALLY EXPLICIT SITES ON THE INTERNET.
23 THE QUESTION IS WHAT IS THE PERCENTAGE OF SEXUALLY
24 EXPLICIT SITES ON THE INTERNET THAT ARE RELEVANT TO
25 COMPARING IT TO COPA?

1 AND ON THIS DEMONSTRATIVE EXHIBIT WE TOOK
2 EACH OF THE FOUR DATABASES THAT MR. MEWETT AND MR. STARK
3 USED, AND WE COUNTED. SO THAT FIRST OF ALL WE TOOK --
4 WE STARTED WITH THEIR 1 PERCENT, WHAT'S THE TOTAL NUMBER
5 OF -- IT SAYS 5F, WHICH IS THEIR SEXUALLY EXPLICIT
6 CATEGORY. SO, JUST FOR EXAMPLE, IN THE FIRST ONE,
7 GOOGLE URL ANALYSIS, HE TOOK A RANDOM SAMPLE OF WEB
8 PAGES FROM GOOGLE. HE LOOKED AT 11,100 WEB PAGES IN
9 GOOGLE. IN THE 11,100 WEB PAGES FROM GOOGLE HE FOUND
10 113 THAT HE CATEGORIZED AS SEXUALLY EXPLICIT. THAT IS
11 SORT OF WHERE HIS 1 PERCENT COMES FROM, 113 OUT OF
12 11,100 IS THE SEXUALLY EXPLICIT. BUT THEN THE QUESTION
13 IS HOW MANY OF THOSE ARE DOMESTIC AND HOW MANY ARE
14 OVERSEAS BECAUSE COPA IS NOT GOING TO REACH THE OVERSEAS
15 ONES. SO THE ONLY REAL QUESTION IS HOW MANY ARE HOSTED
16 IN THE UNITED STATES? WELL, OF THE 113, ONLY 50 ARE
17 HOSTED IN THE UNITED STATES. SO RIGHT OFF THE BAT, WE
18 KNOW THAT WE ARE NOW LESS THAN 1 PERCENT. WE ARE NOW
19 LESS THAN ONE HALF OF 1 PERCENT THAT COPA IS GOING TO
20 GET TO.

21 NOW THE QUESTION IS, SUPPOSE A FILTER IS
22 RUNNING? WHAT IS THE LIKELIHOOD THAT WE ARE GOING TO
23 COME ACROSS A SEXUALLY EXPLICIT DOMESTIC WEBSITE WITH A
24 FILTER RUNNING? THE ANSWER IS, THE NUMBER -- THE NEXT
25 NUMBER. OUT OF THE 11,100 WEB PAGES THAT MR. MEWETT

1 LOOKED AT IN THE GOOGLE DATABASE, FOUR, FOUR WERE
2 DOMESTIC SITES THAT WERE NOT BLOCKED WHEN THE AOL FILTER
3 WAS RUNNING. 13 WERE DOMESTIC SEXUALLY EXPLICIT
4 WEBSITES THAT WERE NOT BLOCKED FROM THE MSN DATABASE. 5
5 OUT OF ALL OF THE SEARCH QUERY STUFF HE DID, THE 10,201
6 HE LOOKED AT IN THE SEARCH QUERIES, 5 WERE DOMESTIC
7 UNBLOCKED WEBSITES. IN THE WORDTRACKER IT WAS 11. THAT
8 IS THE NUMBER OF SITES THAT WE SHOULD BE PAYING
9 ATTENTION TO. AS THE PERCENTAGES SUGGEST, THE
10 PERCENTAGE OF SEXUALLY EXPLICIT DOMESTIC SITES THAT ARE
11 NOT BLOCKED BY WEB PAGES IS EXTRAORDINARILY SMALL. WHAT
12 THIS SUGGESTS IS THE CHANCES OF A CHILD COMING ACROSS A
13 SEXUALLY EXPLICIT WEBSITE IF AOL IS RUNNING IS VIRTUALLY
14 NIL.

15 THERE IS ANOTHER WAY TO LOOK AT THE
16 SUCCESS RATES OF FILTERS AND THAT IS THE FINAL
17 DEMONSTRATIVE EXHIBIT. THE FINAL DEMONSTRATIVE EXHIBIT
18 COMES DIRECTLY OUT OF PROFESSOR STARK'S STUDY. IT SHOWS
19 WHEN USING WORDTRACKER, HOW EFFECTIVE ARE FILTERS. YOUR
20 HONOR WILL RECALL THE WORDTRACKER IS THE ONE THAT USED
21 THE MOST POPULAR SEARCHES. WORDTRACKER WAS THE ONLY
22 RELEVANT REALLY ANALYSIS THAT THEY DID. THE GOOGLE AND
23 URL ANALYSIS -- THE GOOGLE AND MSN ANALYSES, THOSE WERE
24 RANDOM EXAMPLES OF WEB PAGES, AND MR. MEWETT SAYS I
25 AGREE, NO ONE WOULD EVER DO RANDOM ANALYSES OF WEB

1 PAGES. NOBODY ACCESSES THE WEB RANDOMLY. WITH RESPECT
2 TO THE SEARCH QUERIES HE SAID, I DON'T KNOW IF ANYBODY
3 EVER DID ANY OF THESE SEARCHES. THEY COULD HAVE BEEN
4 DONE IN AN AUTOMATED WAY. WORDTRACKER WAS THE ONLY
5 PLACE WHERE REAL PEOPLE PUT IN REAL WORDS INTO SEARCHES
6 AND MR. MEWETT ANALYZED WHAT HAPPENED WITH REAL PEOPLE.
7 THIS IS HOW EFFECTIVE THE FILTERS WERE WHEN REAL PEOPLE
8 WERE PUTTING IN SEARCHES. JUST TAKE FOR EXAMPLE, AOL
9 MATURE TEEN WAS 98.7 PERCENT EFFECTIVE, MSN 97.3 PERCENT
10 EFFECTIVE. NUMBERS ARE VIRTUALLY ALL IN THE HIGH 90S.
11 THAT SEEMS TO BE AN EXTREMELY HIGH NUMBER AND
12 PARTICULARLY WHEN WE KNOW THAT RIGHT OFF THE BAT COPA IS
13 50 PERCENT INEFFECTIVE BECAUSE OF OVERSEAS AND RIGHT OFF
14 THE BAT IT'S EVEN MORE INEFFECTIVE BECAUSE OF ALL OF THE
15 PROTOCOLS IT DOES NOT REACH. THE NOTION THAT FILTERS
16 ARE 97 PERCENT OR 98 PERCENT EFFECTIVE SUGGESTS THAT
17 DEFENDANTS HAVE GROSSLY FAILED TO MEET THEIR BURDEN OF
18 SHOWING FILTERS ARE NOT A LESS RESTRICTIVE ALTERNATIVE.

19 I'M GOING LONGER THAN I HAD PLANNED, SO
20 LET ME TRY TO MOVE A LITTLE MORE QUICKLY THROUGH A FEW
21 OTHER ISSUES WITH RESPECT TO FILTERS.

22 THE COURT: YOU HAVE REACHED THE POINT
23 WHERE YOU THOUGHT YOU WOULD BE FINISHED.

24 MR. HANSEN: I DID AND I'M NOT QUITE
25 FINISHED, BUT I'LL MOVE MORE QUICKLY.

1 FIRST, THE ISSUE AROSE OF MOBILE
2 FILTERING. THE EVIDENCE WAS UNMISTAKABLE AND UNREBUTTED
3 THAT MOBILE FILTERING IS TECHNOLOGICALLY FEASIBLE AND
4 INDEED IS BEGINNING TO ARISE. SECOND, THERE ARE EXTRA
5 FEATURES OF FILTERING, SUCH AS MONITORING OF WHAT YOUR
6 PARENTS DO, TAILORING IT TO THE INDIVIDUAL AGE AND
7 VALUES OF THE FAMILY AND TIME MANAGEMENT.

8 THIRD, THE DEFENDANTS MADE MUCH OF THE
9 FACT THAT THERE WAS A LOT OF OVERBLOCKING WITH SOME OF
10 THE FILTERS AND I SUSPECT IN RESPONSE TO THIS LAST
11 DEMONSTRATIVE THEY WILL SAY I LEFT OUT THE OVERBLOCKING.
12 I DID LEAVE OUT THE OVERBLOCKING. OVERBLOCKING SUPPORTS
13 PLAINTIFFS, NOT DEFENDANTS.

14 OVERBLOCKING -- THE RELATIONSHIP BETWEEN
15 UNDERBLOCKING AND OVERBLOCKING THAT THEY TALKED ABOUT AT
16 SOME LENGTH IS HELPFUL, NOT HURTFUL. WHAT IT MEANS IS A
17 PARENT WHO WANTS TO BE EXTRA CAREFUL WILL CHOOSE A
18 FILTER THAT IS VERY GOOD ON UNDERBLOCKING AND THEY ARE
19 NOT GOING TO WORRY SO MUCH ABOUT OVERBLOCKING. A PARENT
20 WHO IS A LITTLE MORE LOOSE, A LITTLE MORE -- LESS
21 CONCERNED ABOUT THE CHILD COMING ACROSS SEXUALLY
22 EXPLICIT MATERIAL IS GOING TO CHOOSE A FILTER THAT HAS A
23 LITTLE DIFFERENT MEASURE OF OVERBLOCKING VERSUS
24 UNDERBLOCKING. WHAT IS THE VIRTUE IS THAT WE HAVE 11 OR
25 12 OR 15 DIFFERENT FILTERS THAT PARENTS CAN CHOOSE FROM

1 AND PARENTS CAN DECIDE HOW CAREFUL THEY WANT TO BE.
2 PARENTS CAN DECIDE HOW TO MEASURE WHETHER THEY WANT IT
3 TO BE EXTRA CAUTIOUS OR NOT EXTRA CAUTIOUS. THE FACT
4 THAT THE VARIOUS PRODUCTS DIFFER ON HOW CAUTIOUS THEY
5 ARE IS GOOD FOR PARENTS, NOT BAD.

6 THERE WAS SOME TESTIMONY THAT FILTERS
7 ARE HARD TO USE OR HARD TO OBTAIN, BUT BY FAR THE BULK
8 OF THAT TESTIMONY WAS TO THE CONTRARY. INDEED, THE
9 OVERWHELMING TESTIMONY WAS OVER HALF OF ALL PARENTS ARE
10 CURRENTLY USING FILTERS. MOST WHO DON'T USE FILTERS
11 DON'T USE THEM BECAUSE THEY TRUST THEIR CHILDREN AND
12 PARENTS ARE ENORMOUSLY SATISFIED WITH THEIR FILTERS.
13 THERE WAS ALSO EXTENSIVE EVIDENCE THAT IT IS VERY HARD
14 TO CIRCUMVENT FILTERS. THERE WAS SOMETHING MADE OF THE
15 ENTERPRISE VERSUS HOME FILTER MARKET AND THE DEFENDANTS
16 MAKE IT UP, AND THEY SAY THAT SOME OF THESE STUDIES
17 DON'T MATTER BECAUSE THEY REFER TO ENTERPRISE FILTERS
18 VERSUS HOME FILTERS.

19 BUT WE ARE MOVING -- AND THE EVIDENCE WAS
20 QUITE CLEAR, WE ARE MOVING IN THE DIRECTION OF FILTERS
21 BEING ESSENTIALLY THE EQUIVALENT OF ENTERPRISE FILTERS.
22 PEOPLE ARE USING FILTERS NOW THROUGH THEIR ISP'S. THAT
23 IS SORT OF WHAT AN ENTERPRISE FILTER IS. IT MEANS YOU
24 DON'T HAVE TO INSTALL IT, YOU DON'T HAVE TO OPERATE IT.
25 SIMPLE TO USE. INDEED DR. CRANOR GAVE AN EXAMPLE OF HOW

1 SIMPLE IT IS TO USE. AND WHEN VISTA COMES INTO EFFECT,
2 AND DR. CRANOR SAYS VISTA IS GOING TO HAVE PARENTAL
3 CONTROLS, IT WILL BE INCREDIBLY SIMPLE TO USE. THE
4 DIFFERENCE BETWEEN ENTERPRISE FILTERS HAS NOTHING TO DO
5 WITH HOW EFFECTIVE THE FILTERS ARE, HAS ONLY ACCORDING
6 TO MR. MEWETT TO DO WITH WHETHER YOU HAVE A HIGH
7 TECHNICIAN MONITORING FILTERS, BUT YOU DON'T NEED A HIGH
8 TECHNICIAN MONITORING FILTERS.

9 FINALLY LET ME COVER THE DEFENSES THAT
10 THE GOVERNMENT MAY CLAIM SOLVE ALL THE PROBLEMS OF COPA.
11 FIRST, IT'S CLEAR THAT THE --

12 THE COURT: PARDON ME FOR INTERRUPTING.
13 DON'T FORGET YOU HAVE REBUTTAL TIME.

14 MR. HANSEN: I DID NOT PLAN THIS AS WELL
15 AS I HOPED, BUT I'M GOING TO MOVE QUICKLY.

16 IT'S WORTH NOTING THAT ALL OF THE SPEECH
17 WITNESSES TESTIFIED THAT THEY ENGAGE IN THEIR SPEECH FOR
18 FREE AND IN AN UNRESTRICTIVE WAY, BOTH AS A MATTER OF
19 PRINCIPLE, BECAUSE THEY WANT THEIR SPEECH MADE AVAILABLE
20 TO THE WIDEST POSSIBLE AUDIENCE, AND AS A MATTER OF A
21 BUSINESS JUDGMENT.

22 PUTTING A FILTER IN FRONT -- PUTTING A
23 BARRIER, A CREDIT CARD BARRIER OR ANY OTHER BARRIER IN
24 FRONT OF THE SPEECH WILL DETER. AND THERE ARE A TON OF
25 EXAMPLES OF DETERRENCE IN THIS RECORD.

1 THEY WILL BE -- PEOPLE WHO WILL BE
2 DETERRED BECAUSE THEY WANT TO ACCESS THE SPEECH
3 ANONYMOUSLY, AS CONDOMANIA TESTIFIED. PEOPLE WILL BE
4 DETERRED BECAUSE THEY DON'T TRUST SPEECH ON THE --
5 GIVING INFORMATION ON THE INTERNET, AS MR. RUSSO
6 TESTIFIED.

7 PEOPLE WILL BE DETERRED BECAUSE IT DELAYS
8 THEIR EXPERIENCE OF GETTING THE SPEECH, AS URBAN
9 DICTIONARY TESTIFIED. PEOPLE WILL BE DETERRED BECAUSE
10 THERE WILL BE OTHER ALTERNATIVES OUT THERE THAT DON'T
11 HAVE DETERRENCE THAT THEY CAN GO TO INSTEAD, AS MR.
12 RUSSO TESTIFIED. PEOPLE WILL BE DETERRED BECAUSE OF
13 FEAR OF FRAUD AND THEFT AS DEFENDANT'S OWN WITNESS
14 MR. SMITH TESTIFIED TO. THERE WAS EVIDENCE OF
15 DETERRENCE. SALON TESTIFIED THAT WHEN IT DID A
16 SUBSCRIPTION MODEL, THE PEOPLE WERE DETERRED. URBAN
17 DICTIONARY TESTIFIED THAT THERE WERE PEOPLE WHO WERE
18 REFUSING TO GIVE ACCURATE INFORMATION ABOUT THEMSELVES
19 TO EVEN ACCESS URBAN DICTIONARY. HEATHER CORINNA
20 TESTIFIED TO IT. THERE IS PLENTY OF EVIDENCE. INDEED
21 PROFESSOR CLARK SAID HE THOUGHT IT WAS LIKELY PEOPLE
22 WOULD BE DETERRED. HE SAID THAT ON NOVEMBER 14TH AT
23 242. PROFESSOR SMITH TESTIFIED -- PROFESSOR CLARK SAID
24 THAT THERE WERE -- A THIRD OF THE PEOPLE DON'T WANT TO
25 USE CREDIT CARDS AND HALF DON'T WANT TO USE DEBIT CARDS

1 ON THE INTERNET. HE SAID THAT AT 241. PROFESSOR SMITH
2 SAID THAT LOTS OF PEOPLE WHO DON'T WANT TO MAKE
3 PURCHASES WILL BE DETERRED. HE SAID 40 PERCENT OF
4 SHOPPERS AND 26 PERCENT -- 40 PERCENT OF NONSHOPPERS AND
5 26 PERCENT OF SHOPPERS DON'T WANT TO PUT IN CREDIT CARD
6 OR OTHER KINDS OF INFORMATION INTO THE INTERNET. THERE
7 WAS A LOT OF EVIDENCE THAT DETERRENCE WILL TAKE PLACE.

8 THEN DEFENDANTS ONLY OFFERED TWO
9 DEFENSES, THE CREDIT CARD DEFENSE AND THE DVS OR ADULT
10 VERIFICATION DEFENSE.

11 WITH RESPECT TO THE CREDIT CARD DEFENSE,
12 THE CREDIT CARD COMPANIES TESTIFIED REPEATEDLY IN THIS
13 COURT THAT THEY WILL NOT ALLOW CREDIT CARDS TO BE USED
14 AS A PROXY FOR AGE BECAUSE IT'S NOT A PROXY FOR AGE.
15 THEY TESTIFIED THAT THEY DON'T DO ZERO DOLLAR
16 TRANSACTIONS AND THEREFORE SOMEBODY IS GOING TO HAVE TO
17 PAY IF A CREDIT CARD IS GOING TO BE USED. THEY
18 TESTIFIED THAT -- THERE WAS UNCONTRADICTED TESTIMONY IN
19 THIS COURT THAT THERE WERE A SIGNIFICANT NUMBER OF
20 ADULTS THAT DON'T HAVE CREDIT CARDS, AND A SIGNIFICANT
21 NUMBER OF MINORS THAT DO HAVE CREDIT CARDS. INDEED, ONE
22 OF THE MOST STRIKING PIECES OF TESTIMONY THAT MAY HAVE
23 CHANGED SINCE 1999 IS THE NUMBER OF CHILDREN WHO DO HAVE
24 CREDIT CARDS NOW THAT MAYBE DID NOT IN 1999. THERE WAS
25 A LOT OF TESTIMONY BOTH FROM PLAINTIFFS' EXPERTS AND

1 DEFENDANT'S EXPERTS ABOUT THE NUMBER OF PEOPLE -- THE
2 NUMBER OF CHILDREN WHO HAVE ACCESS TO CREDIT CARDS.

3 WITH RESPECT TO THE DATA VERIFICATION
4 SYSTEMS THAT MR. DANCU TESTIFIED TO, MR. DANCU TESTIFIED
5 THAT THERE WAS ENORMOUS COST, 37 TO 42 CENTS A
6 TRANSACTION, THAT IS IN HIS TESTIMONY ON NOVEMBER 9TH AT
7 222. THINK ABOUT THAT 42 CENTS ON NERVE'S ONE MILLION
8 VISITORS PER MONTH OR ON URBAN DICTIONARY'S 40 MILLION
9 VISITORS PER YEAR. BUT THEN, THERE ARE ALL SORTS OF
10 FLAWS IN THOSE PRODUCTS. THEY CAN'T CHECK NON-U.S.
11 VIEWERS, THEY CAN'T CHECK ALL OF THE VIEWERS IN THE
12 UNITED STATES. AND THEY CAN'T CHECK PARTICULARLY YOUNG
13 ADULTS. THEY AGREE THAT IT IS NOT A GUARANTEE OF AGE.
14 INDEED, MR. DANCU REQUIRES ALL HIS CUSTOMERS TO SAY IT'S
15 NOT A GUARANTEE OF AGE AND THAT WE DON'T MAKE ANY
16 GUARANTEES. HE TESTIFIED TO 13 DIFFERENT REASONS WHY
17 HIS PRODUCT MIGHT FAIL TO PROVIDE A GUARANTEE OF AGE.
18 FINALLY, MOST IMPORTANT, HE SAID, ULTIMATELY I DON'T
19 KNOW WHO HAS PUT THE INFORMATION IN TO BE VERIFIED. I
20 DON'T KNOW WHETHER IT'S A 14 YEAR OLD OR 22 YEAR OLD
21 THAT IS PUTTING THE INFORMATION IN TO BE VERIFIED.

22 THE BURDEN OF PROOF IN THIS CASE IS ON
23 THE DEFENDANTS. THIS IS A CRIMINAL STATUTE THAT
24 CRIMINALIZES SPEECH. THE DEFENDANTS HAVE FAILED TO MEET
25 THEIR BURDEN OF PROOF.

1 THE COURT: THANK YOU.

2 MR. MCELVAIN, ARE YOU PREPARED TO
3 PROCEED?

4 MR. MCELVAIN: YES, YOUR HONOR.

5 THE COURT: ALL RIGHT. PLEASE DO SO.

6 MR. MCELVAIN: YOUR HONOR, WE HAVE ONE
7 TRIAL EXHIBIT THAT WE WILL BE REFERRING TO THE PAPER
8 VERSION ONLY IF I CAN TENDER THAT TO YOU.

9 THE COURT: GO RIGHT AHEAD.

10 MR. MCELVAIN: THANK YOU, YOUR HONOR.

11 YOUR HONOR, I WILL BE ADDRESSING THE
12 STATUS QUO PROBLEM THAT WE FACE TODAY AND WHY FILTERS
13 DON'T SOLVE THAT PROBLEM, AND MISS ULRICH WILL BE
14 ADDRESSING THE SCOPE OF COPA AND WHAT COPA CAN DO TO
15 SOLVE THE PROBLEM THAT WE FACE.

16 THE COURT: HOW LONG HAVE YOU ESTIMATED
17 YOUR TIME, THE SAME OR DIFFERENT?

18 MR. MCELVAIN: WE PLAN TO BE ROUGHLY
19 EQUAL.

20 THE COURT: YOU THOUGHT THAT OUT BEFORE
21 TODAY.

22 MR. MCELVAIN: WE ARE TRYING TO BE EQUAL,
23 YOUR HONOR.

24 YOUR HONOR, THE PLAINTIFFS HAVE GIVEN YOU
25 A PRESENTATION THAT WAS DEVOTED PRIMARILY TO A SIMPLE

1 COMPARISON OF THE EFFECTIVENESS OF FILTERS AGAINST THE
2 EFFECTIVENESS OF COPA. BUT THAT IS THE WRONG QUESTION.
3 FILTERS EXIST TODAY AND THEY WILL CONTINUE TO EXIST
4 TOMORROW IF COPA IS UPHELD. COPA DOES NOT BAN FILTERS.
5 TO THE CONTRARY, CONGRESS ENCOURAGED THE PROMOTION OF
6 THEIR USE WHEN IT ENACTED COPA. SO THE QUESTION INSTEAD
7 IS WHAT GAPS ARE LEFT BEHIND BY THE FILTERS EVEN WHEN
8 THE FILTERS ARE BEING USED AND WHAT COPA CAN DO TO FILL
9 THOSE GAPS.

10 AND THE EVIDENCE SHOWS THAT THERE IS A
11 CONTINUED PROBLEM OF THE AVAILABILITY OF HARMFUL TO
12 MINORS MATERIAL TO CHILDREN ON THE WEB EVEN WITH THE USE
13 OF FILTERS. AND THE EVIDENCE SHOWS THAT COPA PROVIDES A
14 SOLUTION TO THIS PROBLEM AND THE EVIDENCE SHOWS THAT THE
15 PLAINTIFFS' PROPOSED ALTERNATIVES CANNOT BE AS EFFECTIVE
16 AS COPA.

17 FIRST, WHAT IS THE PROBLEM THAT WE FACE
18 TODAY? WELL, ADULT MATERIAL IS WIDESPREAD ON THE
19 WORLDWIDE WEB. UNDER A VERY CONSERVATIVE ESTIMATE THERE
20 ARE AT LEAST 275 MILLION ADULT WEB PAGES ON THE SURFACE
21 PORTION OF THE WORLDWIDE WEB ALONE. IT'S REASONABLE TO
22 ESTIMATE THAT NUMBER TO BE AS HIGH AS 700 MILLION ADULT
23 WEB PAGES, AS MR. MEWETT TOLD YOU.

24 FURTHERMORE, THE WEB IS GROWING QUICKLY.
25 AGAIN, THE SURFACE PORTION OF THE WEB ALONE IS GROWING

1 BY 50 MILLION WEB PAGES A DAY, AGAIN AS MR. MEWETT TOLD
2 YOU.

3 AND FURTHER, NOT ONLY IS ADULT MATERIAL
4 WIDESPREAD, BUT THE EVIDENCE IN THE RECORD SHOWS THAT
5 THAT MATERIAL IS RETURNED TO THE SEARCH ENGINE QUERIES
6 MORE FREQUENTLY THAN ARE OTHER PAGES ON THE WEB. SO IT
7 IS WIDESPREAD. IT IS OUT THERE. IT IS READILY
8 AVAILABLE.

9 AND FOR THAT REASON, IT'S NOT SURPRISING
10 THAT THE NATIONAL RESEARCH COUNCIL IN ITS REPORT
11 ESTIMATED THAT FULLY ONE QUARTER OF ALL CHILDREN HAVE
12 BEEN INADVERTENTLY EXPOSED TO SEXUALLY EXPLICIT IMAGES
13 ONLINE. THAT IS AT PAGE 169 OF PLAINTIFFS' EXHIBIT 154.

14 SO THERE IS A VAST ARRAY OF ADULT
15 MATERIAL THAT IS PUBLICLY AVAILABLE ON THE WEB,
16 LITERALLY ONLY A CLICK AWAY FROM ANY CHILD WITH ACCESS
17 TO AN INTERNET CONNECTION. THE QUESTION THUS BECOMES
18 WHETHER FILTERS CAN SUCCEED IN PREVENTING THIS ACCESS
19 WITHOUT DAMAGING THE ABILITY OF MINORS TO ACCESS THE WEB
20 FOR LEGITIMATE REASONS. THE EVIDENCE SHOWS THAT FILTERS
21 CANNOT DO THIS. IT'S USEFUL AT THIS POINT TO REVIEW
22 PRECISELY WHAT FILTERS ARE AND HOW THEY OPERATE. YOU
23 HEARD TESTIMONY FROM MR. MEWETT THAT THEY USE PRIMARY
24 TWO METHODS, BLACK LISTS AND DYNAMIC FILTERING. BOTH OF
25 THESE METHODS HAVE FLAWS.

1 FIRST, WHAT IS A BLACK LIST? IT'S
2 ESSENTIALLY A LIST OF WEB PAGES OR WEBSITES THAT THE
3 FILTER COMPANY HAS COMPILED AND ARE LISTED AS THE PAGES
4 THAT SHOULD BE BLOCKED. IT'S SIMPLY NOT POSSIBLE FOR
5 THE FILTERING COMPANIES TO KEEP THESE BLACK LISTS
6 UP-TO-DATE. THE WEB IS TOO LARGE AND IS GROWING TOO
7 QUICKLY, AND IS CHANGING TOO QUICKLY FOR A BLACK LIST TO
8 KEEP UP, AS MR. MEWETT TOLD YOU. SO IT'S SIMPLY
9 IMPOSSIBLE BOTH SIMULTANEOUSLY TO THOROUGHLY AND
10 ACCURATELY CATALOG THE ENTIRE WEB IN THIS MANNER ON
11 THESE BLACK LISTS.

12 THE FILTER COMPANIES TRY TO COVER FOR
13 THIS FLAW BY USE OF A PROCESS CALLED DYNAMIC FILTERING.
14 IN ESSENCE, THIS DESCRIBES THE USE OF AUTOMATED TOOLS
15 THROUGH WHICH A COMPUTER PROGRAM ATTEMPTS TO ANALYZE THE
16 WEB PAGES AND DETERMINE WHETHER THE PAGE HAS ADULT
17 CONTENT OR NOT OR WHETHER THE PAGE MEETS OTHER BLOCKING
18 CRITERIA. BUT THESE PROGRAMS ARE INCOMPLETE FOR SEVERAL
19 REASONS. FIRST, NO RESIDENTIAL FILTERING SOFTWARE IN
20 USE TODAY IS ABLE TO ANALYZE THE IMAGES ON THE PAGE AS
21 MR. MEWETT TOLD YOU AND AS YOU HEARD FROM THE
22 DEPOSITIONS OF MISS WHITTLE AND MR. MURPHY.

23 THE FILTERING SOFTWARE PRODUCTS ATTEMPT
24 TO GET AROUND THIS PROBLEM BY TRYING TO ANALYZE THE FILE
25 NAMES THAT ARE ASSOCIATED WITH THE IMAGES ON THE PAGE.

1 BUT THIS METHOD DOES NOT WORK IF THE OPERATOR OF THE
2 WEBSITE DOES NOT USE DESCRIPTIVE NAMES FOR THE FILES.
3 FOR EXAMPLE, IF THE OPERATOR OF THE ADULT WEBSITE TAKES
4 THEIR PICTURE AND CALLS IT A ON THE COMPUTER CODE
5 INSTEAD OF SAYING PICTURE OF PORNOGRAPHY, THE FILTERING
6 SOFTWARE WON'T BE ABLE TO KNOW WHAT THAT PICTURE IS.
7 MR. MEWETT TOLD YOU THAT AND PROFESSOR CRANOR,
8 PLAINTIFFS' OWN EXPERT WITNESS, ALSO TOLD YOU THAT.

9 THE FILTERING PROGRAMS THAT USE DYNAMIC
10 FILTERING ALSO TRY TO LOOK AT THE METADATA, THAT IS THE
11 UNDERLYING COMPUTER CODE OF THE WEB PAGES, TO HELP
12 DETERMINE THE CONTENT OF THAT MATERIAL. BUT THIS IS
13 ALSO AN IMPERFECT METHOD. THE OPERATORS OF THE ADULT
14 SITES FREQUENTLY DO NOT USE METADATA AT ALL ON THEIR
15 SITES THAT WOULD IDENTIFY THEM AS ADULT. SO MR. MEWETT
16 IN HIS REVIEW OF THE ADULT WEB PAGES IN THE COURSE OF
17 THE STUDY THAT HE CONDUCTED FOR THIS CASE FOUND THAT A
18 LARGE MAJORITY OF THOSE PAGES DID NOT HAVE METADATA AT
19 ALL.

20 SO THE COMPUTER PROGRAMS CAN'T EVALUATE
21 THE IMAGES, THEY CAN'T NECESSARILY RELY ON THE
22 UNDERLYING COMPUTER CODE TO IDENTIFY THE MATERIAL THAT
23 THEY ARE ATTEMPTING TO ANALYZE, AND THEY ARE REDUCED
24 THEREFORE TO STUDYING THE TEXT OF THE WEB PAGE ITSELF,
25 BUT THE COMPUTER PROGRAMS CAN'T FULLY RECOGNIZE THE

1 CONTEXT OF WORDS AND NEVER WILL BE ABLE TO DO SO.

2 YOU HEARD FROM DR. STEPHEN NEALE, A
3 RECOGNIZED EXPERT IN THE FIELD OF LINGUISTICS. AS HE
4 EXPLAINED, A COMPUTER PROGRAM CAN NEVER ACTUALLY
5 UNDERSTAND TEXT. ALL IT CAN DO IS TRY TO ANALYZE THE
6 FORMAL FEATURES OF THAT TEXT. BUT THERE ARE MANY
7 EXAMPLES OF COMBINATIONS OF WORDS THAT COULD IN ONE
8 CONTEXT APPEAR TO SIGNIFY SEXUALLY EXPLICIT THEMES BUT
9 IN OTHER CONTEXTS WOULD NOT. BECAUSE THE FILTERING
10 PROGRAMS CAN'T RECOGNIZE THESE DIFFERENCES THE WAY A
11 HUMAN BEING CAN, THEY CAN NOT FULLY DISTINGUISH ADULT
12 CONTENT FROM OTHER CONTENT.

13 THESE ARE INHERENT LIMITATIONS IDENTIFIED
14 BY PHILOSOPHERS OF LINGUISTICS. THESE ARE NOT PRESENT
15 DAY FAILURES ON THE PART OF THE FILTERING PROGRAMS. NO
16 PURELY FORMAL METHODS LIKE A COMPUTER PROGRAM WILL EVER
17 BE ABLE TO TRULY UNDERSTAND THE TEXT OF A WEB PAGE, AS
18 PROFESSOR NEALE TOLD YOU.

19 SO NEITHER THE BLACK LIST METHOD NOR THE
20 DYNAMIC METHOD CAN EVER WORK FULLY EFFECTIVELY.
21 FURTHER, THE ADULT WEBSITE OPERATORS USE ADDITIONAL
22 METHODS TO MAKE THE FILTER'S JOBS EVEN HARDER. ONE
23 METHOD THAT DESERVES PARTICULAR MENTION IS THE USE OF
24 WHAT IS CALLED URL REDIRECTION. YOU RECALL THAT MR.
25 MEWETT DESCRIBED THIS TO YOU. YOU WILL RECALL THAT A

1 URL IS ESSENTIALLY THE TERM FOR THE ADDRESS OF A WEB
2 PAGE ON THE WORLDWIDE WEB. ADULT WEBSITES FREQUENTLY
3 WILL USE ONE URL THAT ITSELF LACKS ADULT CONTENT, BUT
4 WHEN THE VIEWER GOES TO THAT PAGE THEY ARE AUTOMATICALLY
5 FORWARDED TO ANOTHER PAGE WHERE THE ADULT CONTENT
6 ACTUALLY RESIDES. IN FACT, THEY CAN CYCLE THROUGH MANY
7 DIFFERENT ADULT WEB PAGES THROUGH THIS PROCESS.

8 THE PROBLEM THERE IS THAT THE FILTERS'
9 BLACK LISTS CAN'T IDENTIFY THESE REDIRECTED URLS AND SO
10 THE FILTERS JOB BECOMES THAT MUCH HARDER.

11 SO THAT'S THE LAY OF THE LAND OF WHAT
12 FILTERS TRY TO DO, AND THE TECHNICAL LIMITATIONS AND
13 WHAT THEY ARE ABLE TO ACCOMPLISH. SO THE LOGICAL NEXT
14 QUESTION BECOMES, HOW DO THE FILTERS ACTUALLY PERFORM IN
15 REAL LIFE. AND YOU HEARD FROM MR. MEWETT AND YOU HEARD
16 FROM DR. STARK. THEY CONDUCTED A COMPREHENSIVE STUDY
17 AND THE ANSWER OF THAT STUDY THAT IS THE FILTERS DO NOT
18 PERFORM WELL.

19 AND FIRST I WOULD LIKE TO GIVE YOU SOME
20 REVIEW OF THE METHODS OF THE STUDY BECAUSE THE REASONS
21 THAT THIS STUDY WAS COMPREHENSIVE ARE IMPORTANT TO THIS
22 CASE.

23 FIRST, THEY USE SCIENTIFIC METHODS TO
24 GATHER RANDOM SAMPLES OF WEBSITES FOR THE TESTING. THIS
25 IS IMPORTANT BECAUSE IT ALLOWS FOR EXTRAPOLATION TO THE

1 LARGER WORLDWIDE WEB, UNLIKE SOME OF THE OTHER STUDIES
2 YOU HEARD FROM WHICH DON'T ALLOW FOR ANY EXTRAPOLATION
3 OTHER -- JUST FROM THE PARTICULAR WEB PAGES THAT WERE
4 STUDIED IN THOSE STUDIES.

5 IT'S PARTICULARLY IMPORTANT BECAUSE
6 FILTERS COULD PERFORM DIFFERENTLY ON DIFFERENT KINDS OF
7 WEB PAGES. AND SO IT'S IMPORTANT NOT TO SELF-SELECT THE
8 WEB PAGES, BUT INSTEAD TO PICK THE PAGES THAT ARE
9 REPRESENTATIVE OF A LARGER WHOLE AND AGAIN, WE AVOIDED
10 THAT PROBLEM WITH THIS STUDY.

11 THE STUDY ALSO USED THE MOST RECENT DATA
12 AVAILABLE. THIS IS IMPORTANT BECAUSE THE WEB IS
13 CHANGING VERY QUICKLY AND THE OLDER DATA WOULD BE OF
14 LIMITED RELEVANCE TODAY.

15 THROUGH THIS PROCESS, MR. MEWETT AND DR.
16 STARK STUDIED THREE DIFFERENT TYPES OF DATASETS. EACH
17 OF THE DATASETS ARE RELEVANT, BUT NONE OF THEM GIVES YOU
18 THE FULL PICTURE OF THE EFFECTIVENESS OF FILTERS. THAT
19 IS IMPORTANT BECAUSE PLAINTIFFS APPARENTLY WISH TO REFER
20 YOUR ATTENTION TO ONLY ONE OF THE DATASETS.

21 THE FIRST DATASET THAT THEY STUDIED WAS
22 THE SET OF RANDOM PAGES FROM THE GOOGLE AND MSN SEARCH
23 ENGINE INDICES. THE TESTING OF THE WEB PAGES FOUND FROM
24 THAT PROCESS WILL GIVE YOU A SENSE OF PERFORMANCE OF
25 FILTERS AGAINST WEB PAGES THAT ARE OUT THERE TO BE

1 FOUND.

2 THE SECOND MEASURED THE EFFECTIVENESS OF
3 FILTERS AGAINST A REPRESENTATIVE SET OF THE KINDS OF WEB
4 PAGES THAT VIEWERS WOULD SEE IN RESPONSE TO TYPICAL
5 QUERIES ON THE SEARCH ENGINES. AGAIN, THIS REPRESENTS
6 PERFORMANCE OF FILTERS AGAINST THE SORTS OF WEB PAGES
7 THAT VIEWERS TYPICALLY SEE.

8 THE THIRD SET MEASURED THE EFFECTIVENESS
9 OF THE FILTERS AGAINST THE WEB PAGES THAT ARE RETURNED
10 IN RESPONSE TO THE MOST POPULAR QUERIES. AND THIS
11 MEASURES THE EFFECTIVENESS OF FILTERS AGAINST THE
12 PARTICULAR SET OF WEB PAGES THAT PEOPLE SEE MOST OFTEN.

13 NOT ONE OF THESE DATASETS PROVIDES THE
14 FULL STORY FOR THE EFFECTIVENESS OF FILTERS. NO ONE
15 ONLY SEARCHES WEB PAGES RANDOMLY ON THE SEARCH ENGINE
16 INDICES, NO ONE IS FULLY TYPICAL IN THE QUERIES THAT
17 THEY ENTER AND THE WEB PAGES THAT THEY RECEIVE BACK FROM
18 THOSE QUERIES AND NO ONE ONLY SEARCHES FOR THAT SMALL
19 SET OF THE MOST POPULAR TERMS. BUT THE THREE DATASETS
20 TOGETHER PROVIDE A PICTURE OF THE FULL RANGE OF HOW
21 FILTERS SUCCEED OR FAIL. AS DR. STARK PUT IT, IT'S
22 LOOKING AT THE ELEPHANT FROM SEVERAL DIFFERENT ANGLES.
23 THEY PROVIDE COMPLEMENTARY VIEWS.

24 SO WHAT DO THE RESULTS OF MR. MEWETT'S
25 AND DR. STARK'S STUDY SHOW? FIRST, THERE IS A

1 SIGNIFICANT UNDERBLOCKING PROBLEM. ALL OF THE FILTERS
2 UNDERBLOCKED, THAT IS, THEY MISSED LARGE PORTIONS OF THE
3 ADULT MATERIAL. FOR THE SEARCH ENGINE INDICES, EACH OF
4 THE FILTERS MISSED LARGE PORTIONS OF THIS MATERIAL. YOU
5 WILL SEE THAT IN DEFENDANT'S EXHIBIT 68, THOSE COLUMNS
6 THERE ON THE LEFT. VAST PORTIONS OF ALL ADULT MATERIAL
7 THAT IS OUT THERE ON THE SEARCH ENGINE INDICES SIMPLY
8 WERE NOT RECOGNIZED AS SUCH BY THE FILTERS. THE SAME IS
9 TRUE FOR THE WEB PAGES RETURNED FROM THE QUERIES AND
10 THAT WE FIND IN DEFENDANT'S EXHIBIT 74. AGAIN, YOU SEE
11 VERY LARGE PERCENTAGES FOR EACH OF THE FILTERS OF THE
12 ADULT MATERIAL THAT WAS MISSED.

13 AND FOR THE WORDTRACKER, THAT IS THE MOST
14 POPULAR QUERY DATA, ALSO SUBSTANTIAL PORTIONS WERE
15 MISSED. YOU SEE THAT UNDER THE UNDERBLOCKING FOR
16 RESULTS COLUMN AND THE UNDERBLOCKING FOR QUERIES COLUMN.
17 NOW THIS REQUIRES A LITTLE BIT OF EXPLANATION.
18 PLAINTIFFS HAVE FOCUSED ON THIS IN THEIR PRESENTATION.
19 THESE NUMBERS MAY SUFFICIENTLY APPEAR TO BE POSITIVE
20 RESULTS. THEY APPEAR TO BE LOWER PERCENTAGES ON THESE
21 COLUMNS BUT AS PROFESSOR STARK EXPLAINED TO YOU IN HIS
22 TESTIMONY, YOU NEED TO RECALL WHAT THE BASE OF ADULT
23 MATERIAL IS IN THIS DATASET. 14.1 PERCENT OF THE
24 MATERIAL IN THIS SET OF DATA TURNED OUT TO BE ADULT
25 MATERIAL IN RESPONSE TO THE MOST POPULAR QUERIES AS

1 OPPOSED TO 1.7 PERCENT IN RESPONSE TO THE QUERIES. SO
2 IF YOU TAKE THE PROPORTIONS HERE AND MULTIPLY IT BY THE
3 VASTLY LARGER AMOUNT OF ADULT MATERIAL THAT IS AVAILABLE
4 TO BE REACHED YOU ACTUALLY SEE THAT MORE ADULT MATERIAL
5 GETS THROUGH ON THIS DATASET THAN YOU SAW ON THE OTHER
6 DATASETS.

7 YOUR HONOR, YOU HAVE SEEN SOME OF THE WEB
8 PAGES THAT THE FILTERS FAILED TO BLOCK AND YOU HAVE
9 BEFORE YOU DEFENDANTS' EXHIBIT 88. I WON'T ASK YOU TO
10 FLIP THROUGH IT AT THIS POINT, BUT JUST TO REMIND YOU
11 THAT THOSE ARE EXAMPLES OF SOME OF THE WEB PAGES THAT AT
12 LEAST THREE OF THE FILTER SETTINGS TESTED FAILED TO
13 BLOCK.

14 NOW, PLAINTIFFS HAVE PROVIDED WITH YOU A
15 DEMONSTRATIVE EXHIBIT WHICH WE HAVE HAD SOME ARGUMENT
16 ABOUT THIS MORNING AND I WOULD LIKE TO DISCUSS THAT
17 BRIEFLY. THEY -- I BELIEVE WHAT THEY ARE TRYING TO GET
18 AT WITH THIS EXHIBIT IS SOMETHING THEY WOULD LIKE TO
19 CALL AN INCIDENCE RATE FROM DR. STARK'S DATA. I WISH TO
20 REMIND YOU THIS IS NOT BASED ON RECORD EVIDENCE. IT IS
21 APPARENTLY ONLY CALCULATIONS MADE BY PLAINTIFFS'
22 COUNSEL, NOT BY ANY QUALIFIED STATISTICIAN. IN FACT,
23 PLAINTIFFS HAD A STATISTICIAN AS A WITNESS ON THE TRIAL
24 LIST. THEY CHOSE NOT TO CALL HIM. THE REPORT THAT HE
25 ISSUED SAID NOTHING AT ALL ABOUT PROFESSOR STARK'S DATA.

1 IT WAS ADDRESSED TOTALLY TO A SEPARATE STATISTIC.

2 AS DR. STARK EXPLAINED IN HIS TESTIMONY,
3 THIS TYPE OF CALCULATION THAT THE PLAINTIFFS ARE NOW
4 TRYING TO PERFORM IS NOT A MEANINGFUL CALCULATION OF THE
5 LIKELIHOOD THAT CHILDREN WOULD SEE ADULT MATERIAL ON THE
6 WEB OR SEE UNBLOCKED DOMESTICALLY HOSTED ADULT MATERIAL.

7 AND AN IMPORTANT THING TO REMEMBER FROM
8 THIS, THE WAY THEY GET TO THESE LOW FIGURES IS THEY
9 START FIRST FROM THE POINT THAT 1 PERCENT OF THE
10 MATERIAL ON THE WEB IS ADULT. SO THEY ARE STARTING FROM
11 A 99 PERCENT NUMBER TO START HERE. THAT IS REALLY VERY
12 MISLEADING. I WISH TO REMIND YOU THAT THE VAST MAJORITY
13 OF MAGAZINES ARE NOT ADULT MAGAZINES. I THINK IT MAY BE
14 A FAIR STATEMENT THAT 99 PERCENT OF MAGAZINES ARE NOT
15 ADULT MAGAZINES. THIS DOES NOT MEAN THAT THERE IS NOT A
16 PROBLEM THAT BLINDER RACKS COULD ADDRESS.

17 THE VAST MAJORITY OF RESTAURANTS AND BARS
18 ARE NOT ADULT NIGHTCLUBS. IT MIGHT BE A FAIR STATEMENT
19 THAT 99 PERCENT OF ALL RESTAURANTS AND BARS ARE NOT
20 ADULT NIGHTCLUBS. THIS DOES NOT MEAN THAT THERE IS NOT
21 A PROBLEM THAT AGE REQUIREMENTS TO ENTER THOSE
22 NIGHTCLUBS COULD ADDRESS.

23 BUT LET'S ASSUME FOR THE SAKE OF ARGUMENT
24 THAT THESE CALCULATIONS AMOUNT TO SOMETHING MEANINGFUL
25 DESPITE PROFESSOR STARK'S TESTIMONY TO THE CONTRARY. IT

1 APPEARS THAT WHAT THEY ARE TRYING TO DO HERE IS COME UP
2 WITH A NUMBER FOR THE LIKELIHOOD THAT AN ADULT WEB PAGE
3 WOULD APPEAR ON ANY ONE OCCASION. LET'S TAKE THE LOWEST
4 NUMBER THAT THEY HAVE COME UP WITH ON THIS NUMBER, 0.033
5 PERCENT. BY MY CALCULATION THAT IS SOMETHING LIKE ONE
6 OUT OF THREE THOUSAND. THAT DOES SOUND SMALL. BUT
7 AGAIN, I HAVE TO REMIND YOU WHAT THIS IS THEY ARE TRYING
8 DO, THE LIKELIHOOD OF ANY ONE CHILD ON ANY ONE OCCASION
9 SEEING ANY ONE WEB PAGE THAT IS ADULT, AN ADULT WEB
10 PAGE. ASSUMING THAT THE AOL FILTER IS RUNNING. IS
11 THERE ONLY ONE CHILD IN THE UNITED STATES WHO HAS SURFED
12 THE WEB? NO. 35 MILLION CHILDREN FROM AGE 3 TO GRADE
13 12 USE THE INTERNET. YOU FIND THAT IN DEFENSE EXHIBIT
14 81, EDUCATION DEPARTMENT STUDY AT PAGE 3. OF THOSE 35
15 MILLION CHILDREN, HAVE THOSE CHILDREN SURFED THE WEB
16 ONLY ONCE? NO, OF COURSE NOT. THE MAJORITY OF
17 TEENAGERS GO ONLINE DAILY. THAT IS FROM THE PEW REPORT,
18 PLAINTIFFS' EXHIBIT 17, PAGE 2. WHEN THEY GO ONLINE, DO
19 THEY LOOK AT ONLY ONE WEB PAGE? NO. OF COURSE NOT.
20 THE MAJORITY OF TEENAGERS SPEND ONE TO FIVE HOURS A WEEK
21 SURFING THE WEB. THAT IS FROM PLAINTIFFS EXHIBIT 54,
22 THE NRC REPORT AT PAGE 129.

23 SO TAKE THIS FIGURE OF ONE OUT OF THREE
24 THOUSAND. MULTIPLY IT BY 35 MILLION, THAT IS EVEN
25 ASSUMING EVERY MINOR ACTUALLY USES THE FILTER AND THAT

1 FILTER IS THE AOL FILTER. MULTIPLIED BY 365 DAYS A
2 YEAR, MULTIPLY IT BY THE MANY WEB PAGES THAT THE MINORS
3 SEE EACH TIME THEY GO ONLINE, YOU START TO GET A SENSE
4 OF THE SCOPE OF THE PROBLEM. TO SIMPLY SAY THEY COME UP
5 WITH SOME FIGURE THAT AMOUNTS TO ONE OUT OF THREE
6 THOUSAND IS REALLY A MISSTATEMENT OF THE PROBLEM. THAT
7 IS THE UNDERBLOCKING ISSUE.

8 BUT OUR TESTS SHOW THAT THE OVERBLOCKING
9 RATES ARE HIGH FOR THE FILTERS AS WELL. THE FILTERS DID
10 PARTICULARLY POORLY FOR OVERBLOCKING IN THE WORDTRACKER
11 DATASET AND IN ALL THE DATASETS. AND THE PLAINTIFFS
12 HAVE PROVIDED YOU A CHART SHOWING ONLY THE UNDERBLOCKING
13 RATES FOR THIS DATASET. AND PLAINTIFFS' COUNSEL
14 PREDICTED THAT I WOULD BE REFERRING ALSO TO THE
15 OVERBLOCKING RATE AND PLAINTIFFS' COUNSEL PREDICTED
16 CORRECTLY.

17 IF YOU LOOK AT THE ENTIRE CHART, THIS IS
18 THE CHART FROM PROFESSOR STARK'S SUPPLEMENTAL REPORT
19 THAT THEY DREW THEIR STATISTICS FROM WHICH IS
20 ESSENTIALLY THE SAME THING AS EXHIBIT 78, YOU SEE VERY
21 HIGH OVERBLOCKING RATES FOR EACH OF THE FILTERS. AND
22 SINCE THE PLAINTIFFS HAVE FOCUSED ON AOL I WOULD LIKE TO
23 ADDRESS YOU PARTICULARLY TO THAT STATISTIC. AOL
24 OVERBLOCKED 19.6 PERCENT OF WHAT WERE CALLED THE CLEAN
25 RESULTS IN MR. MEWETT'S AND PROFESSOR STARK'S STUDY.

1 AND IN FACT THIS IS TRUE FOR EACH OF THE DATASETS. IF
2 YOU LOOK AT DEFENDANT'S EXHIBIT 68, YOU WILL SEE THAT
3 AOL OVERBLOCKED LARGE PORTIONS OF THE CLEAN MATERIAL.
4 IF YOU LOOK AT DEFENDANT'S EXHIBIT 74, WHICH IS THE
5 QUERY DATASET, AGAIN, YOU SEE LARGE PORTIONS OF MATERIAL
6 OVERBLOCKED BY AOL. AND WE HAVE ALREADY TALKED ABOUT
7 PLAINTIFFS' EXHIBIT 78, WHICH IS THE MOST POPULAR QUERY
8 DATA AND AGAIN, VERY LARGE PORTIONS OF THE MATERIAL WERE
9 BLOCKED.

10 FOR ALL OF THE FILTERS, FOR ALL THE
11 DATASETS, THERE WAS A DIRECT CORRELATION THAT DR. STARK
12 FOUND BETWEEN THE UNDERBLOCKING RATE AND THE
13 OVERBLOCKING RATE. YOU CAN'T GET BOTH RATES LOW AT THE
14 SAME TIME.

15 IT'S ALSO IMPORTANT TO PUT THESE
16 OVERBLOCKING NUMBERS INTO CONTEXT. AS WE HAVE ALREADY
17 DISCUSSED, THERE ARE VASTLY MORE CLEAN SITES OUT THERE
18 THAN THERE ARE ADULT SITES. SO WE HAVE A LARGE
19 OVERBLOCKING NUMBER WHEN YOU HAVE A NUMBER 20 PERCENT
20 FOR THE AOL FILTER. THESE MEANS THAT HUGE NUMBERS OF
21 PERFECTLY LEGITIMATE SITES ARE BEING BLOCKED AND THE
22 VAST MAJORITY OF THOSE BLOCKED SITES ARE BEING BLOCKED
23 IN ERROR, AS PROFESSOR STARK TOLD YOU.

24 NOW, I THINK PLAINTIFFS ARE SUGGESTING
25 THAT OVERBLOCKING IS NOT AN ISSUE, THAT YOU CAN CONSIDER

1 ONLY THE UNDERBLOCKING HALF OF THE EQUATION. BUT YOU
2 CAN'T CONSIDER THAT ALONE. YOU HAVE TO CONSIDER THE
3 PRICE THAT A COMPANY IS TRYING TO BLOCK MORE MATERIAL
4 THROUGH THE USE OF FILTERS. THAT PRICE IS THE
5 OVERBLOCKING. AND THERE ARE IMPORTANT VALUES AT STAKE
6 ON BOTH SIDES OF THE EQUATION. MINORS HAVE LEGITIMATE
7 REASONS TO SURF THE WEB. THEY USE THE WEB TO COMPLETE
8 THEIR SCHOOLWORK, THEY USE THE WEB TO LEARN ABOUT NEWS,
9 WEATHER AND SPORTS. IF THE FILTERS ARE HINDERING THESE
10 CHILDREN FROM LEARNING ABOUT THE WORLD AROUND THEM, THAT
11 IS A REAL PROBLEM.

12 TO THE EXTENT THAT THE PLAINTIFFS ARE
13 PUTTING FORWARD EXPANDED USE OF FILTERING AS ONE OF
14 THEIR PROPOSED ALTERNATIVES TO COPA, YOU HAVE TO
15 CONSIDER WHAT THE EFFECT OF THAT WOULD BE. THE FILTERS
16 ONLY BLOCK MORE ADULT SITES BY BLOCKING HUGE PORTIONS OF
17 VALUABLE MATERIAL AS WELL. THAT IS A REAL COST. THAT
18 NEEDS TO BE CONSIDERED. FURTHER, AS A MATTER OF SIMPLE
19 SCIENCE, YOU NEED TO STUDY THE TWO TOGETHER, AS
20 PROFESSOR STARK TOLD YOU AND AS PROFESSOR NEALE TOLD
21 YOU. IF ALL THAT YOU CARED ABOUT WAS ONE HALF OF
22 EQUATION THE ANSWER WOULD BE EASY. ALL YOU WOULD HAVE
23 TO DO IS UNPLUG THE COMPUTER. YOU WOULD GET AN
24 UNDERBLOCKING RATE OF ZERO AND AN OVERBLOCKING RATE OF
25 100, BUT THAT'S OBVIOUSLY NOT THE SOLUTION. THE REASON

1 THAT THAT IS OBVIOUSLY NOT THE SOLUTION IS BECAUSE THERE
2 ARE MANY VALUABLE THINGS ON THE WORLDWIDE WEB THAT
3 EVERYONE, ADULTS AND MINORS, WOULD GAIN BENEFITS FROM.
4 SO CUTTING OFF ACCESS TO THE WEB ENTIRELY IS SIMPLY NOT
5 THE ANSWER.

6 I'M GOING TO ADDRESS SOME PARTICULAR
7 EXAMPLES OF OVERBLOCKING. BUT FIRST I WOULD LIKE TO
8 DISCUSS SOME POINTS REGARDING PLAINTIFFS' CRITICISM OF
9 MR. MEWETT'S SYSTEM OF CODING. FIRST OF ALL, MR. MEWETT
10 WAS STUDYING WHAT THE FILTERS ARE TRYING TO BLOCK. AS
11 HE PUT IT, IN A WAY, THAT IS BETTER FOR HIM TO -- I WAS
12 TRYING TO FIND UNAMBIGUOUS SEXUAL CONTENT THAT I FELT A
13 FILTER SET TO SEXUALLY EXPLICIT CONTENT WOULD BE KEEN TO
14 BLOCK. THEY ARE HIS WORDS, NOT MINE, BUT THE IMPORTANT
15 POINT HERE IS THAT HE WASN'T STUDYING WHAT HE WOULD
16 PROSECUTE FOR HARMFUL TO MINORS. HE IS NOT A
17 PROSECUTOR. HE WAS STUDYING WHAT THE FILTERS SET OUT TO
18 TRY TO DO AND WHETHER THEY SUCCEED AT THE TASK THAT THE
19 FILTERS SET OUT FOR THEMSELVES.

20 PLAINTIFFS HAVE REFERRED TO A NUMBER OF
21 WEBSITES THAT FELL INTO THE "OTHER" CATEGORY THAT MR.
22 MEWETT USED. AND THEY HAVE ATTEMPTED TO DRAW SOME
23 CONCLUSIONS THAT IF SOMETHING FELL INTO THIS "OTHER"
24 CATEGORY, THAT MEANS THAT THOSE WEB PAGES WOULD BE AT
25 RISK FOR PROSECUTION. IT'S IMPORTANT TO REMEMBER WHAT

1 THAT CATEGORY WAS. IT WAS A CATEGORY THAT MR. MEWETT
2 CREATED SO HE WOULD EFFECTIVELY CATCH ANYTHING THAT HE
3 DID NOT HAVE A CATEGORY FOR. IT WAS NOT THE ADULT
4 ENTERTAINMENT CATEGORY. IT WAS JUST THE PAGES THAT DID
5 NOT FALL INTO SOMETHING ELSE.

6 AS HE PUT IT WHEN HE WAS ASKED WHY HE
7 CODED ONE PARTICULAR PAGE AS IN THIS "OTHER" CATEGORY,
8 IT DOES NOT FALL INTO ANY OTHER CATEGORY. I'VE ONLY GOT
9 SO MANY SUBSETS. SO FOR THEM TO ATTEMPT TO DRAW SOME
10 CONCLUSIONS AS TO PARTICULAR PAGES THAT FELL WITHIN THIS
11 CATEGORY AS MEANING THAT THESE PAGES ARE AT SOME RISK OF
12 PROSECUTION FOR BEING ADULT MATERIAL SIMPLY IS NOT A
13 CONCLUSION THAT COULD FAIRLY BE DRAWN FROM THIS RECORD.

14 THIS IS IMPORTANT WHEN YOU CONSIDER SOME
15 OF THE EXAMPLES THAT WE FOUND IN OUR TESTING OF MATERIAL
16 THAT MR. MEWETT DID NOT CONSIDER TO BE ADULT
17 ENTERTAINMENT, DID NOT CONSIDER TO BE MATERIAL THAT THE
18 FILTERS WOULD BE TRYING TO BLOCK BUT IN FACT THE FILTERS
19 BLOCKED. FIRST, IN OUR TESTING, THE ACLU'S OWN WEBSITE
20 WAS BLOCKED BY THE FILTER. FURTHER, EVERY ONE OF THE
21 FILTERS THAT WAS TESTED BLOCKED THE WEBSITE OF
22 SEXUALHEALTH.COM IN WHOLE OR IN PART. THERE ARE FURTHER
23 EXAMPLES. YOU WILL RECALL PLAINTIFFS' EXHIBIT 177, PAGE
24 2, IF WE CAN CALL THAT UP, PLEASE. THIS IS OBVIOUSLY
25 NOT AN ADULT WEBSITE. THIS IS OBVIOUSLY NOT A HARMFUL

1 TO MINORS WEBSITE, BUT NONETHELESS IT WAS BLOCKED BY
2 THREE OF THE FILTERS. TURNING TO PLAINTIFFS' EXHIBIT
3 180, PAGE 8, THIS IS THE WEBSITE OF PLANNED PARENTHOOD.
4 AGAIN, THIS IS OBVIOUSLY NOT ADULT MATERIAL. MR. MEWETT
5 DID NOT CHARACTERIZE THIS AS ADULT MATERIAL. IT WAS NOT
6 WHAT MR. HANSEN CALLED A SEX SITE. THAT IS NOT A
7 CORRECT STATEMENT OF MR. MEWETT'S TESTIMONY AT ALL, BUT
8 NONETHELESS, THIS WEB PAGE WAS BLOCKED BY FOUR OF THE
9 FILTERS.

10 IF I CAN TURN TO PLAINTIFFS' EXHIBIT 177,
11 PAGE 8. THIS IS THE WEB PAGE OF THE NATIONAL CENTER FOR
12 LESBIAN RIGHTS. AGAIN, NOT AN ADULT WEBSITE, NOT CODED
13 AS SUCH BY MR. MEWETT DESPITE MR. HANSEN'S SUGGESTION TO
14 THE CONTRARY. BUT DESPITE THE FACT THAT THIS IS
15 OBVIOUSLY NOT AN ADULT WEBSITE, IT WAS BLOCKED BY THREE
16 OF THE FILTERS.

17 TURNING NEXT TO PLAINTIFFS' EXHIBIT 177,
18 PAGE 10, THIS IS THE GAY AND LESBIAN MEDICAL
19 ASSOCIATION. ONCE AGAIN, OBVIOUSLY NOT AN ADULT
20 WEBSITE, NOT TREATED AS SUCH BY MR. MEWETT, DESPITE MR.
21 HANSEN'S SUGGESTION TO THE CONTRARY, BUT NONETHELESS,
22 THIS WEBSITE WAS BLOCKED BY FOUR OF THE FILTERS.

23 FINALLY, TURNING TO PLAINTIFFS' EXHIBIT
24 177, PAGE 12, AN ARTICLE FROM A MAGAZINE CALLED
25 PARENTING TEENS ON TEEN SEXUALITY, AGAIN OBVIOUSLY NOT

1 AN ADULT WEBSITE, NOT TREATED AS SUCH BY MR. MEWETT BUT
2 THIS WAS BLOCKED BY NINE OF THE FILTERS.

3 IT IS IMPORTANT TO REMEMBER WHAT THESE
4 OVERBLOCKING EXAMPLES MEAN AND WHAT THE OVERBLOCKING
5 STATISTICS SHOW. IN THE TESTING THAT MR. MEWETT AND DR.
6 STARK USED, THEY SET THE SETTINGS AT THE OLDER MINOR
7 STANDARDS. THAT IS, IF THERE WAS A SETTING THAT WAS
8 AVAILABLE FOR 16-YEAR-OLDS THEY TESTED THAT SETTING.
9 DESPITE THE FACT THAT THAT WAS IN ESSENCE THE CHOICE TO
10 TRY TO RATCHET DOWN THE EFFECT OF THE FILTERS ON THE
11 OVERBLOCKING, THEY STILL SHOW HUGE AMOUNTS OF
12 OVERBLOCKING. SO PLAINTIFFS' COUNSEL SUGGESTED TO YOU
13 THAT OVERBLOCKING IS NOT A PROBLEM BECAUSE IT GIVES
14 PARENTS A CHOICE. IF THEY WANT MORE BLOCKING, THAT IS
15 FINE. IF THEY WANT LESS BLOCKING, THAT IS FINE. BUT
16 THE EVIDENCE SHOWS THAT EVEN AT THE SETTING THAT IS
17 TRYING TO GET TO THE OLDER MINORS, THAT IS TRYING TO
18 OVERBLOCK THE LEAST, THAT IS, YOU STILL SEE HUGE
19 PORTIONS OF OVERBLOCKING, HUGE PORTIONS OF VALUABLE
20 MATERIAL THAT IS BEING BLOCKED. IT IS NOT HARD TO
21 IMAGINE THAT THERE ARE REASONS THAT A TEENAGER MAY HAVE
22 VERY IMPORTANT REASONS THAT THEY WOULD WANT TO VISIT
23 THESE WEBSITES THAT WE HAVE JUST SHOWN ON THIS PAGE.
24 THERE MAY BE REASONS WHY THAT TEENAGER MAY HAVE
25 DIFFICULTY SPEAKING WITH THEIR PARENT ABOUT THOSE

1 PROBLEMS. THE FACT THAT THE FILTER IS PREVENTING THOSE
2 CHILDREN FROM GETTING ACCESS TO THOSE MATERIALS IS A
3 VERY IMPORTANT PROBLEM THAT NEEDS TO BE ADDRESSED.

4 SO WE HAVE ADDRESSED THE FACT THAT THE
5 FILTERS HAVE SERIOUS PROBLEMS WITH UNDERBLOCKING ADULT
6 MATERIAL, AND THAT EVEN WHAT APPEAR TO BE SUPERFICIALLY
7 LOW UNDERBLOCKING RATES CAN ONLY COME WITH VERY HIGH
8 OVERBLOCKING RATES.

9 DESPITE THIS, PLAINTIFFS HAVE OFFERED TO
10 YOU THE OPINION OF PROFESSOR LORRIE CRANOR WHO OPINED
11 THAT THE FILTERS ARE EFFECTIVE. YOUR HONOR, HER OPINION
12 SUFFERS FROM SEVERAL IMPORTANT DEFECTS. SHE DID NOT
13 FULLY CONSIDER HER SOURCE MATERIALS AND SHE CITED TO THE
14 WRONG KINDS OF STUDIES. FOR THAT REASON HER OPINION
15 WILL NOT BE OF MUCH VALUE TO YOU IN YOUR DELIBERATIONS.

16 FIRST, THE PROBLEM THAT SHE DEFINED FOR
17 HERSELF IN DEFINING WHETHER A FILTER IS EFFECTIVE IS IF
18 THE FILTER WORKS MOST OF THE TIME. SHE ALSO SAID SHE
19 SIMPLY DID NOT CONSIDER OVERBLOCKING TO BE A RELEVANT
20 MEASURE. AS DR. STARK EXPLAINED TO YOU, IF YOU DEFINE
21 THE PROBLEM THAT WAY, IT'S A VERY EASY QUESTION TO
22 ANSWER BECAUSE A FILTER THAT INDISCRIMINATELY BLOCKED 80
23 PERCENT OF EVERYTHING WOULD BE AN EFFECTIVE FILTER BY
24 THAT DEFINITION. THAT'S CLEARLY THE WRONG DEFINITION.

25 SHE ALSO QUOTED TO YOU THE PORTION OF THE

1 NATIONAL RESEARCH COUNCIL REPORT IN SUPPORT OF HER
2 CONCLUSION THAT FILTERS ARE EFFECTIVE. HER QUOTATION
3 WAS: FILTERS CAN BE HIGHLY EFFECTIVE IN REDUCING THE
4 EXPOSURE OF MINORS TO INAPPROPRIATE CONTENT IF THE
5 INABILITY TO ACCESS LARGE AMOUNTS OF APPROPRIATE
6 MATERIAL IS ACCEPTABLE. NOW, THAT IS OF COURSE A TRUE
7 STATEMENT, BUT THE CENTRAL POINT OF COURSE SHOULD BE
8 THAT THE INABILITY TO ACCESS LARGE AMOUNTS OF
9 APPROPRIATE MATERIAL SHOULD NOT BE ACCEPTABLE.

10 FURTHER, PROFESSOR CRANOR'S METHODOLOGY
11 WAS SIMPLY FLAWED. YOU WILL RECALL HER TESTIMONY ABOUT
12 THE COPA COMMISSION REPORT. SHE TESTIFIED THAT SHE TOOK
13 ONLY A CURSORY LOOK THROUGH THE WHOLE REPORT. SHE WAS
14 TALKING ABOUT SOME OF THE BAR GRAPHS THAT CAME UP AND
15 SOME OF THE RATINGS THAT THE COPA COMMISSIONERS
16 DEVELOPED FOR SOME OF THE DIFFERENT KINDS OF
17 TECHNOLOGIES THAT THEY CONSIDERED. SHE CALLED IT A 20
18 POINT SCALE, BUT IN FACT IF YOU LOOK AT THE ACTUAL
19 REPORT, AT PAGE 15, IT'S VERY CLEAR THAT THE COPA
20 COMMISSIONERS ARE TELLING YOU IT WAS A 10 POINT SCALE.
21 SHE SIMPLY MISREAD THE REPORT. YOU WILL ALSO RECALL HER
22 TESTIMONY REGARDING A STUDY BY AN ORGANIZATION CALLED
23 NETALERT. AND IN HER TESTIMONY SHE WAS LOOKING AT A
24 BLACK AND WHITE COPY OF A CHART IN THAT REPORT. SHE
25 SAID THAT THE CONCLUSION WAS THAT THE FILTERS ARE 100

1 PERCENT EFFECTIVE. BUT IN FACT AS PROFESSOR STARK
2 EXPLAINED TO YOU, THE ORIGINAL COLOR VERSION OF THAT
3 DOCUMENT SHOWED THAT SHE MISREAD THAT CHART. SHE SIMPLY
4 JUST DID NOT FULLY AND ADEQUATELY CONSIDER THE SOURCE
5 MATERIALS THAT SHE WAS CITING TO YOU.

6 MORE FUNDAMENTALLY, THE STUDIES THAT SHE
7 DID CITE ARE OF LIMITED VALUE TO YOU BECAUSE SHE WAS
8 TALKING ABOUT ENTERPRISE FILTERS. THE DISTINCTION
9 BETWEEN ENTERPRISE FILTERS AND RESIDENTIAL FILTERS ARE A
10 SUBJECT THAT HAS BEEN DISCUSSED THROUGHOUT THIS TRIAL.
11 TO REMIND YOU, AN ENTERPRISE FILTER IS A PRODUCT THAT IS
12 USED IN AN INSTITUTIONAL SETTING, A SCHOOL, LIBRARY OR A
13 BUSINESS. IT'S NOT THE SAME THING AS THE KIND OF
14 SOFTWARE THAT IS AVAILABLE FOR HOME USE. AS MR. MEWETT
15 EXPLAINED TO YOU, THE ENTERPRISE FILTERS INVOLVE
16 EXPENDITURES FOR COMPUTER INFRASTRUCTURE ALONG WITH THE
17 SOFTWARE PROGRAM IN THE INSTITUTION. THEY ALSO INVOLVE
18 THE USE OF DEVICES CALLED PROXY SERVERS WHICH IS A
19 DIFFERENT KIND OF DEVICE AND UNLIKELY TO BE FOUND IN THE
20 HOME ENVIRONMENT. FURTHER, ENTERPRISE FILTERS TYPICALLY
21 HAVE TECHNICIANS ASSIGNED TO THEM TO ASSIST IN THEIR
22 OPERATION, FOR EXAMPLE, TO RESPOND TO OVERBLOCKING
23 PROBLEMS THAT MAY ARISE.

24 PROFESSOR CRANOR ARGUED THAT THESE
25 DISTINCTIONS ARE ALL IRRELEVANT BECAUSE WITH THE RIGHT

1 SEVERAL LIBRARIANS. IT IS IMPORTANT TO REMEMBER WHEN
2 THEY DISCUSSED THE EFFECTIVENESS OF FILTERS IN THEIR
3 SCHOOL DISTRICTS THEY WERE TALKING ABOUT ENTERPRISE
4 FILTERS. THEY ARE NOT TALKING ABOUT THE HOME USE OF THE
5 FILTERS. MOREOVER, NONE OF THEM WERE AWARE OF ANY
6 SYSTEMATIC STUDIES OF THE EFFECTIVENESS OF THE FILTER
7 PRODUCTS. THEY JUST SIMPLY SAID THEY HAD NOT HEARD
8 REPORTS OF UNDERBLOCKING PROBLEMS, SO THAT TESTIMONY IS
9 OF VERY LIMITED VALUE.

10 THE COURT: YOU ARE GETTING TO THE POINT
11 THAT YOU SAID YOU COULD BE FINISHED.

12 MR. MCELVAIN: MY GOSH. I HAVE MORE TO
13 GO. I WILL TRY TO SPEED UP.

14 THE COURT: YOU MAY BE USING MS. ULRICH'S
15 TIME.

16 MR. MCELVAIN: SHE WILL BE VERY UPSET
17 WITH ME. I WILL TRY TO BE QUICKER.

18 IN ADDITION TO THE UNDERBLOCKING AND
19 OVERBLOCKING PROBLEMS, THERE IS A PROBLEM OF LACK OF
20 USE. AND AS WAS SHOWN, THERE ARE SERIOUS DEFECTS BOTH
21 IN UNDERBLOCKING AND OVERBLOCKING, BUT A FILTER CAN ONLY
22 BE EFFECTIVE EVEN IN THIS LIMITED FASHION IF IT IS
23 ACTUALLY USED. AND THE EVIDENCE SHOWS THAT MANY PARENTS
24 DON'T ACTUALLY USE THE FILTERS. NOW, PROFESSOR CRANOR
25 TOLD YOU THAT THE PARENTS DON'T USE THESE FILTERS

1 BECAUSE THEY TRUST THEIR CHILDREN OR BECAUSE THEY DON'T
2 ACTUALLY SEE A NEED TO TRY TO BLOCK THE SEXUALLY
3 EXPLICIT CONTENT. BUT THE ONE DOCUMENT THAT SHE CITED
4 IN SUPPORT OF HER CONCLUSION ACTUALLY CONTRADICTS HER.
5 THE AOL STUDY THAT SHE REFERRED TO IN FACT TELLS THAT
6 YOU 72 PERCENT OF THE PARENTS WHO REMOVE THE PARENTAL
7 CONTROLS DID SO BECAUSE THEY THOUGHT THE PRODUCT WAS TOO
8 RESTRICTIVE. THAT'S PAGE 5 OF PLAINTIFFS' EXHIBIT 85.
9 MOREOVER, THE SINGLE MOST IMPORTANT CONCERN RATED BY
10 PARENTS IN THE AOL STUDY WAS THAT THEIR CHILDREN WERE
11 SEEING INAPPROPRIATE MATERIALS. THAT IS AT PAGE 9 OF
12 THE SAME STUDY. SO PARENTS CARE ABOUT THE PROBLEM.
13 THEY ARE HAMPERED BY THE FACT THAT THE FILTERS OVERBLOCK
14 AND THAT PREVENTS THEM FROM USING THE FILTERS TO SOLVE
15 THE PROBLEM.

16 SO FAR WHAT WE HAVE DISCUSSED ARE
17 PROBLEMS WITH FILTERING AND LACK OF USE WITH COMPUTERS
18 IN THE HOME ENVIRONMENT. BUT THE PROBLEM BECOMES EVEN
19 MORE SEVERE WHEN WE CONSIDER THAT THE ACCESS TO THE WEB
20 CAN BE REACHED THROUGH MOBILE PHONES. AS THE EVIDENCE
21 HAS SHOWN, IT IS ACTUALLY HARDER TO EFFECTIVELY FILTER
22 CONTENT ON THESE DEVICES. FIRST, WE SHOULD REMEMBER
23 THAT NO CURRENT PRODUCT ACTUALLY OFFERS ACTUAL FILTERING
24 FOR THE MOBILE DEVICES, AS MR. MEWETT TOLD YOU. SOME OF
25 THE PRODUCERS CLAIM TO HAVE FILTERING PRODUCTS THAT

1 WOULD BE AVAILABLE DOWN THE ROAD, BUT THERE HAS BEEN NO
2 TESTING OF THESE PRODUCTS. WHAT WE DO KNOW, DESPITE
3 THIS LACK OF TESTING, IS THAT MOBILE PAGES ARE HARDER TO
4 RATE, BECAUSE THEY ARE SMALLER, THEY HAVE LESS
5 INFORMATION ON A PAGE THAT WOULD ALLOW THE FILTER TO
6 IDENTIFY THEM. SO ALL OF THE PROBLEMS THAT WE HAVE SEEN
7 WITH FILTERING ON THE PERSONAL COMPUTERS WILL BE THAT
8 MUCH FURTHER COMPOUNDED THROUGH THE USE OF CELL PHONES.
9 AND THAT EVEN COMES FROM THE DEPOSITION OF MR. ALLEN WHO
10 WAS DESCRIBING HIS MOBILE FILTERING PRODUCT WHO HAD NO
11 INCENTIVE TO SAY THAT HIS PRODUCT WOULD BE LESS
12 EFFECTIVE.

13 SO WE HAVE LAID OUT THE LAY OF THE LAND
14 ON WHY FILTERS DON'T FULLY SOLVE THE PROBLEM, WHAT THE
15 COSTS ARE IN TERMS OF REALLY VAST AMOUNTS OF
16 OVERBLOCKING AND THE NEED FOR ANOTHER SOLUTION. AND THE
17 PLAINTIFFS HAVE PUT FORTH THIS CHART WITH A LAUNDRY LIST
18 OF POSSIBLE ALTERNATIVES. THEY HAVE NOT ADDRESSED ALL
19 OF THEM. I WILL ONLY ADDRESS THE ONES THAT PLAINTIFFS'
20 COUNSEL REFERRED TO.

21 BUT FIRST, WHEN THEY REFER TO FILTERING
22 SOFTWARE AS A POSSIBLE SOLUTION, IT'S UNCLEAR WHAT IS
23 MEANT BY THAT BECAUSE, AS I SAID AT THE BEGINNING,
24 FILTERING ALREADY EXISTS, IT'S ALREADY IN USE TODAY. IT
25 WILL STILL EXIST TOMORROW IF COPA GOES INTO EFFECT. IF

1 THE PLAINTIFFS MEAN TO REFER TO THE POSSIBILITY THAT THE
2 GOVERNMENT COULD PROMOTE MORE USE OF FILTERING, AGAIN,
3 YOU WOULD HAVE TO CONSIDER WHAT THE OVERBLOCKING COST
4 IS. THERE ARE REAL -- THERE IS REAL DAMAGE THERE TO THE
5 OVERBLOCKING IF EVERYONE WERE TO USE A FILTER.

6 MR. HANSEN ALSO REFERRED TO THE
7 POSSIBILITY OF OBSCENITY LAWS AS AN ALTERNATIVE. BUT
8 SIMPLY BY DEFINITION THE HARMFUL TO MINORS CATEGORY IN
9 COPA IS A BROADER CATEGORY THAN THAT FOUND IN THE
10 OBSCENITY STATUTE. SO THE OBSCENITY PROSECUTIONS WOULD
11 NOT PROTECT MINORS FROM THIS MATERIAL. TO THE EXTENT
12 THAT PLAINTIFFS ARE NOW ATTEMPTING TO CLAIM THAT THE
13 HARMFUL TO MINORS CATEGORY AND THE OBSCENITY CATEGORY IS
14 CO-EXTENSIVE, YOU HAVE TO REMEMBER THAT THERE IS A
15 DIFFERENCE IN THE STATUTE. COPA APPLIES TO MINORS.
16 OBSCENITY APPLIES TO ALL ADULTS. AND SO THEIR ATTEMPT
17 TO DRAW SOME DISTINCTION BETWEEN WHETHER A 17-YEAR-OLD
18 WOULD -- WHETHER FROM THE STANDARD OF A 17-YEAR-OLD
19 SOMETHING WOULD BE PRURIENT OR WOULD MEET THE OTHER
20 PRONGS VERSUS FROM THE PERSPECTIVE OF A 16-YEAR-OLD IS
21 SIMPLY CORRECT BECAUSE THE OBSCENITY STATUTE DOES NOT
22 APPLY TO 17-YEAR-OLDS. IT REFERS TO ALL ADULTS.

23 AND FURTHER, TO THE EXTENT THAT
24 PLAINTIFFS ARE NOW SEEKING -- NOW SEEKING TO CREATE A
25 SENSE THAT THE OBSCENITY STATUTE AND THE HARMFUL TO

1 MINORS STATUTE ARE CO-EXTENSIVE, I THINK IT'S IMPORTANT
2 TO REMEMBER WHAT THEIR OWN EXPERT, MR. REICHMAN, SAID
3 WHEN HE WAS TALKING ABOUT THE PLAINTIFFS' FEAR OF
4 PROSECUTION. HE SPECIFICALLY SAID THAT NONE OF THE
5 PLAINTIFFS HAD ANY REASON TO FEAR OBSCENITY
6 PROSECUTIONS. AND INDEED, NONE OF PLAINTIFFS PROVIDED
7 ANY TESTIMONY THAT THEY FEARED OBSCENITY PROSECUTIONS,
8 WHICH IS TESTIMONY THAT YOU WOULD EXPECT IF THEY REALLY
9 CONSIDERED THE TWO STATUTES TO BE CO-EXTENSIVE.

10 PLAINTIFFS' COUNSEL ALSO REFERRED TO
11 POSSIBLE ALTERNATIVE OF THE GOVERNMENT PROVIDING A LIST
12 OF WHAT IT CONSIDERS TO BE HARMFUL TO MINORS WEBSITES TO
13 THE FILTERING COMPANIES. BUT YOU WILL RECALL MR. MEWETT
14 TOLD YOU IT'S SIMPLY UNREASONABLE TO EXPECT THAT THE
15 BLACK LISTS WOULD BE FULLY EFFECTIVE ALONE BECAUSE OF
16 THE CONTINUING CHANGING DYNAMIC STYLE OF THE WEB. THE
17 WEB IS SIMPLY TOO LARGE AND CHANGING TOO QUICKLY FOR ANY
18 ONE LIST TO KEEP UP. AND THE IDENTITY OF THE PERSON OR
19 THE ORGANIZATION COMPILING THAT BLACK LIST WOULD NOT
20 MATTER. IT WOULD NOT MATTER IF IT'S THE GOVERNMENT. IT
21 WOULD NOT MATTER IF IT'S SOME ORGANIZATION FUNDED BY THE
22 GOVERNMENT. IT DOES NOT MATTER IF IT'S THE FILTERING
23 COMPANIES THEMSELVES.

24 AND LASTLY THE PLAINTIFFS HAVE REFERRED
25 TO SOME PROPOSALS OF MORE EDUCATION, MORE ACCEPTABLE USE

1 POLICIES, MORE PARENTAL SUPERVISION AS POSSIBLE
2 ALTERNATIVES TO COPA. THESE ARE ALL FINE THINGS OF
3 COURSE AND THAT IS WHY THE GOVERNMENT ALREADY ENCOURAGES
4 THESE THINGS THROUGH A RECENTLY ENACTED STATUTE, PUBLIC
5 LAW 109248. THERE IS A ALREADY A CAMPAIGN IN PLACE TO
6 ENCOURAGE THESE SORT OF PARENTAL SUPERVISION TECHNIQUES.
7 THESE CAN HARDLY BE VIEWED AS AN EFFECTIVE SOLUTION. AS
8 THE NRC REPORT TELLS YOU, THESE ARE USEFUL THINGS BUT
9 THE EXPECTATIONS FOR SUCH EDUCATION AND SOCIALIZATION
10 SIMPLY SHOULD NOT BE UNREALISTIC.

11 SO IN SUM, SHOULD WE COUNT ON ALL OF THE
12 MANY FAMILIES OUT THERE WHO HAVE TO WATCH THEIR CHILDREN
13 ALL THE TIME TO TRY TO STOP THE GAPS AT EVERY POSSIBLE
14 SOURCE OF ADULT CONTENT, OR IS IT BETTER TO TRY TO GET
15 THE MATERIAL AT THE SOURCE, TO TRY TO IMPOSE REASONABLE
16 AND MINIMAL OBLIGATIONS ON THE COMMERCIAL PORNOGRAPHERS
17 THEMSELVES. AND THE EVIDENCE SHOWS THAT YOU REALLY
18 CAN'T EXPECT THAT THE FAMILIES THEMSELVES CAN REALLY
19 FULLY SOLVE THE PROBLEMS, AS THE NATIONAL RESEARCH
20 COUNCIL REPORT TELLS YOU AT PAGE 226. PARENTS IN MANY
21 FAMILIES TODAY FACE LONG WORK DAYS, LONG COMMUTES AND
22 CONSIDERABLE WORK-RELATED OVERNIGHT TRAVEL. SINGLE
23 PARENT HOUSEHOLDS ARE COMMON, AS ARE FAMILIES IN WHICH
24 BOTH PARENTS WORK FULL TIME. THESE FACTS SUGGEST THAT
25 CONTINUAL AND PERSONAL SUPERVISION OF A CHILD'S INTERNET

1 USAGE BY A PARENT IS NOT LIKELY TO BE ACHIEVED BY MANY
2 FAMILIES. I THINK PLAINTIFFS' OWN WITNESS, TERRI KIRK,
3 PUT IT BEST WHEN SHE WAS DESCRIBING HER OWN SCHOOL
4 DISTRICT. SHE WAS DESCRIBING HOW THERE IS A HIGH
5 POVERTY RATE IN HER DISTRICT. AND AS SHE STATED, THAT
6 TRANSLATES THAT WE JUST DON'T HAVE A LOT OF PARENT
7 INVOLVEMENT FROM THOSE PARENTS, THAT JUST GOES SORT OF
8 HAND-IN-HAND. IT IS NICE TO IMAGINE THAT EVERY FAMILY
9 COULD ALWAYS HAVE THE FREEDOM AND THE FREE TIME TO BE
10 CONSTANTLY IN CONTACT WITH THEIR CHILDREN, BUT THERE ARE
11 MANY DEMANDS AND MANY DIFFERENT KINDS OF FAMILIES OUT
12 THERE. THEY NEED FURTHER HELP. AND COPA OFFERS THAT
13 HELP.

14 WITH THE COURT'S INDULGENCE, MY COLLEAGUE
15 MISS ULRICH WILL PRESENT THE REMAINDER OF THE
16 GOVERNMENT'S ARGUMENTS AS TO THE SCOPE OF COPA AND THE
17 SOLUTION THAT COPA OFFERS TO THIS PROBLEM.

18 THE COURT: THANK YOU, MR. MCELVAIN.

19 I WILL START THE CLOCK OVER.

20 MS. ULRICH: I WOULD LOVE TO START THE
21 CLOCK OVER.

22 THE COURT: DO YOUR BEST.

23 MS. ULRICH: GOOD MORNING.

24 THE COURT: GOOD MORNING.

25 MS. ULRICH: COPA WAS ENACTED TO COMBAT A

1 SPECIFIC PROBLEM, THE READY ACCESS OF ADULT MATERIAL,
2 PORNOGRAPHIC MATERIAL ON THE WEB THAT IS HARMFUL TO
3 MINORS. THIS INTEREST IN PROTECTING MINORS IS A
4 COMPELLING GOVERNMENT INTEREST.

5 COPA SETS FORTH THESE GOALS REGARDING
6 RESTRICTING ACCESS TO PORNOGRAPHIC MATERIAL THROUGH ITS
7 STATUTORY LANGUAGE. IT SPECIFICALLY SETS FORTH THE
8 DEFINITION OF HARMFUL TO MINORS, IT APPLIES TO
9 COMMERCIAL WEBSITES, THOSE THAT ARE ENGAGED IN THE
10 BUSINESS OF DISTRIBUTING HARMFUL TO MINORS MATERIAL, AND
11 IT STATES THAT THE DISTRIBUTION MUST BE DONE KNOWINGLY.

12 COPA SETS UP A SYSTEM WHEREBY ADULTS CAN
13 GAIN ACCESS TO ADULT MATERIALS WHILE MINORS CANNOT GAIN
14 ACCESS. THIS SOLUTION TARGETS THE PROBLEM AT ITS
15 SOURCE, THOSE THAT DISTRIBUTE COMMERCIAL PORNOGRAPHY.
16 THIS SOLUTION ALSO USES AFFIRMATIVE DEFENSES THAT HAVE
17 BEEN ESTABLISHED IN OTHER CONTEXTS AND THAT ARE FLEXIBLE
18 ENOUGH TO ADAPT TO A TECHNOLOGICALLY CHANGING
19 ENVIRONMENT.

20 UNDER COPA, THE COMMERCIAL WEBSITE
21 OPERATOR CANNOT DISTRIBUTE HARMFUL TO MINORS MATERIAL
22 UNLESS IT IN GOOD FAITH SEEKS TO RESTRICT ACCESS TO SUCH
23 MATERIAL BY MINORS.

24 A WEBSITE OPERATOR CAN SHOW THIS GOOD
25 FAITH ATTEMPT BY REQUIRING THE USE OF A CREDIT, DEBIT OR

1 ADULT PIN NUMBER, ACCEPTING A DIGITAL CERTIFICATE THAT
2 VERIFIES AGE OR TAKING ANY OTHER REASONABLE MEASURES
3 THAT ARE FEASIBLE UNDER AVAILABLE TECHNOLOGY. AT TRIAL
4 THE EVIDENCE FOCUSED ON TWO OF THESE AFFIRMATIVE
5 DEFENSES, THE CREDIT OR DEBIT CARD AFFIRMATIVE DEFENSE
6 AND THE OTHER REASONABLE MEASURES OF VERIFYING AGE. I
7 WOULD LIKE TO ADDRESS THE CREDIT OR DEBIT CARDS FIRST.

8 CONGRESS NOTED IN ENACTING COPA THAT
9 CREDIT CARDS ARE AN AFFIRMATIVE DEFENSE IN THE FCC'S
10 DIAL-A-PORN REGULATIONS WHICH HAVE BEEN UPHELD BY THE
11 COURTS. PLAINTIFFS NOTE CERTAIN POLICIES OF CREDIT CARD
12 COMPANIES REGARDING THE USE OF AGE VERIFICATION.
13 HOWEVER, THESE POLICIES HAVE NOT STOPPED COURTS FROM
14 ALLOWING CREDIT CARDS AS AN AFFIRMATIVE DEFENSE WHEN IT
15 COMES TO PROTECTING MINORS FROM HARMFUL CONTENT.

16 COURTS HAVE APPROVED CREDIT CARDS BECAUSE
17 WHAT IS COMMON SENSE KNOWLEDGE, THAT AS A GENERAL RULE,
18 ADULTS HAVE CREDIT CARDS AND MINORS DON'T. BUT THE
19 COURT DOES NOT NEED TO RELY SIMPLY ON COMMON SENSE FOR
20 THIS PROPOSITION. THE TESTIMONY OF DEFENDANT'S EXPERT
21 ART CLARK DEMONSTRATES THAT THE VAST MAJORITY OF ADULTS
22 HAVE CREDIT OR DEBIT CARDS. MR. CLARK TALKED ABOUT WHAT
23 HE TERMED TRADITIONAL PAYMENT CARDS. THIS PHRASE REFERS
24 TO THREE THINGS: CREDIT CARDS, WHICH INVOLVE USING A
25 LINE OF CREDIT; DEBIT CARDS, WHICH INVOLVE ACCESSING

1 MONEY FROM YOUR CHECKING ACCOUNT; AND A RELOADABLE
2 PREPAID CARD. THESE ARE CARDS THAT CAN BE PURCHASED FOR
3 CASH AND RELOADED WITH MORE MONEY.

4 MR. CLARK TESTIFIED THAT THESE
5 TRADITIONAL PAYMENT CARDS HAVE FIVE UNIQUE
6 CHARACTERISTICS THAT MAKE IT A VALID AFFIRMATIVE DEFENSE
7 UNDER COPA. THEY HAVE HIGH ADOPTION RATES BY WEBSITE
8 OPERATORS AND CONSUMERS. IN OTHER WORDS, PEOPLE USE
9 THEM ON THE WEB. THEY HAVE WIDESPREAD ACCESS BY ADULTS.
10 IN FACT, MR. CLARK TESTIFIED THAT THE VAST MAJORITY OF
11 ADULTS IN THE UNITED STATES HAVE THESE TRADITIONAL
12 PAYMENT CARDS. AND THEY HAVE LIMITED ACCESS BY
13 CHILDREN. THOSE THAT HAVE ACCESS CAN BE SUPERVISED BY
14 THEIR PARENTS BECAUSE THE TRANSACTIONS CREATE A BILLING
15 RECORD.

16 PLAINTIFFS STATE THAT CREDIT CARDS ARE
17 NOT A VIABLE AFFIRMATIVE DEFENSE UNDER COPA BECAUSE
18 CHILDREN HAVE ACCESS TO THEM. THIS ASSERTION IS WRONG.
19 MR. CLARK'S OPINION IS THAT APPROXIMATELY 11 PERCENT OF
20 12 TO 17-YEAR-OLDS HAVE A CREDIT OR DEBIT CARD IN THEIR
21 OWN NAME AND ANOTHER 11 PERCENT HAVE ACCESS TO A PAYMENT
22 CARD IN ANOTHER MANNER, SUCH AS BORROWING IT FROM A
23 PARENT OR A FRIEND. THE EVIDENCE SHOWS THAT THE
24 TEENAGERS THAT HAVE CARDS IN THEIR OWN NAMES HAVE IT AS
25 AN EXTRA CARD ON THEIR PARENT'S ACCOUNT. ADULTS ARE THE

1 ONES WHO ARE PRIMARY CARDHOLDERS. THE EVIDENCE SHOWS
2 THAT WHILE ADULTS HAVE CREDIT AND DEBIT CARDS, BANKS DO
3 NOT ISSUE THESE CARDS TO MINORS. STATE AGE OF MAJORITY
4 LAWS DETER BANKS FROM ISSUING THEM. EVEN FOR THE
5 PERCENTAGE OF CHILDREN THAT HAVE ACCESS TO CREDIT CARDS,
6 THAT DOES NOTHING TO UNDERMINE COPA'S EFFECTIVENESS
7 BECAUSE THE CREDIT CARDS ARE STILL IN THE ADULT'S NAME
8 AND ADULTS HAVE EVERY OPPORTUNITY TO MONITOR THE
9 ACTIVITY ON THESE CARDS.

10 TESTIMONY WAS ALSO READ INTO THE RECORD
11 FROM VARIOUS CREDIT CARD COMPANIES, AND THEY SUPPORT
12 MR. CLARK'S OPINION. MASTERCARD TESTIFIED ABOUT ITS
13 FAMILY ACCOUNT IN WHICH THE PRIMARY CARDHOLDER CAN HAVE
14 ADDITIONAL CARDS FOR THEIR CHILDREN ATTACHED TO THE
15 ACCOUNT. DISCOVER TESTIFIED THAT DISCOVER HAS A POLICY
16 NOT TO ISSUE CARDS TO PEOPLE UNDER 17 YEARS OLD. THIS
17 POLICY IS BASED ON THE FACT THAT PEOPLE UNDER 18 CANNOT
18 BE HELD LEGALLY RESPONSIBLE FOR THEIR PURCHASES. AND
19 VISA TESTIFIED ABOUT THE VISA BUXX CARD. THESE ARE
20 CARDS WHERE BOTH TEENAGERS AND ADULTS HAVE ACCESS TO THE
21 CARD. THE ADULTS CAN HAVE THE CHILD AS AN AUTHORIZED
22 USER, BUT THE ADULT IS THE ONE WHO'S RESPONSIBLE FOR THE
23 ACCOUNT.

24 PLAINTIFFS HAVE ALSO STATED THAT COPA'S
25 CREDIT CARD DEFENSE IS INEFFECTIVE BECAUSE THERE ARE

1 PREPAID CARDS ON THE MARKET AND THEY CAN BE USED TO
2 ACCESS SEXUALLY EXPLICIT MATERIAL BY CHILDREN. AGAIN,
3 PLAINTIFFS ARE WRONG IN THEIR CONCLUSIONS. MR. CLARK
4 DISCUSSED TWO TYPES OF PREPAID CARDS THAT ARE ON THE
5 MARKET, THERE ARE RELOADABLE PREPAID CARDS THAT CAN BE
6 USED OVER AND OVER AND THERE ARE NONRELOADABLE GIFT
7 CARDS. RELOADABLE CARDS ARE CARDS FROM CREDIT COMPANIES
8 LIKE VISA, MASTERCARD, AMERICAN EXPRESS AND DISCOVER.
9 THESE ALLOW ADULTS WHO DO NOT HAVE THEIR OWN CREDIT CARD
10 TO GET A CARD THAT CAN BE USED FOR ONLINE PURCHASES IN
11 THE VERY SAME WAY AS A CREDIT CARD COULD. SO THESE
12 CARDS ARE A VALUABLE TOOL FOR ADULTS WHO WANT TO ACCESS
13 ONLINE CONTENT BUT DON'T HAVE THEIR OWN CREDIT CARD FOR
14 BAD CREDIT OR ANY OTHER REASON. RELOADABLE PREPAID
15 CARDS HOWEVER WILL NOT BE USED BY MINORS TO ACCESS
16 MATERIAL ON THE WEB. THIS IS BECAUSE SINCE AT LEAST
17 2002, CARD ISSUING INSTITUTIONS HAVE BEEN REQUIRED BY
18 THE KNOW-YOUR-CUSTOMER PROVISIONS OF THE BANK SECRECY
19 ACT AS AMENDED BY THE PATRIOT ACT TO VERIFY THE IDENTITY
20 OF ALL NEW CUSTOMERS. THESE REGULATIONS REQUIRE THE
21 COLLECTION OF CERTAIN INFORMATION, INCLUDING AN ADDRESS
22 OF A CUSTOMER. THESE REGULATIONS ALSO REQUIRE THAT THE
23 CUSTOMER BE AN ADULT. BOTH MR. CLARK AND PLAINTIFFS'
24 EXPERT, PROFESSOR MANN, TESTIFIED THAT THE PATRIOT ACT
25 APPLIES TO RELOADABLE PREPAID CARDS IN ADDITION TO

1 CREDIT AND DEBIT CARDS. MR. CLARK ALSO TESTIFIED, BASED
2 ON HIS EXPERIENCE AS A CONSULTANT FOR CREDIT CARD
3 COMPANIES, THAT CREDIT CARD COMPANIES FOLLOW THE
4 REQUIREMENTS OF THE PATRIOT ACT IN ISSUING THESE
5 RELOADABLE CARDS. BECAUSE RELOADABLE PREPAID CARDS ARE
6 TIED TO ADULT USE, THEY CAN BE USED TO COMPLY WITH COPA.
7 NOW THERE IS ANOTHER TYPE OF PREPAID CARD
8 AND THAT IS THE NONRELOADABLE PREPAID CARD. ON THESE
9 CARDS THERE IS A SET AMOUNT OF MONEY AND ONCE THE MONEY
10 IS SPENT, THE CARDS ARE SIMPLY TOSSED OUT. YOU CAN'T
11 ADD MORE MONEY TO THEM. THE VAST MAJORITY OF THESE
12 CARDS ARE WHAT'S CALLED CLOSED SYSTEM GIFT CARDS OR
13 ONLINE GIFT CERTIFICATES. THESE ARE GIVEN OUT BY A
14 STORE FOR USE IN THAT STORE, LIKE A BARNES AND NOBLE
15 GIFT CARD, FOR EXAMPLE. THIS IS NOT A CONCERN UNDER
16 COPA BECAUSE THESE ARE NOT GENERAL USE CARDS. THERE ARE
17 SOME NONRELOADABLE CARDS THAT ARE CALLED OPEN SYSTEM
18 GIFT CARDS, AND THESE ARE NOT LIMITED TO ANY ONE STORE
19 BUT CAN BE USED IN A VARIETY OF PLACES. THESE
20 NONRELOADABLE PREPAID CARDS HAVE ONE IMPORTANT
21 CHARACTERISTIC. THEY DO NOT HAVE RECORDS OF A BILLING
22 ADDRESS ATTACHED TO THEM. ACCORDING TO MR. CLARK,
23 ONLINE MERCHANTS CAN AND FOR REASONS OF FRAUD PREVENTION
24 GENERALLY DO DECLINE THESE RELOADABLE --NONRELOADABLE
25 PREPAID CARDS BECAUSE THEY LACK A BILLING ADDRESS. IN

1 ADDITION THE VOLUME OF SALES ON THESE NONRELOADABLE
2 PREPAID CARDS IS VERY SMALL, LESS THAN 1 PERCENT OF THE
3 VOLUME VERSUS CREDIT OR DEBIT CARDS. THE FACT THAT
4 NONRELOADABLE PREPAID CARDS EXIST AND THE FACT THAT
5 MINORS MAY BE ABLE TO PURCHASE THEM DOES NOT UNDERMINE
6 COPA'S CREDIT CARD AFFIRMATIVE DEFENSE.

7 THE AFFIRMATIVE DEFENSES ARE TO INSULATE
8 MERCHANTS WHO PROVIDE REASONABLE MEASURES TO KEEP
9 CHILDREN AWAY FROM HARMFUL TO MINORS MATERIALS.
10 TRADITIONAL PAYMENT CARDS ARE THIS REASONABLE MEASURE.
11 AND BASED ON MR. CLARK'S TESTIMONY, THE MARKET FOR
12 NONRELOADABLE PREPAID CARDS IS TOO SMALL TO CHANGE THE
13 OVERALL CONCLUSION THAT PAYMENT CARDS AS A GENERAL RULE
14 ARE CONTROLLED BY ADULTS. EVEN IN THE SMALL INSTANCES
15 WHERE TEENAGERS PURCHASE NONRELOADABLE PREPAID CARDS,
16 ONLINE MERCHANTS WILL GENERALLY PROHIBIT TRANSACTIONS ON
17 THESE CARDS DUE TO FRAUD CONCERNS. PLAINTIFFS' EXPERT
18 RONALD MANN DOES NOT DISTINGUISH BETWEEN THESE
19 RELOADABLE AND NONRELOADABLE PREPAID CARDS IN HIS EXPERT
20 REPORT. THIS DISTINCTION, HOWEVER, IS CRITICAL.

21 PLAINTIFFS HAVE ATTACKED THE CREDIT CARD
22 DEFENSE OF COPA BECAUSE OF COST. HOWEVER, AS THE
23 SUPREME COURT STATED IN SABLE COMMUNICATIONS, THE MERE
24 FACT THAT THERE ARE COSTS INVOLVED IN COMPLIANCE WITH
25 THE LAW DOES NOT MAKE THE LAW UNCONSTITUTIONAL.

1 MR. HANSEN ALSO MENTIONED ZERO DOLLAR
2 TRANSACTIONS AND WHETHER MERCHANTS WOULD BE WILLING TO
3 DO ZERO DOLLAR TRANSACTIONS. THERE IS SOME TESTIMONY
4 FROM CREDIT CARDS IN THE RECORD. MASTERCARD STATED THAT
5 AS A GENERAL MATTER, IT PROHIBITS PROCESSING OF A
6 PAYMENT CARD WITHOUT A TRANSACTION, BUT THERE ARE
7 LIMITED EXCEPTIONS TO THAT. VISA ALSO STATED THAT AS A
8 RULE -- THAT IT HAS RULES TO PROHIBIT A MERCHANT FROM
9 ESTABLISHING A MINIMUM AMOUNT FOR A TRANSACTION. SO A
10 MERCHANT WOULD HAVE TO ACCEPT A TRANSACTION THAT WAS
11 ONLY A FEW CENTS. THERE IS ALSO TESTIMONY IN THE RECORD
12 BY DOUG KNOPPER OF BITPASS, WHICH IS A METHOD BY WHICH
13 VERY SMALL PAYMENTS ON THE CONSUMER END CAN BE USED,
14 PAYMENTS AS LOW AS ONE CENT, AND THE BITPASS SOLUTION IS
15 OF LOW COST TO MERCHANTS, THERE ARE NO START UP FEES.
16 THEY JUST TAKE A PERCENTAGE.

17 IN ANY EVENT PAYMENT CARDS ARE NOT THE
18 ONLY AFFIRMATIVE DEFENSE TO COPA. UNDER COPA A WEBSITE
19 OPERATOR IS NOT LIABLE IF HE USES OTHER REASONABLE MEANS
20 THAT ARE FEASIBLE UNDER AVAILABLE TECHNOLOGY TO RESTRICT
21 ACCESS BY MINORS. AT TRIAL, THERE WAS TESTIMONY ABOUT
22 IDENTITY AND AGE VERIFICATION PRODUCTS, SUCH AS IDOLOGY,
23 WHICH IS ANOTHER REASONABLE MEANS BY WHICH WEBSITE
24 OPERATOR COULD COMPLY WITH COPA.

25 YOU HEARD TESTIMONY FROM JOHN DANCU, THE

1 CEO OF IDOLOGY. IDOLOGY IS ONE OF SEVERAL COMPANIES
2 THAT PROVIDE THIS SERVICE. THE DEFENDANT HAS LISTED
3 THEM AS PROVIDING SERVICES THAT WOULD MEET COPA'S
4 AFFIRMATIVE DEFENSE REQUIREMENTS. IDOLOGY HAS THE
5 CAPABILITY OF VERIFYING SOMEONE'S AGE BASED ON DATA
6 RECORDS. AT A MINIMUM, THEY CAN VERIFY AGE BASED ON THE
7 FIRST NAME, LAST NAME, STREET ADDRESS AND ZIP CODE.
8 THEY CAN ALSO MAKE THEIR PRODUCT MORE STRINGENT IN ITS
9 REQUIREMENTS FOR VERIFYING AGE, SUCH AS USING THE LAST
10 FOUR DIGITS OF SOMEONE'S SOCIAL SECURITY NUMBER.

11 IDOLOGY ALSO HAS THE CAPABILITY OF
12 VERIFYING AGE OR IDENTITY BASED ON A SERIES OF QUESTIONS
13 THAT ONLY THE PERSON IDENTIFIED WOULD KNOW. FOR
14 EXAMPLE, THEY CAN OFFER MULTIPLE CHOICE QUESTIONS ABOUT
15 PAST ADDRESSES OR MAKES OF CARS. MR. DANCU TESTIFIED
16 THAT IDOLOGY USES OVER 10,000 DATA SOURCES THAT
17 ENCOMPASS CLOSE TO 450 MILLION INDIVIDUALS IN THE UNITED
18 STATES. THESE SOURCES INCLUDE A MYRIAD OF INFORMATION
19 SOURCES INCLUDING DRIVER'S LICENSE RECORDS, VOTER
20 REGISTRATIONS, PROPERTY DEEDS, MARRIAGES AND DIVORCES,
21 CREDIT REPORTS AND EVEN HUNTING AND FISHING LICENSES.
22 THESE DATA SOURCES, PARTICULARLY THE DRIVER'S LICENSE
23 RECORDS, VOTER REGISTRATIONS AND APARTMENT LEASING
24 RECORDS THAT HE MENTIONED, CAN VERIFY EVEN YOUNG ADULTS.
25 THIS AGE VERIFICATION IS DONE IN LESS THAN A SECOND.

1 IDOLOGY HAS CLIENTS THAT USE IT FOR AGE VERIFICATION,
2 SUCH AS KENDALL JACKSON WINERIES. ITS AGE VERIFICATION
3 PROCESS HAS BEEN APPROVED BY THE STATE OF MICHIGAN FOR
4 USAGE BY WINERIES DOING BUSINESS IN MICHIGAN. THIS
5 APPROVAL CAME AFTER TESTING OF THE IDOLOGY TECHNOLOGY.

6 IDOLOGY ALSO CURRENTLY PROVIDES SERVICES
7 FOR WEBSITES SELLING ACCESS TO ADULT CONTENT. AND AS
8 MR. DANCU TESTIFIED, THE WEBSITE CAN DECIDE WHETHER TO
9 HAVE SOMEONE REVERIFY FOR EVERY VISIT OR WHETHER THEY
10 WANT TO PROVIDE CUSTOMERS WITH A PASSWORD THAT CAN BE
11 REUSED ON THAT WEBSITE OR AN AFFILIATE WEBSITE.

12 IDOLOGY ALSO PROVIDES AGE VERIFICATION
13 FOR COMPANIES PROVIDING FREE CONTENT ON THE WEB. MR.
14 DANCU TESTIFIED THAT A TOBACCO COMPANY USES IDOLOGY TO
15 VERIFY AGE TO PROVIDE ACCESS TO CONTENT ON ITS WEBSITE.

16 MR. DANCU ALSO TESTIFIED THAT IDOLOGY
17 PROVIDES AGE VERIFICATION FOR ACCESS TO THE MOBILE
18 DEVICE INDUSTRY.

19 IDOLOGY IS NOT THE ONLY COMPANY THAT DOES
20 THIS AGE AND IDENTITY VERIFICATION. AS MR. DANCU
21 TESTIFIED, IT'S A COMPETITIVE BUSINESS, AND IDOLOGY'S
22 COMPETITORS INCLUDE CHOICEPOINT, ID RESPONSE AND
23 ARISTOTLE. IN FACT, THERE IS SOME CHOICEPOINT
24 DEPOSITION TESTIMONY ENTERED IN THIS CASE AND
25 CHOICEPOINT STATED THAT IT BELIEVES ITS DATA RECORDS

1 COVER BETWEEN 92 AND 95 PERCENT OF THE ADULT POPULATION
2 OF THE UNITED STATES.

3 PLAINTIFFS HAVE ELICITED SOME TESTIMONY
4 REGARDING THE COSTS OF VARIOUS SERVICES FOR THESE
5 AFFIRMATIVE DEFENSES IN AN EFFORT TO SHOW THAT THEY ARE
6 UNCONSTITUTIONALLY BURDENSOME. THESE CONCERNS ARE
7 OVERSTATED. FIRST, AS A LEGAL MATTER, THERE IS NO
8 CONSTITUTIONAL IMPEDIMENT TO ENACTING A LAW THAT MAY
9 IMPOSE COSTS ON A MEDIUM FOR ELECTING TO PROVIDE
10 INDECENT MESSAGES. SECOND, AS A FACTUAL MATTER, THE
11 MODEST BURDENS OF COPA'S AFFIRMATIVE DEFENSES CAN BE
12 HANDLED BY BOTH WEBSITES THAT FALL WITHIN COPA'S SCOPE
13 AS WELL AS THE CONSUMERS.

14 IT IS IMPORTANT TO KEEP IN MIND WHAT COPA
15 REGULATES AND THAT IS COMMERCIAL WEBSITES. DR. SCOTT
16 SMITH TESTIFIED AT LENGTH ABOUT WHETHER COMMERCIAL
17 WEBSITES WOULD BE HARMED BY COPA. HE CONCLUDED THAT
18 COPA WILL NOT HAVE A SIGNIFICANT IMPACT ON THE WEBSITES
19 COVERED BY COPA. HE STATED THAT SUBSCRIPTION WEBSITES,
20 ONE TYPE OF COMMERCIAL WEBSITE, WILL HAVE NO DIFFICULTY
21 COMPLYING WITH COPA. ALL THEY HAVE TO DO IS TONE DOWN
22 TEASERS THAT WOULD BE IN FRONT OF AGE VERIFICATION AND
23 MOVE THE AGE VERIFICATION SCREEN. ADVERTISING WEBSITES
24 WON'T LOSE REVENUE BECAUSE THE AREA OF THE WEBSITE
25 BEFORE THE VERIFICATION BARRIER WILL NOT LOSE TRAFFIC,

1 AND THAT NO COMMERCIAL WEBSITE WILL PLACE THE
2 VERIFICATION BARRIER ON THE FIRST PAGE, THAT SHOWING
3 SAMPLE OR FREE CONTENT IS ESSENTIAL TO A COMMERCIAL
4 WEBSITE TO ENTICE THE CUSTOMER INTO THE WEBSITE.
5 WEBSITES CAN ALSO MAKE CONSUMERS FEEL MORE COMFORTABLE
6 WITH THEIR WEBSITE BY POSTING A PRIVACY POLICY AND BY
7 USING VERISIGN OR ANOTHER COMPANY THAT PROVIDES SECURE
8 TRANSACTIONS ON THE INTERNET.

9 DR. SMITH ALSO TESTIFIED ABOUT THE EFFECT
10 ON CONSUMERS. HE TESTIFIED THAT CONSUMERS OF ADULT
11 CONTENT ARE MOTIVATED CONSUMERS WHO WILL NOT BE DETERRED
12 BY AGE VERIFICATION REQUIREMENTS. HE ALSO TESTIFIED
13 THAT CONSUMERS ARE USED TO PURCHASING VISUALLY CONSUMED
14 CONTENT PRIOR TO VIEWING IT AND THAT CONSUMERS WILL
15 ADAPT QUICKLY TO THE CHANGE OF EXPECTATIONS FOR WHAT IS
16 REQUIRED TO VIEW ADULT CONTENT ONLINE. HE ALSO
17 TESTIFIED THAT ALTHOUGH MANY CONSUMERS EXPRESS SOME
18 RETICENCE ABOUT PROVIDING PERSONAL INFORMATION ON THE
19 INTERNET, WHAT CONSUMERS ACTUALLY DO IS A BETTER MEASURE
20 OF CONSUMER BEHAVIOR THAN WHAT THEY SAY. AS HE
21 TESTIFIED, E-COMMERCE IS THRIVING AND MORE AND MORE
22 PEOPLE ARE SHOPPING ONLINE.

23 WE ALSO HEARD TESTIMONY FROM DOUG
24 KNOPPER OF BITPASS. HIS COMPANY MAKES A PRODUCT THAT
25 CAN BE USED IN CONJUNCTION WITH CREDIT CARDS THAT MAKES

1 MANY OF PLAINTIFFS' PREDICTIONS ABOUT THE HIGH COST TO
2 CONSUMERS OBSOLETE. USING BITPASS'S PRODUCT, A CUSTOMER
3 CAN PURCHASE ACCESS TO ONLINE CONTENT FOR VERY SMALL
4 AMOUNTS, AS LITTLE AS ONE CENT. AND BITPASS ALLOWS
5 CUSTOMERS TO BUY DIGITAL CONTENT FOR THESE VERY LOW
6 AMOUNTS WITHOUT INTERRUPTING THE FLOW OF THE WEB SURFING
7 EXPERIENCE. A CUSTOMER CAN SET UP AN ACCOUNT FOR AS
8 LITTLE AS THREE DOLLARS.

9 PLAINIFFS ALSO TRY TO RAISE AN ARGUMENT
10 THAT CREATING AN AGE VERIFICATION SCREEN WILL CAUSE
11 TECHNOLOGICAL BARRIERS TO WEBSITES. ACCORDING TO PAUL
12 MEWETT, DEFENDANT'S EXPERT, HE EXPLAINED THAT EVEN WEB
13 PAGES AFTER AN AGE VERIFICATION PAGE CAN BE INDEXED BY
14 SEARCH ENGINES SUCH AS GOOGLE. THEREFORE WEBSITES DO
15 NOT HAVE TO WORRY THAT AN AGE VERIFICATION SCREEN WILL
16 CAUSE INDEX ES TO SKIP OVER THEIR SITES.

17 MANY OF THE PLAINTIFFS TESTIFIED THAT IF
18 COPA BECOMES LAW THEY WOULD NEED TO PLACE AN AGE
19 VERIFICATION BARRIER AT THE FRONT PAGE OF THEIR WEBSITE.
20 THIS IS SIMPLY NOT TRUE. FIRST, THEY ARE NOT COVERED BY
21 COPA. THEY ARE NOT ENGAGED IN THE BUSINESS OF PROVIDING
22 MATERIAL THAT IS HARMFUL TO MINORS. COPA IS ADDRESSED
23 TO PORNOGRAPHY WEBSITES THAT ARE ENGAGED IN THE BUSINESS
24 OF PROVIDING HARMFUL TO MINORS MATERIAL AND THE AGE
25 VERIFICATION SCREEN IS BASED ON CONGRESS'S UNDERSTANDING

1 OF THE COMMERCIAL PORNOGRAPHY WEBSITE MODEL, THOSE THAT
2 HAVE TEASERS UP FRONT AND REQUIRE CREDIT CARDS TO ACCESS
3 THE MATERIAL. SECONDLY, THERE IS NO REQUIREMENT IN COPA
4 THAT AGE VERIFICATION BE ON THE FRONT PAGE. IT ONLY
5 NEEDS TO BE BEFORE HARMFUL TO MINORS MATERIAL.

6 PLAINTIFFS STATED THAT BECAUSE THEY HAVE
7 SEXUALLY EXPLICIT CONTENT THEY WOULD NOT KNOW WHERE TO
8 PUT AN AGE VERIFICATION SCREEN OTHER THAN THE FRONT
9 PAGE. WELL, COPA DOES NOT COVER ALL SEXUALLY EXPLICIT
10 MATERIAL. EVEN IF MATERIAL IS SEXUALLY EXPLICIT, IF IT
11 HAS VALUE FOR OLDER MINORS IT IS NOT COVERED BY COPA.

12 PLAINTIFFS ASSERTION THAT THEY WOULD HAVE
13 TO PUT ANY WARNINGS ON THE FRONT PAGE, IF IN FACT THEY
14 WERE COVERED BY COPA, IS ACTUALLY BELIED BY THE
15 TESTIMONY AT TRIAL. CONDOMANIA, ONE OF THE PLAINTIFFS,
16 ALREADY HAS AN ADULT WARNING SCREEN TO COVER CERTAIN
17 MATERIAL ON ITS WEBSITE THAT IT CONSIDERS TO BE MORE
18 ADULT IN NATURE. HEATHER CORINNA, ANOTHER PLAINTIFF,
19 TESTIFIED THAT SHE ALSO MARKED CERTAIN WORKS ON THE
20 SCARLET LETTERS WEBSITE WITH A SYMBOL THAT THE MATERIAL
21 IS MORE EXPLICIT IN CONTENT. AND SHE ALSO TESTIFIED
22 ABOUT HER FEMMEROTIC WEBSITE WHERE ONE NEEDS A
23 SUBSCRIPTION TO SEE THE MOST SEXUALLY EXPLICIT MATERIAL
24 AND IF ONE DOES NOT HAVE A SUBSCRIPTION, THEY GET TO SEE
25 WORK SAFE SAMPLES. NERVE, LIKewise, ALREADY HAS A

1 PREMIUM SUBSCRIPTION MODEL IN PLACE THAT GIVES ACCESS TO
2 MATERIAL THAT IS MORE SEXUALLY EXPLICIT THEN THE FREELY
3 AVAILABLE CONTENT.

4 ONE THING THE COURT WILL BE DECIDING IS
5 IF COPA IS SUFFICIENTLY NARROWLY TAILORED. AND CONGRESS
6 TOOK SEVERAL STEPS TO NARROWLY TAILOR THE STATUTE BASED
7 ON SUPREME COURT GUIDANCE.

8 THERE WAS A COMMUNICATIONS DECENCY ACT
9 THAT WAS A PREDECESSOR TO COPA AND THIS PROHIBITED
10 INDECENT MATERIAL BOTH ON THE WORLDWIDE WEB AND BEYOND,
11 COVERING E-MAIL AND CHAT ROOMS. THE ACLU SUED OVER THAT
12 LAW, ARGUING, AMONG OTHER THINGS, THAT BECAUSE IT
13 APPLIED TO ASPECTS OF THE INTERNET BEYOND THE WORLDWIDE
14 WEB, IT WASN'T NARROWLY TAILORED. THE ACLU WON THAT
15 LAWSUIT. CONGRESS PASSED A NEW LAW NARROWLY TAILORING
16 IT TO THE PROBLEMS ON THE WORLDWIDE WEB WHERE COMMERCIAL
17 PORNOGRAPHY IS PUBLICLY AVAILABLE AND PERVASIVE. RATHER
18 THAN ACKNOWLEDGING THIS NARROW TAILORING, THE ACLU
19 ATTACKS IT, SAYING THAT COPA IS NOT CONSTITUTIONAL
20 BECAUSE IT DOES NOT GO BEYOND THE WORLDWIDE WEB.

21 PLAINTIFFS ARGUE THAT COPA IS NOT
22 EFFECTIVE BECAUSE IT DOES NOT COVER CERTAIN OTHER
23 ASPECTS OF THE INTERNET, LIKE USENET GROUPS, E-MAIL,
24 INSTANT MESSAGING, CHAT OR PEER-TO-PEER. THE COURT
25 SHOULD NOT DWELL TOO LONG ON THIS DISINGENUOUS ARGUMENT

1 FOR REASONS BOTH FACTUAL AND LEGAL. AS A LEGAL MATTER,
2 THE ACLU CANNOT TAKE AN INCONSISTENT POSITION IN
3 LITIGATION ON AN ISSUE FOR WHICH THEY PREVIOUSLY
4 PREVAILED. IT'S CALLED HAVING YOUR CAKE AND EATING IT
5 TOO. AND IT IS PROHIBITED BY THE DOCTRINE OF JUDICIAL
6 ESTOPPEL.

7 ALSO AS A LEGAL MATTER, IT IS ENTIRELY
8 APPROPRIATE FOR CONGRESS TO LEGISLATE TO ADDRESS ISSUES
9 INCREMENTALLY. THE SUPREME COURT HAS STATED AND I
10 QUOTE: REFORM MAY TAKE ONE STEP AT A TIME, ADDRESSING
11 ITSELF TO THE PHASE OF THE PROBLEM THAT SEEMS MOST ACUTE
12 TO THE LEGISLATIVE MIND. THAT IS FROM MCCONNELL VERSUS
13 FEDERAL ELECTION COMMISSION, 540 U.S. 93, AT 207 TO 08.
14 WHAT IS THE PROBLEM THAT CONGRESS WAS SEEKING TO
15 ADDRESS? THE PROBLEM OF READILY PUBLICLY ACCESSIBLE
16 MATERIAL ON THE INTERNET THAT IS HARMFUL TO MINORS.

17 THE PLAINTIFFS CALLED DR. FELTEN TO
18 DISCUSS THE TECHNICAL ASPECTS OF THE INTERNET THAT ARE
19 NOT THE WEB. NOTHING IN DR. FELTEN'S TESTIMONY DOES
20 ANYTHING TO UNDERMINE THE EFFECTIVENESS OF COPA. DR.
21 FELTEN TESTIFIED ABOUT CERTAIN INTERNET APPLICATIONS FOR
22 WHICH COPA DOES NOT APPLY AND ARE NOT PUBLICLY
23 ACCESSIBLE. THIS IS E-MAIL, VOICE OVER IP PROTOCOL,
24 WHICH IS A WAY PEOPLE CAN MAKE TELEPHONE CALLS THROUGH
25 THE INTERNET, CHAT, AND INSTANT MESSAGING. THE

1 IMPORTANT THING ABOUT EACH OF THESE PROTOCOLS IS THAT
2 THEY ARE NOT PUBLICLY AVAILABLE. BECAUSE THEY ARE NOT
3 PUBLICLY AVAILABLE IN THE SAME MANNER AS THE WORLDWIDE
4 WEB, THEY DO NOT POSE THE SAME RISKS AND CONCERNS AS
5 PUBLICLY AVAILABLE MATERIAL ON THE WEB, NOR HAS THERE
6 BEEN ANY TESTIMONY THAT COMMERCIAL PORNOGRAPHY, THE
7 TARGET OF THE CONGRESSIONAL LEGISLATION, IS EVEN
8 PREVALENT WITH THESE NONPUBLIC PROTOCOLS.

9 PLAINTIFFS ALSO OFFERED TESTIMONY ABOUT
10 PEER-TO-PEER NETWORKS. AND THESE ARE WAYS THROUGH WHICH
11 PEOPLE CAN SHARE FILES WITH EACH OTHER. THERE WAS NO
12 TESTIMONY THAT COMMERCIAL PORNOGRAPHY IS DISTRIBUTED
13 USING PEER-TO-PEER NETWORKS. IN FACT, DR. FELTEN DID
14 NOT KNOW WHAT PERCENTAGE OF PEER-TO-PEER FILE
15 DISTRIBUTIONS WERE PORNOGRAPHIC AT ALL.

16 PLAINTIFFS HAVE ALSO PROVIDED TESTIMONY
17 BY DR. FELTEN THAT THERE ARE CERTAIN TECHNOLOGIES ON THE
18 INTERNET LIKE STREAMING VIDEO AND STREAMING AUDIO. AND
19 HE STATES THAT BECAUSE THESE DO NOT USE HTTP PROTOCOLS,
20 THE PROTOCOL OF THE WEB, THE PLAINTIFFS CONCLUDE THAT
21 THESE ARE OUTSIDE THE SCOPE OF COPA. HOWEVER, STREAMING
22 AUDIO AND VIDEO THAT IS ACCESSIBLE ON THE WEB IS COVERED
23 BY COPA. AND DR. FELTEN'S EXAMPLES OF STREAMING AUDIO
24 AND VIDEO ARE FROM HTTP WEBSITES.

25 DR. FELTEN ALSO TESTIFIED ABOUT SOMETHING

1 CALLED FTP PROTOCOL. AND HE SAID THAT IT'S POSSIBLE FOR
2 A WEBSITE OPERATOR TO MAKE ITS PAGE FTP INSTEAD OF HTTP
3 AND THE PLAINTIFFS SAY THAT THIS IS A WEAKNESS IN COPA
4 FOR SOME REASON. HOWEVER, DR. FELTEN STATED THAT HE DID
5 NOT KNOW HOW MUCH FTP IS BEING USED TO DELIVER MATERIAL
6 ON THE WEB OR IF SOMEONE WOULD PREFER FTP OVER HTTP. IN
7 FACT, THERE ARE SEVERAL REASONS WHY SOMEONE WOULD NOT
8 PREFER FTP. FTP DOES NOT ACCEPT COOKIES, WHICH ARE
9 COMMONLY USED BY WEBSITES TODAY. AND SEARCH ENGINES
10 LIKE GOOGLE LOOK FOR HTTP WEBSITES TO INDEX THEM. AS
11 MR. MEWETT TESTIFIED, IF A WEBSITE WAS AN FTP INSTEAD OF
12 HTTP, THERE IS A STRONG LIKELIHOOD THAT THE TRAFFIC FROM
13 SEARCH ENGINES WOULD MISS THOSE WEBSITES. THE MERE FACT
14 THAT IT IS A THEORETICAL POSSIBILITY FOR A WEBSITE TO
15 USE A DIFFERENT PROTOCOL THAN WHAT IS LISTED IN THE
16 STATUTE DOES NOT MEAN THAT WEBSITES ARE DOING THAT OR
17 EVEN THAT IT IS A PROBLEM THAT CONGRESS NEEDS TO ADDRESS
18 WITH COPA. CONGRESS IS TASKED WITH ADDRESSING THE
19 REALITY OF THE PROBLEM, NOT EVERY HYPOTHETICAL
20 PERMUTATION OF AN ISSUE THAT IS NOT PART OF THE PROBLEM.

21 MR. HANSEN SPOKE EARLIER TODAY ABOUT
22 OVERSEAS REACH. I WILL JUST BRIEFLY TOUCH ON THAT
23 SUBJECT. THE PLAINTIFFS ARGUE THAT COPA'S INEFFECTIVE
24 BECAUSE THEY SAY IT CANNOT APPLY OVERSEAS, AND THAT
25 FILTERS ARE BETTER AT REACHING OVERSEAS MATERIAL. FOR

1 STARTERS, THIS IS NOT THE RELEVANT QUESTION. IT'S NOT A
2 QUESTION OF FILTERS VERSUS COPA. IT'S HOW COPA CAN FILL
3 IN THE GAP LEFT BY FILTERS. AND THE APPLICATION OF
4 WHETHER COPA CAN APPLY TO OVERSEAS ENTITIES IS A
5 QUESTION OF LAW, AND WE HAVE SUBMITTED LEGAL ARGUMENTS
6 IN OUR TRIAL BRIEF. I WILL NOT GO OVER THEM HERE TODAY.
7 BUT THE BOTTOM LINE FROM A LEGAL STANDPOINT IS THAT
8 COURTS HAVE JURISDICTION TO ENFORCE COPA AGAINST FOREIGN
9 WEBSITE OPERATORS. COURTS HAVE APPLIED OTHER
10 PORNOGRAPHY RELATED STATUTES ABROAD.

11 IN ADDITION, AS TESTIFIED TO BY
12 MR. CLARK, THERE ARE WORLDWIDE POLICIES OF CREDIT CARD
13 COMPANIES. THIS IS ANOTHER MANNER IN WHICH COPA COULD
14 HAVE OVERSEAS REACH. MR. CLARK AS WELL AS MS. BERGMAN
15 OF VISA TESTIFIED THAT CREDIT CARD COMPANIES REQUIRE
16 HIGH-RISK MERCHANTS' BANKS INCLUDING ADULT CONTENT
17 WEBSITE OPERATORS TO MONITOR CONTENT DAILY OF EACH
18 MERCHANT WEBSITE. MR. CLARK ALSO TESTIFIED THAT FOREIGN
19 MERCHANTS DOING BUSINESS WITH U.S. CUSTOMERS MUST FOLLOW
20 CREDIT CARD COMPANY POLICIES, INCLUDING THE POLICY TO
21 FOLLOW APPLICABLE U.S. LAW. A RECENT EXAMPLE OF CREDIT
22 CARD COMPANIES ASSISTING WITH U.S. LAWS IS THE FINANCIAL
23 COALITION AGAINST CHILD PORNOGRAPHY TO TERMINATE
24 MERCHANT AGREEMENTS OF MERCHANTS AROUND THE WORLD THAT
25 SELL CHILD PORNOGRAPHY. IN ADDITION YOU HEARD TESTIMONY

1 FROM MS. ALEXANDER, THE CEO OF A COMPANY CALLED QUOVA.
2 AND THROUGH THIS TESTIMONY, WE LEARN THAT WEBSITE
3 OPERATORS CAN USE IP INTELLIGENCE SERVICES TO IDENTIFY
4 THE GEOGRAPHIC LOCATION OF VISITORS TO THEIR SITES.
5 INDEED MANY OF THE PLAINTIFFS AT TRIAL KNEW FROM THEIR
6 DEMOGRAPHIC STUDIES THAT THEY HAD WITH TECHNOLOGICAL
7 COMPANIES WHERE THEIR VISITORS WERE COMING FROM.

8 WITH QUOVA, THE GEOGRAPHIC IDENTIFICATION
9 OF WEBSITE VISITORS CAN BE MADE INSTANTANEOUSLY AND
10 ACCURATELY. AND WEBSITES CAN TAILOR THEIR CONTENT
11 GEOGRAPHICALLY. THIS IS SIGNIFICANT TESTIMONY BECAUSE
12 IT CHALLENGES THE ASSUMPTION THAT COMMUNICATIONS ARE
13 MADE ANYWHERE IN THE WORLD ARE NECESSARILY RECEIVED
14 ANYWHERE IN THE WORLD. USING QUOVA TECHNOLOGY, A
15 FOREIGN WEBSITE CAN CUT OFF ACCESS BY PEOPLE IN THE U.S.
16 IF THEY DO NOT WANT TO COMPLY WITH COPA. LIKEWISE,
17 WEBSITES CAN TAILOR THEIR WEB PAGES TO DIFFERENT
18 GEOGRAPHIC REGIONS. IN ANY EVENT, THE LARGE MAJORITY OF
19 THE POPULAR ADULT WEB PAGES ARE HOSTED IN THE UNITED
20 STATES. ACCORDING TO THE DEFENDANT'S COMPREHENSIVE
21 STUDY, ALMOST 90 PERCENT OF THE RETURNED PAGES FROM
22 QUERIES WERE HOSTED IN THE UNITED STATES.

23 AND THE PLAINTIFFS' EXPERT, MR. ZOOK,
24 ACTUALLY AGREES WITH THIS CONCLUSION. HIS EXPERT REPORT
25 DID NOT STUDY HOSTING DATA, BUT HIS MOST RECENT DATA,

1 WHICH IS FROM A 2003 ARTICLE, SHOWED THAT 85 PERCENT OF
2 ADULT MEMBERSHIP SITES WERE HOSTED IN THE U.S. OVER 93
3 PERCENT OF WHAT HE CALLED ADULT FREE OR FEEDER SITES
4 WERE HOSTED IN THE U.S. WHY IS THE HOSTING DATA
5 RELEVANT? WELL, IT SHOWS THAT THERE IS PERSONAL
6 JURISDICTION OVER THE WEBSITE OPERATOR. EVEN AMONG
7 FOREIGN SITES, THE DEFENDANTS' COMPREHENSIVE STUDY FOUND
8 THAT ABOUT 90 PERCENT OF THESE SITES HAD COMMERCIAL
9 CONNECTIONS TO THE UNITED STATES. THIS ESTABLISHES THAT
10 ENFORCEMENT CAN BE EFFECTIVELY USED AGAINST THESE SITES.

11 IF PLAINTIFFS' ARGUMENT WERE CORRECT THAT
12 CONGRESS COULD NOT LEGISLATE DUE TO THE INTERNATIONAL
13 NATURE OF THE INTERNET, CONGRESS WOULD NOT BE ABLE TO
14 LEGISLATE AT ALL IN THE AREA OF THE INTERNET. BUT
15 CONGRESS DOES LEGISLATE REGARDING THE INTERNET AND
16 ENFORCEABILITY IS NOT AN ISSUE. THERE ARE LAWS
17 REGARDING INTERNET GAMBLING, THERE ARE LAWS REGARDING
18 CHILD PORNOGRAPHY ON THE INTERNET.

19 MR. HANSEN SPOKE THIS MORNING ABOUT
20 PROFESSOR ZOOK, THE PLAINTIFFS' EXPERT, REGARDING
21 OVERSEAS APPLICATION. AND PROFESSOR ZOOK REPORTED
22 DIFFERENT NUMBERS THAN OURS ABOUT FOREIGN VERSUS
23 DOMESTIC SITES, BUT THIS STUDY IS LITTLE TO NO USE.
24 FIRST HE USED REGISTRATION DATA, NOT HOSTING DATA, BUT
25 HE DID NOT CONSIDER WHETHER REGISTRATION DATA IS

1 RELIABLE OR NOT FOR ADULT SITES. IN FACT, MR. MEWETT
2 HAS FOUND THAT REGISTRATION DATA IS FREQUENTLY
3 INCORRECT. SECOND, HE USED A COMPUTER PROGRAM TO
4 SHORTEN THE URLS FROM THE LIST TO DOMAIN NAMES, BUT THIS
5 PROGRAM ITSELF CAUSED MANY ERRORS. FINALLY THE LISTS HE
6 USED ARE NOT RANDOM SAMPLES, AND THUS NO INFERENCES CAN
7 BE DRAWN FROM THOSE LISTS.

8 I WOULD LIKE TO MOVE ON AT THIS POINT TO
9 THE ISSUE OF STANDING, BECAUSE STANDING IS ONE OF THE
10 LEGAL ISSUES THAT THE COURT MUST RESOLVE. WE HAVE
11 BRIEFED THIS ISSUE THOROUGHLY AND I WILL NOT BELABOR THE
12 SAME ARGUMENTS HERE TODAY BUT REFER THE COURT TO OUR
13 PREVIOUS MOTION ON THE ISSUE AS IT RELATES TO THE
14 TESTIFYING PLAINTIFFS. HOWEVER, SEVERAL NAMED
15 PLAINTIFFS CHOSE NOT TO PARTICIPATE IN THIS TRIAL, AND
16 THEREFORE HAVE NOT DEMONSTRATED THE REQUISITE CREDIBLE
17 THREAT OF PROSECUTION. THE COURT DID NOT HEAR FROM
18 FREESPEECH MEDIA, PHILADELPHIA GAY NEWS OR POWELL'S BOOK
19 STORES. BECAUSE THEY HAVE CHOSEN NOT TO TESTIFY, THERE
20 IS NO EVIDENCE THAT ANY ALLEGED FEAR IS CREDIBLE, WHICH
21 IS A REQUIREMENT TO MAINTAIN STANDING, AND EACH OF THOSE
22 PLAINTIFFS SHOULD BE DISMISSED FROM THE LAWSUIT AT THIS
23 TIME.

24 PLAINTIFF EPIC ALSO SUED TO ENFORCE WHAT
25 IT STATED ARE ITS RIGHTS REGARDING THE ABILITY TO ACCESS

1 THE INTERNET. EPIC HAS CHOSEN NOT TO PARTICIPATE AT
2 THIS TRIAL. THEREFORE THERE IS NO EVIDENCE AT ALL
3 REGARDING EPIC'S CLAIMS AND THEIR ABILITY TO MAINTAIN
4 STANDING, AND EPIC SHOULD BE DISMISSED FROM THE LAWSUIT
5 AT THIS TIME.

6 THERE ARE ALSO THREE ASSOCIATIONS THAT
7 SEEK TO BRING THIS ACTION ON BEHALF OF THEIR MEMBERS,
8 THE ACLU, THE ELECTRONIC FRONTIER FOUNDATION, AND THE
9 AMERICAN BOOK SELLERS ASSOCIATION FOR FREE EXPRESSION.
10 AS THE COURT IS WELL AWARE, ASSOCIATIONAL STANDING CAN
11 ONLY BE MAINTAINED TO THE EXTENT THAT THE MEMBERS OF THE
12 ASSOCIATION MAINTAIN STANDING. FOR EACH OF THESE
13 ASSOCIATIONS THEIR MEMBERS HAVE NOT COME FORWARD TO
14 TESTIFY. THERE WAS NO EVIDENCE IN THE RECORD ABOUT ACLU
15 MEMBERS, EFF MEMBERS, OR AMERICAN BOOK SELLERS MEMBERS,
16 AND THOSE MEMBERS' INJURIES. THEREFORE EACH OF THESE
17 ASSOCIATIONS MUST BE DISMISSED FOR LACK OF STANDING AT
18 THIS TIME.

19 THERE ARE SEVERAL OTHER CLAIMS IN THIS
20 LAWSUIT WITHOUT ANY EVIDENTIARY SUPPORT. ACLU CLAIMS TO
21 SUE ON BEHALF OF ITS SO-CALLED LISTENER PLAINTIFFS WHO
22 WISH TO ACCESS MATERIAL ON THE INTERNET AND BELIEVE THAT
23 COPA WILL INTERFERE WITH THIS RIGHT. THERE HAS BEEN NO
24 TESTIMONY OR EVIDENCE BROUGHT FORTH ABOUT LISTENER
25 PLAINTIFFS TO DEMONSTRATE ANY ALLEGED INJURY DUE TO COPA

1 OR TO SUPPORT THIS CLAIM.

2 ONE COUNT OF THE COMPLAINT ALLEGES A
3 VIOLATION OF OLDER MINORS' RIGHTS TO ACCESS MATERIAL ON
4 THE INTERNET. AGAIN, THIS IS LARGELY A LEGAL ISSUE THAT
5 WAS FULLY ADDRESSED IN OUR TRIAL BRIEF. I WILL NOT
6 REITERATE THE ARGUMENTS HERE, BUT THE BOTTOM LINE IS
7 TWOFOLD: ONE, THIS CLAIM IS BASED ON A STATUTORY
8 MISINTERPRETATION. CASE LAW DEMONSTRATES THAT AN OLDER
9 MINOR STANDARD IS THE CORRECT STANDARD TO USE; AND TWO,
10 OLDER MINORS HAVE NO CONSTITUTIONAL RIGHT TO ACCESS
11 HARMFUL TO MINORS MATERIAL. EVEN IF THERE WERE A LEGAL
12 CLAIM TO BE MADE, PLAINTIFFS HAVE PROFFERED NO EVIDENCE
13 ON THIS CLAIM. THERE HAS NOT BEEN ONE OLDER MINOR
14 TESTIFYING AT TRIAL ABOUT HIS INJURY. GIVEN THE UTTER
15 LACK OF EVIDENCE TO ESTABLISH THE CLAIM INVOLVING THE
16 RIGHTS OF OLDER MINORS, JUDGMENT SHOULD BE GRANTED ON
17 PLAINTIFFS' CLAIM REGARDING THE RIGHTS OF OLDER MINORS.

18 ANOTHER COUNT OF THE COMPLAINT ALLEGES
19 THAT COPA VIOLATES THE CONSTITUTIONAL RIGHT TO ACCESS
20 THE WEB ANONYMOUSLY. AGAIN, THIS IS LARGELY A LEGAL
21 ISSUE THAT WAS FULLY ADDRESSED IN OUR TRIAL BRIEF. I
22 WILL NOT REITERATE THE ARGUMENTS MADE, BUT THE BOTTOM
23 LINE IS THAT THERE IS NOT A CONSTITUTIONAL RIGHT TO
24 ANONYMOUS ACCESS TO THE INTERNET. EVEN IF THERE WERE
25 SOME SUCH LEGAL RIGHT, THE PLAINTIFFS HAVE NOT PROFFERED

1 EVIDENCE TO ESTABLISH THIS CLAIM. NOBODY TESTIFIED
2 ABOUT THEIR NEED TO ACCESS THE WEB ANONYMOUSLY AND HOW
3 COPA WOULD CAUSE INJURY TO THEM. WITHOUT AN ESTABLISHED
4 INJURY IN THE RECORD, THERE CANNOT BE A CLAIM, AND
5 JUDGMENT SHOULD BE GRANTED IN FAVOR OF DEFENDANT ON
6 PLAINTIFFS' CLAIM REGARDING ANONYMOUS ACCESS TO THE
7 INTERNET.

8 THE ULTIMATE QUESTION FOR THE COURT TO
9 DECIDE INVOLVES STATUTORY INTERPRETATION. WHAT IS
10 COVERED BY COPA DICTATES WHETHER THE STATUTE IS
11 OVERBROAD. IN A SIMILAR MANNER THE STATUTORY LANGUAGE
12 DETERMINES WHETHER COPA GIVES FAIR WARNING ABOUT
13 PROHIBITED CONDUCT TO EVALUATE PLAINTIFFS' VAGUENESS
14 CLAIM. THERE HAVE BEEN MANY BRIEFS ON THIS ISSUE AND
15 OUR LEGAL POSITIONS HAVE BEEN FULLY SET FORTH THERE. I
16 WILL NOT REARGUE THE LAW HERE. BUT I BELIEVE THAT THE
17 EVIDENCE PROFFERED IN THIS CASE OFFERS CONCRETE EXAMPLES
18 OF HOW THE COPA STATUTE IS PROPERLY INTERPRETED.

19 MR. HANSEN STATED EARLIER THIS MORNING
20 THAT DEFENDANT HAS NOT BEEN CONSISTENT IN ITS POSITION,
21 BUT THAT IS NOT THE CASE. THE DEFENDANT HAS BEEN
22 CONSISTENT IN ITS POSITION. WE HAVE STATED NUDITY IS
23 NOT ENOUGH. MR. HANSEN IS TRYING TO CONFUSE THE ISSUE
24 BY PROFFERING EXAMPLES SUCH AS THE PLAYBOY AND PENTHOUSE
25 PICTURES THAT WERE THE SUBJECT OF DISCOVERY. WE WERE

1 ASKED -- THE DEPARTMENT OF JUSTICE, THAT IS, WAS ASKED
2 TO MAKE A DETERMINATION BASED ON CERTAIN PAGES AND IN
3 RESPONDING TO DISCOVERY WE DID. ONE OF THE PAGES, WHICH
4 WAS THE PLAYBOY PAGE, HAD PICTURES OF TOPLESS WOMEN AND
5 THE DEPARTMENT GAVE ITS OPINION AS TO THAT. THE OTHER
6 ONE CONTAINED MANY IMAGES INCLUDING FULL FRONTAL NUDITY,
7 CLOSE UP ON THE GENITALIA AND THE DEPARTMENT GAVE ITS
8 ANSWER TO THAT. TO CONFLATE THE TWO IS TO ADD CONFUSION
9 WHERE THERE IS NONE.

10 MR. HANSEN THIS MORNING ALSO TESTIFIED AT
11 LENGTH ABOUT MR. MEWETT AND WHAT MR. MEWETT MIGHT
12 BELIEVE TO BE SEXUALLY EXPLICIT. AND THE BOTTOM LINE
13 HERE IS THAT MR. MEWETT IS NOT A LAWYER, HE WAS NOT
14 TASKED WITH MAKING DETERMINATIONS ABOUT WHAT IS SEXUALLY
15 EXPLICIT -- I'M SORRY, ABOUT WHAT IS HARMFUL TO MINORS
16 UNDER THE LAW.

17 LET'S LOOK AT THE DEFINITION OF HARMFUL
18 TO MINORS. THIS DEFINITION IS DERIVED FROM THE MILLER
19 OBSCENITY TEST AND IT INCLUDES THREE PRONGS. THE FIRST
20 PRONG IS THAT THE AVERAGE PERSON APPLYING CONTEMPORARY
21 COMMUNITY STANDARDS WOULD FIND, TAKING THE MATERIAL AS A
22 WHOLE AND WITH RESPECT TO MINORS, IS DESIGNED TO APPEAL
23 TO OR DESIGNED TO PANDER TO THE PRURIENT INTEREST.

24 DESIGNED TO APPEAL TO THE PRURIENT
25 INTEREST IS A CONCEPT THAT HAS EXISTED LEGALLY FOR QUITE

1 SOME TIME. I WOULD LIKE TO SHOW SOME EXAMPLES OF THIS.
2 IF WE COULD PULL UP PLAINTIFFS' EXHIBIT P 41 AT PAGE 16.
3 THIS IS A PAGE FROM THE URBAN DICTIONARY WEBSITE. IF
4 YOU COMPARE THIS PAGE TO WHAT THE COURT HAS IN ITS
5 BINDER, DEFENDANT'S EXHIBIT 88 AT PAGE 20, AND ASK WHICH
6 OF THESE TWO EXHIBITS IS DESIGNED TO APPEAL TO THE
7 PRURIENT INTEREST, AN URBAN DICTIONARY DEFINITION WEB
8 PAGE OR A WEB PAGE THAT STATES THE MAN, THE MYTH, THE
9 LEGION, EDPOWERS.COM, JUST YOUR AVERAGE GUY WHO JUST SO
10 HAPPENS TO HAVE A HAREM OF HORNY GIRLS THAT ARE READY TO
11 GET YOU OFF, TONS OF ROOMS, NAUGHTY YOUNG ONES, SHY
12 GIRLS, NAUGHTY NYMPHOS, TELL THEM WHAT TO DO, CHAT WITH
13 THEM. THIS PAGE ALSO CONTAINS FOUR PHOTOS OF SEX ACTS
14 WITH THE INSTRUCTION, CLICK HERE TO VIEW THE SHOWS. I
15 DON'T THINK IT IS DIFFICULT TO MAKE THE DETERMINATION
16 BETWEEN THESE TWO EXHIBITS WHICH ONE APPEALS TO THE
17 PRURIENT INTEREST.

18 THE SECOND PRONG OF COPA'S HARMFUL TO
19 MINORS' DEFINITION IS THAT THE MATERIAL DEPICTS,
20 DESCRIBES OR REPRESENTS IN A MANNER PATENTLY OFFENSIVE
21 WITH RESPECT TO MINORS AN ACTUAL OR SIMULATED SEXUAL ACT
22 OR SEXUAL CONTACT, AN ACTUAL OR SIMULATED NORMAL OR
23 PERVERTED SEXUAL ACT OR A LEWD EXHIBITION OF THE
24 GENITALS OR POST-PUBESCENT FEMALE BREAST. SEVERAL
25 PLAINTIFFS TESTIFIED THAT THEY FEARED THEIR MATERIAL

1 WOULD BE CONSIDERED TO MEET THIS PRONG. FOR EXAMPLE,
2 ADAM GLICKMAN OF CONDOMANIA TESTIFIED THAT HE FEARED
3 PROSECUTION IN PART DUE TO A DRAWING OF A PENIS ON HIS
4 WEBSITE. IF WE CAN PULL UP PLAINTIFFS' EXHIBIT 40, PAGE
5 3, THIS IS THE PAGE HE WAS REFERRING TO. AGAIN, I WOULD
6 ASK THE QUESTION, BETWEEN THAT EXHIBIT AND AN EXHIBIT
7 THAT THE COURT HAS IN ITS BINDER, PAGE 4 OF DEFENDANT'S
8 EXHIBIT 88, A COLOR PHOTOGRAPH OF A SEXUAL ACT WITH A
9 GRAPHIC FOCUS ON THE GENITALS. BETWEEN THESE TWO
10 EXHIBITS, WHICH ONE MEETS THE SECOND PRONG OF COPA? IT
11 IS NOT THAT DIFFICULT TO DECIDE.

12 THE THIRD PRONG OF COPA'S HARMFUL TO
13 MINORS DEFINITION IS THAT THE WORK TAKEN AS A WHOLE
14 LACKS SERIOUS LITERARY, ARTISTIC, POLITICAL OR
15 SCIENTIFIC VALUE FOR MINORS. THIS IS A PRONG THAT
16 PLAINTIFFS SEEMINGLY COMPLETELY READ OUT OF THE
17 DEFINITION. THEY SAY IT'S A MEANINGLESS PRONG.
18 HOWEVER, IT IS A VERY MEANINGFUL PRONG FOR THE HARMFUL
19 TO MINORS DEFINITION. LIKE OBSCENITY LAW, COPA ADOPTS
20 AN "AS A WHOLE" REQUIREMENT FOR THE DETERMINATION OF
21 WHAT IS HARMFUL TO MINORS. THIS REQUIREMENT PROTECTS
22 SPEECH AS IT INSULATES SPEAKERS FROM PROSECUTION BASED
23 ON ISOLATED ELEMENTS OF THEIR SPEECH, AND THAT IS WHAT
24 PLAINTIFFS HAVE PROFFERED IN COURT AT THIS TRIAL, ARE
25 ISOLATED ELEMENTS OF THEIR SPEECH.

1 BUT THE TRIAL TESTIMONY FROM THE
2 PLAINTIFFS IS REplete WITH REFERENCES ABOUT THE VALUE OF
3 THEIR WORKS AS A WHOLE. EACH PLAINTIFF TESTIFIED ABOUT
4 THE VALUE. FOR EXAMPLE, SALON.COM IS AN INTERNET
5 MAGAZINE DEVOTED TO NEWS, POLITICS, CULTURE, ARTS AND
6 LIFESTYLE ISSUES. ADAM GLICKMAN OF CONDOMANIA TALKED
7 ABOUT THE SEX EDUCATION VALUE OF HIS WEBSITE, AS DID
8 MITCHELL TEPPER OF THE SEXUAL HEALTH NETWORK. HEATHER
9 CORINNA TESTIFIED ABOUT THE VALUE OF EACH OF HER THREE
10 WEBSITES. IN PARTICULAR SHE NOTED SCARLETEEN IS A
11 WEBSITE PROVIDING SEXUAL EDUCATION MATERIALS
12 SPECIFICALLY GEARED TOWARDS TEENAGERS. CONTRAST EACH OF
13 THESE WEBSITES WITH WHAT THE WEBSITES MUST BE FOR THE
14 PAGES IN DEFENDANT'S EXHIBIT 88. OBVIOUSLY THE
15 DETERMINATION CANNOT BE MADE ON ONE PAGE ALONE, BUT IT
16 IS NOT DIFFICULT TO IMAGINE THE WEBSITES THAT ARE
17 ATTACHED TO WEB PAGES WITH THE FOLLOWING HEADLINES, FREE
18 PORN, WORLD OF PORN HARD CORE, DARK PORN, WELCOME TO SEX
19 EXPLORER AND GAY SEX WORLD LIVE SEX SHOWS. IN FACT, ALL
20 OF THE PAGES WITHIN DEFENDANT'S EXHIBIT 88 ARE WHAT
21 FILTERS ARE LETTING THROUGH. FOR EACH OF THESE PAGES,
22 FILTERS FAILED TO BLOCK THE PAGES.

23 IT'S ALSO IMPORTANT TO REMEMBER THAT NOT
24 ONE BUT ALL THREE PRONGS OF THE DEFINITION OF HARMFUL TO
25 MINORS MUST BE MET BEFORE A WEBSITE CAN BE CONSIDERED TO

1 BE HARMFUL TO MINORS. AND THERE ARE OTHER IMPORTANT
2 STATUTORY REQUIREMENTS AS WELL WITHIN COPA. ONE IS THAT
3 MATERIAL MUST BE KNOWINGLY POSTED ON THE WEB. THIS IS
4 NOT SOMETHING THAT WAS ADDRESSED BY PLAINTIFFS IN THEIR
5 ARGUMENT. THE INADVERTENT POSTING OF THE MATERIAL WILL
6 NOT SUBJECT ENTITIES TO COPA. NOW SEVERAL PLAINTIFFS
7 TESTIFIED THAT THEY DO NOT HAVE KNOWLEDGE OF EVERYTHING
8 ON THEIR WEBSITE, THEY HAVE CHAT ROOMS OR THEY HAVE
9 BOARDS WHERE PEOPLE CAN POST MATERIAL AND THAT IT'S
10 POSSIBLE THAT A USER MAY POST SOMETHING ON A MESSAGE
11 BOARD. THESE TYPES OF INCIDENTS DO NOT FALL UNDER COPA.
12 THEY ARE NOT KNOWINGLY MADE BY A WEBSITE OPERATOR.

13 ANOTHER VERY IMPORTANT DISTINCTION FOR
14 COPA IS THAT IT APPLIES ONLY TO COMMERCIAL WEBSITES.
15 AND THIS IS DEFINED WITHIN THE STATUTE. A WEBSITE HAS
16 TO BE ENGAGED IN THE BUSINESS OF DISSEMINATING HARMFUL
17 TO MINORS MATERIAL TO BE A COMMERCIAL WEBSITE. THIS IS
18 A REQUIREMENT THAT TARGETS COPA TO COMMERCIAL
19 PORNOGRAPHERS. ACCORDING TO THE NRC REPORT, WHICH IS
20 PLAINTIFFS' EXHIBIT 54 AT PAGE 72, AS OF 2002, THE
21 ONLINE ADULT INDUSTRY IN THE UNITED STATES GENERATED
22 APPROXIMATELY 1 BILLION DOLLARS OF REVENUE ANNUALLY.
23 THESE ARE NOT WEBSITES THAT WILL BE OVERLY BURDENED BY
24 COPA'S COMPLIANCE REQUIREMENTS. DR. SMITH TESTIFIED
25 THAT COPA WILL NOT BE BURDENSOME TO EITHER COMMERCIAL

1 PORNOGRAPHY WEBSITES OR CONSUMERS SEEKING ACCESS TO
2 THOSE SITES. AND THE EVIDENCE SHOWS THAT THE QUOTE,
3 UNQUOTE, FREE PORNOGRAPHY WEBSITES ARE IN FACT
4 COMMERCIAL WEBSITES IN DISGUISE. THE PLAINTIFFS' EXPERT
5 MR. RUSSO, WHO OPERATED THESE WEBSITES HIMSELF,
6 TESTIFIED THAT WHEN HE RAN FREE ADULT WEBSITES, THESE
7 SITES WERE TO PROVIDE TRAFFIC TO AFFILIATE PROGRAMS.
8 AND THE PLAINTIFFS' EXPERT, MR. ZOOK, ALSO TESTIFIED
9 THAT FREE ADULT WEBSITES, ALSO CALLED FEEDER SITES ARE
10 COMMERCIALLY DRIVEN BECAUSE THEY NEED TO PAY FOR LARGE
11 BANDWIDTH AND THEY MAKE THEIR MONEY BY AFFILIATING WITH
12 MEMBERSHIP WEBSITES.

13 COPA UNDER A PROPER STATUTORY
14 INTERPRETATION DOES NOT APPLY TO ANY OF THE TESTIFYING
15 PLAINTIFFS. THEY HAVE NOT BEEN THREATENED WITH
16 PROSECUTION UNDER ANY OF THE STATE HARMFUL TO MINORS
17 LAWS THAT CURRENTLY EXIST. THEY CANNOT BE SAID TO LACK
18 VALUE EVEN FOR OLDER MINORS. IN AN OVERBREADTH
19 CHALLENGE IT IS THE COURT'S TASK TO INTERPRET COPA IN A
20 CONSTITUTIONALLY PERMISSIBLE MANNER IF POSSIBLE. THE
21 LANGUAGE OF COPA AS WELL AS THE LEGISLATIVE HISTORY
22 GIVES THE PROPER GUIDANCE IN THIS TASK. COPA IS NOT
23 OVERLY BROAD. IT COVERS THAT MATERIAL THAT IS COMMONLY
24 UNDERSTOOD AS COMMERCIAL PORNOGRAPHY. NOR IS COPA
25 VAGUE. THE STATUTORY LANGUAGE FAIRLY DESCRIBES WHAT IS

1 COVERED BY THE STATUTE, COMMERCIAL PORNOGRAPHY.

2 THANK YOU VERY MUCH.

3 THE COURT: THANK YOU, MISS ULRICH.

4 MR. HANSEN, YOUR PLEASURE. DO YOU WANT
5 TO GET THIS FINISHED?

6 MR. HANSEN: I'M NOT GOING TO BE VERY
7 LONG. I'M HAPPY TO GO AHEAD.

8 THE COURT: LET'S GET IT DONE.

9 MR. HANSEN: THANK YOU, YOUR HONOR.

10 I WOULD LIKE TO START AGAIN WITH SPEECH,
11 WHICH IS WHAT I THINK WHAT THIS CASE IS PRIMARILY ABOUT,
12 AND ADDRESS SOME OF THE ARGUMENTS THAT THE DEFENDANTS
13 MADE WITH RESPECT TO THE COVERAGE OF COPA AND THE
14 RELATIVE COVERAGE OF FILTERS. FIRST, THE DEFENSE
15 COUNSEL ADDRESSED WHAT ESSENTIALLY IS THE FIRST
16 DEMONSTRATIVE EXHIBIT THAT PLAINTIFFS PRESENTED, AND
17 THAT IS THE VARIOUS PROTOCOLS THAT COPA DOES NOT REACH
18 BUT THAT FILTERS DO REACH. THEY MADE A COUPLE OF POINTS
19 THAT I THINK ARE WORTH RESPONDING TO. FIRST, THEY
20 SUGGESTED THAT THERE WAS NO EVIDENCE IN THE RECORD THAT
21 THERE IS SEXUALLY EXPLICIT MATERIAL ON PEER-TO-PEER,
22 WHICH IS AN INCREASINGLY POPULAR METHOD THAT MINORS USE
23 ON THE INTERNET. WELL, THAT IS JUST WRONG. MR. RUSSO
24 TESTIFIED AT SOME LENGTH THAT IT WAS VERY EASY TO FIND
25 SEXUALLY EXPLICIT MATERIAL ON THE WEB -- ON

1 PEER-TO-PEER. INDEED, THE GOVERNMENT'S OWN GAO REPORT
2 TESTIFIED THAT IT WAS VERY EASY TO FIND SEXUALLY
3 EXPLICIT MATERIAL ON PEER-TO-PEER, A METHOD OF
4 COMMUNICATION, BY THE WAY, WHICH DID NOT EXIST IN 1999
5 WHEN COPA WAS PASSED AND NOW EXISTS AND IS ENORMOUSLY
6 POPULAR PARTICULARLY WITH YOUNG PEOPLE.

7 SECOND, THEY SUGGEST THAT STREAMING VIDEO
8 AND AUDIO THAT IS NOT COVERED BY COPA WAS IN FACT
9 COVERED BY COPA IF IT WAS ACCESSED THROUGH A WEBSITE.
10 THE PROBLEM WITH THAT IS MR. FELTEN'S EXPLANATION.
11 MR. FELTEN SAID YOU CAN GET THE STREAMING AUDIO AND
12 VIDEO BY GOING TO A WEBSITE, ALTHOUGH EVEN WHEN YOU DO
13 THAT YOU ARE NOT RECEIVING THE INFORMATION THROUGH HTTP.
14 BUT HE ALSO TESTIFIED YOU DON'T HAVE TO GO TO A WEBSITE
15 IN ORDER TO GET ACCESS TO THAT INFORMATION. YOU CAN GO
16 DIRECTLY -- USING THE PROTOCOLS OF STREAMING VIDEO AND
17 STREAMING AUDIO YOU CAN GO DIRECTLY. IT'S A MATTER OF
18 YOUR CHOICE WHETHER YOU GO AND FIND IT THROUGH THE WEB
19 AND THROUGH HTTP OR WHETHER YOU FIND IT IN THE ALTERNATE
20 METHOD. INDEED, THE MASSIVE HOLE IN COPA THAT IS
21 REPRESENTED BY STREAMING VIDEO IS INDEED MASSIVE. THE
22 NOTION THAT COPA DOES NOT COVER ANY VIDEO, WHICH IT DOES
23 NOT, AND THERE IS UNCONTRADICTED TESTIMONY THAT IT DOES
24 NOT, IS IN FACT A GIANT HOLE IN COPA'S EFFECTIVENESS.

25 THEY ALSO DISCUSSED THE FTP PROBLEM. AS

1 YOU RECALL DR. FELTEN SAID THAT YOU COULD TAKE YOUR
2 WEBSITE AND YOU CAN CONVERT IT FROM HTTP TO FTP, AND HE
3 CONCEDED THERE WERE SOME PROBLEMS WITH DOING THAT.
4 DEFENSE COUNSEL SAID WELL, BECAUSE THERE ARE PROBLEMS,
5 THIS IS NOT WORTH PAYING ATTENTION TO. I THINK THEY
6 SORT OF MISS THE POINT. THE POINT OF THAT TESTIMONY
7 WAS, IF I AM A WEBSITE AND I WANT TO CONTINUE TO PROVIDE
8 SEXUALLY EXPLICIT MATERIAL WITHOUT BEING BOUND BY THE
9 REQUIREMENTS OF COPA, I CAN DO THAT. EVERY SEXUALLY
10 EXPLICIT WEBSITE, EVERY -- TO USE THEIR PHRASE, WHICH I
11 DON'T ACCEPT, COMMERCIAL PORNOGRAPHY WEBSITE, THAT WANTS
12 TO EVADE COPA CAN DO IT. ALL THEY HAVE TO DO IS CONVERT
13 TO FTP. PROFESSOR FELTEN SHOWED YOU HOW EASY IT IS TO
14 CONVERT TO FTP, AND EVERY SINGLE COMMERCIAL WEBSITE IN
15 THE NATION COULD DO THAT TOMORROW AND COPA WOULD HAVE NO
16 EFFECT ON THEM.

17 THE ONLY OTHER POINT I WANT TO MAKE WITH
18 RESPECT TO SPEECH HAS TO DO WITH THE STANDING OF THE
19 NONTESTIFYING PLAINTIFFS. THE LAW IS QUITE CLEAR THAT
20 PLAINTIFFS CAN REPRESENT SPEAKERS OTHER THAN THEMSELVES
21 IN FIRST AMENDMENT CASES, PARTICULARLY IN OVERBREADTH
22 CASES. THE STANDING OF ALL OF THE PLAINTIFFS INCLUDING
23 THOSE THAT DID NOT TESTIFY HAS BEEN REPEATEDLY
24 ESTABLISHED OVER AND OVER AGAIN IN THIS CASE AND IN
25 OTHER CASES, AND THERE HAS BEEN NO EVIDENCE THAT

1 ANYTHING HAS CHANGED SINCE ALL OF THOSE VARIOUS
2 DETERMINATIONS.

3 SO LET ME TALK NOW ABOUT FILTERS FOR A
4 SECOND. MR. MCELVAIN STARTED OUT BY SAYING THAT THE
5 ISSUE IN THIS CASE IS NOT FILTERS VERSUS COPA AS THE
6 PLAINTIFFS SUGGEST IT IS. WELL, PLAINTIFFS OF COURSE
7 DON'T THINK THE ISSUE IN THIS CASE IS FILTERS VERSUS
8 COPA. IN THE FIRST INSTANCE, THE ISSUE IS WHETHER THE
9 DEFENDANTS HAVE ESTABLISHED THAT THERE ARE NO LESS
10 RESTRICTIVE ALTERNATIVES, THE BURDEN OF PROOF IS ON
11 THEM. SECOND, PLAINTIFFS' SECOND DEMONSTRATIVE EXHIBIT
12 ESTABLISHES THAT FILTERS ARE HARDLY THE ONLY LESS
13 RESTRICTIVE ALTERNATIVE; THERE ARE LOTS OF OTHERS.

14 BUT THEN HE SUGGESTED THAT THE REAL ISSUE
15 IN THIS CASE IS WHETHER COPA WOULD BE EFFECTIVE WHEN
16 JOINED TOGETHER WITH FILTERS. THE PROBLEM WITH THAT
17 ARGUMENT IS THAT IT HAS BEEN EXPLICITLY REJECTED BY THE
18 UNITED STATES SUPREME COURT IN THIS CASE, 124 SUPREME
19 COURT PAGE 2791, JUSTICE KENNEDY, FOR FIVE JUSTICES,
20 MAJORITY OF THE SUPREME COURT, EXPRESSLY AND EXPLICITLY
21 ADDRESSES AND REJECTS THE ARGUMENT THAT THEY MADE. THE
22 ISSUE IN THIS CASE IS NOT WHETHER COPA AND FILTERS
23 TOGETHER ARE EFFECTIVE. THE ISSUE IS WHETHER FILTERS
24 ARE ONE OF THE LESS RESTRICTIVE ALTERNATIVES THAT WOULD
25 BE BETTER THAN COPA.

1 NOW, THEY ALSO SPENT A FAIR AMOUNT OF
2 TIME DURING CLOSING ON THE ISSUE OF OVERBLOCKING, TRYING
3 TO ESSENTIALLY RUN AWAY FROM THE FACT THAT FILTERS ARE
4 AS SUCCESSFUL AS THEY ARE IN UNDERBLOCKING TERMS, THEY
5 MADE A BIG DEAL OF THE FACT THAT FILTERS OVERBLOCK.

6 THE FIRST POINT TO BE MADE ABOUT
7 OVERBLOCKING THAT I HAVE NOT ALREADY MADE IS THAT OF
8 COURSE, THE EVIDENCE WAS UNDISPUTED THAT PARENTS CAN
9 DEAL WITH OVERBLOCKING, PARENTS CAN OVERRIDE ANY EXAMPLE
10 OF OVERBLOCKING THEY FIND. THE SECOND POINT TO BE MADE
11 IS THAT -- I WILL MAKE IT BRIEFLY THIS TIME BECAUSE I
12 MADE IT ONCE, IS THAT OVERBLOCKING IS IN SOME WAYS A
13 VIRTUE.

14 I WOULD LIKE TO AT THIS TIME USE DR.
15 STARK'S EXAMPLE OF THE METAL DETECTOR. HE SAID,
16 FILTERING IS SORT OF LIKE METAL DETECTORS AT THE
17 AIRPORT. YOU CAN EITHER SET IT REALLY STRICT AND IF YOU
18 DO THAT YOU ARE GOING TO GET SOME NAIL CLIPPERS AND SOME
19 OTHER THINGS, BUT YOU ARE GOING TO BE ABSOLUTELY 100
20 PERCENT SURE THAT THERE ARE NO GUNS THAT GET THROUGH, OR
21 YOU CAN SET IT A LITTLE LOOSER, THE METAL DETECTORS MAY
22 EVEN ALLOW THROUGH THE NAIL CLIPPERS, THEY MAY ALLOW
23 THROUGH SOME SMALL OTHER THINGS THAT YOU WOULDN'T WANT
24 TO LET THROUGH, BUT YOU CAN SET IT THAT WAY.

25 WELL, FILTERS ARE IN FACT LIKE METAL

1 DETECTORS IN THAT RESPECT. WE HAVE ALL ACCEPTED IN THE
2 CONTEXT OF THE AIRPORT THAT THE GOAL OF PROTECTING
3 OURSELVES ON THE AIRPLANES IS SO IMPORTANT THAT WE ARE
4 GOING TO SET IT REALLY STRICTLY. IF YOU ARE A PARENT
5 WHO THINKS THAT THE GOAL IS SO IMPORTANT TO PROTECT YOUR
6 CHILDREN FROM SEXUALLY EXPLICIT MATERIAL, YOU CHOOSE A
7 FILTER THAT IS SET REALLY STRICTLY, JUST AS THE UNITED
8 STATES GOVERNMENT DOES WITH RESPECT TO METAL DETECTORS.
9 IF YOU ARE A PARENT WHO DOES NOT MIND AN OCCASIONAL
10 THING SLIPPING THROUGH, THEN YOU SET IT MORE LOOSELY.

11 FINAL POINT TO BE MADE ABOUT OVERBLOCKING
12 IS THAT FILTERS ARE NOT THE ONLY THING THAT OVERBLOCKS.
13 COPA OVERBLOCKS. COPA'S OVERBLOCKING IS THE CHILL, THE
14 CHILL THAT PROVIDES TO THE ESSENTIALLY 50 PERCENT OF
15 SITES THAT MR. MEWETT FOUND WERE REALLY, REALLY CLOSE TO
16 THE LINE. ALL OF THE PLAINTIFFS WHO TESTIFIED HERE
17 TESTIFIED THAT THEIR SPEECH IS CHILLED AS A RESULT OF
18 COPA. THAT IS THE OVERBLOCKING THAT COPA CAUSES. AND
19 SO TO SUGGEST THAT BECAUSE FILTERS HAVE SOME
20 OVERBLOCKING WE HAVE TO REJECT THE OPTION OF FILTERS IS
21 TO IGNORE THE OTHER HALF OF THE EQUATION.

22 FINALLY ON FILTERING, THE ONLY OTHER
23 POINT I WANT TO MAKE WITH RESPECT TO FILTERING IS TO SEE
24 IF I CAN'T FINALLY PUT TO DEATH THIS NOTION THAT
25 ENTERPRISE FILTERS AND HOME FILTERS ARE SOME ENTIRELY

1 DIFFERENT CREATURES. THREE DIFFERENT EXPERTS, EISENACH,
2 MEWETT AND CRANOR, ALL TESTIFIED THAT WITH RESPECT TO
3 EFFECTIVENESS, WITH RESPECT TO THE MECHANISM BY WHICH
4 THEY BLOCK AND BY WHICH THEY DON'T BLOCK, ENTERPRISE
5 FILTERS AND HOME FILTERS ARE EXACTLY THE SAME.
6 PROFESSOR MEWETT, MR. MEWETT TESTED ENTERPRISE FILTERS.
7 HE TESTED THE ISP FILTERS, HE TESTED AOL, BECAUSE IN
8 FACT PARENTS HAVE AVAILABLE TO THEM, WITHOUT THE MASSIVE
9 COSTS THAT THE DEFENSE COUNSEL IS REFERRING TO, PARENTS
10 HAVE AVAILABLE TO THEM WHAT YOU WOULD DESCRIBE AS AN
11 ENTERPRISE FILTER LIKE AOL. AND DR. CRANOR SHOWED HOW
12 EASY IT WAS TO INSTALL AND USE THE AOL FILTER.

13 NOW, FINALLY I WANT TO TALK ABOUT THE
14 DEFENSES FOR A MINUTE, THE CREDIT CARD AND OTHER
15 DEFENSES. FIRST OF ALL, IT APPEARS TO ME BASED ON THEIR
16 ARGUMENT THAT NOBODY DISAGREES THAT LARGE NUMBERS OF
17 CHILDREN HAVE ACCESS TO CREDIT CARDS. PROFESSOR MANN
18 SAID MORE THAN 37 PERCENT OF 16-YEAR-OLDS HAVE ACCESS TO
19 CREDIT CARDS AND 52 PERCENT OF TEENS SHOP ONLINE.
20 DEFENSE COUNSEL QUOTED PROFESSOR CLARK AS SAYING 22
21 PERCENT OF ALL CHILDREN HAVE ACCESS TO CREDIT CARDS. SO
22 THERE REALLY IS NOT A SERIOUS DISPUTE THAT A VERY, VERY
23 LARGE PERCENTAGE, INDEED MILLIONS OF TEENAGERS UNDER THE
24 AGE OF 17 HAVE CREDIT CARDS. WHAT THE DEFENDANTS'
25 ARGUMENT ULTIMATELY BOILS DOWN TO IS THAT SOONER OR

1 LATER IF A KID USES A CREDIT CARD TO GET ACCESS TO
2 SEXUALLY EXPLICIT SPEECH, HIS PARENTS WILL CATCH IT
3 BECAUSE THEY WILL FIND IT ON THE MONTHLY CREDIT CARD
4 STATEMENT. THERE IS NO EVIDENCE TO THAT EFFECT. THERE
5 IS NO EVIDENCE FOR EXAMPLE OF WHAT THE ENTRY IS THAT
6 APPEARS ON THE CREDIT CARD STATEMENT WHEN KIDS GO TO
7 SEXUALLY EXPLICIT SPEECH, BUT MORE IMPORTANT, ALL OF A
8 SUDDEN, DEFENDANTS WHO SAY PARENTS ARE WAY TOO BUSY TO
9 USE FILTERS, WAY TOO BUSY TO SUPERVISE THEIR KIDS, WAY
10 TOO BUSY TO EDUCATE THEIR KIDS, SUDDENLY PARENTS ARE
11 VIGILANT AND ATTENTIVE TO EVERY SINGLE CREDIT CARD
12 STATEMENT AND EVERY LINE ON EVERY SINGLE CREDIT CARD
13 STATEMENT. WHAT THEIR ARGUMENT BOILS DOWN TO KIDS WILL
14 ACCESS SEXUALLY EXPLICIT MATERIAL AND SOONER OR LATER
15 THEIR PARENTS WILL CATCH THEM. THAT IS NOT AN ANSWER.

16 WITH RESPECT TO CHILDREN HAVING ACCESS TO
17 CREDIT CARDS. EVERYBODY AGREES THAT THERE ARE LARGE
18 NUMBERS OF CHILDREN THAT DON'T HAVE ACCESS TO CREDIT
19 CARDS. THAT IS IMPORTANT FOR A DIFFERENT REASON. MANY
20 OF THE PLAINTIFFS TESTIFIED THAT THEIR AUDIENCE INCLUDES
21 MINORS. AND AS A RESULT OF THE CREDIT CARD REQUIREMENT,
22 MUCH OF THEIR INTENDED AUDIENCE WILL NOT BE ABLE TO
23 ACCESS THE SPEECH THAT THEY INTEND THEIR AUDIENCE TO
24 ACCESS. A REALLY GOOD EXAMPLE IS THE RAPPER ALICIA
25 SMITH, WHO RAPS UNDER THE NAME GOD-DES, WHOSE AUDIENCE

1 CONSISTS OF A LARGE PART OF MINORS. THAT WASN'T THE
2 ONLY EXAMPLE. SEXUAL HEALTH NETWORK SAID THAT MUCH OF
3 THEIR AUDIENCE FOR SEX EDUCATION IS MINORS. URBAN
4 DICTIONARY SAID THEY WANT TO ATTRACT MINORS BECAUSE
5 MINORS ARE USUALLY MORE IN TOUCH WITH THE LATEST WORDS
6 THAT ARE COMING OUT. MR. SNELLEN TESTIFIED THAT GAY
7 PEOPLE WANT TO REACH GAY MINORS SO THAT THEY DON'T FEEL
8 ISOLATED. IF WE HAVE A CREDIT CARD SCREEN, MINORS WILL
9 NOT BE ABLE TO ACCESS SPEECH THAT IS INTENDED FOR MINORS
10 AND THAT IS APPROPRIATE FOR MINORS.

11 THEN WE GET TO THE DETERRENCE. THE
12 DEFENSE COUNSEL SPENT RELATIVELY LITTLE TIME ON THE
13 DETERRENCE THAT EXISTS AS A RESULT OF A CREDIT CARD OR
14 SOME OTHER SCREEN, BUT IT IS WORTH NOTING THAT THEIR OWN
15 EXPERT, MR. SMITH, SAID HE HAS REFUSED TO REGISTER FOR
16 WEBSITES BECAUSE HE DOES NOT LIKE REGISTERING. HE HAS
17 REFUSED TO GIVE WEBSITES HIS CREDIT CARD NUMBER BECAUSE
18 HE DOES NOT LIKE GIVING OUT HIS CREDIT CARD NUMBER.
19 THERE IS PLENTY OF EVIDENCE THAT PEOPLE WILL BE DETERRED
20 FROM ACCESSING SPEECH IF THERE IS SOME SORT OF CREDIT
21 CARD OR OTHER SCREEN IN FRONT OF IT. MR. SMITH'S
22 OPINION IS ALSO A LITTLE BIT SUSPECT BECAUSE HE ASSUMED
23 THAT HE WAS ONLY TALKING ABOUT PURVEYORS OF ADULT
24 ENTERTAINMENT CONTENT. SINCE COPA REACHES LARGER THAN
25 THAT, THAT IS -- HIS OPINIONS HAVE SOME DIFFICULTIES.

1 BUT THERE IS ONE SORT OF MORE IMPORTANT
2 POINT ABOUT MR. SMITH'S ARGUMENT THAT I THINK IS
3 FASCINATING. HIS TESTIMONY WAS THAT IN ORDER TO AVOID
4 THE DETERRENCE PROBLEMS WHICH HE CONCEDED, A WEBSITE
5 WOULD HAVE TO PUT THE CREDIT CARD SCREEN OR WHATEVER
6 SCREEN AS DEEP INTO THE WEBSITE AS POSSIBLE AND HAVE IN
7 FRONT OF THE CREDIT CARD SCREEN, BEFORE YOU GET TO THE
8 CREDIT CARD SCREEN, AS MUCH SPEECH AS YOU POSSIBLY CAN
9 ADVISING PEOPLE WHAT'S AVAILABLE INSIDE THE CREDIT CARD
10 SCREEN. THIS IS EXACTLY THE DESCRIPTION OF WHAT THE
11 DEFENDANTS CLAIM IS THE PROBLEM HERE. MR. SMITH WAS
12 ENDORING THE CURRENT MODEL THAT ADULT ENTERTAINMENT
13 WEBSITES USE, TEASERS OUT IN FRONT AND OTHER STUFF
14 BEHIND THE CREDIT CARD SCREEN. THAT IS WHAT THE ADULT
15 INDUSTRY IS RIGHT TODAY. COPA THEY SAY WAS DESIGNED TO
16 CHANGE THAT MODEL, WAS DESIGNED TO FORCE ADULT WEBSITES
17 OUT OF THAT MODEL, WAS DESIGNED TO PREVENT ADULT
18 WEBSITES FROM USING THAT MODEL. AND THEN, THEIR OWN
19 EXPERT COMES IN AND ENDORSES THAT MODEL, SAYS BECAUSE OF
20 DETERRENCE HE SAYS THAT IS THE ONLY WAY TO BE
21 COMMERCIALY VIABLE.

22 ONCE AGAIN, THIS CASE IS ABOUT A CRIMINAL
23 STATUTE THAT CRIMINALIZES SPEECH. STATUTES OF THAT KIND
24 OUGHT TO BE VIEWED WITH ENORMOUS SKEPTICISM AND WITH
25 GREAT SCRUTINY. WHEN COPA IS VIEWED THAT WAY, IT CANNOT

1 SURVIVE. THANK YOU, YOUR HONOR.

2 THE COURT: THANK YOU VERY MUCH. ALL
3 COUNSEL DID VERY WELL IN THEIR ARGUMENTS AND THEY ARE
4 ALL HELPFUL TO THE COURT, AS USUAL.

5 WE HAVE ONLY A COUPLE OF ADMINISTRATIVE
6 HIGHLIGHTS TO RECONFIRM, I SUPPOSE. THE DATE FOR
7 SUBMISSIONS OF UPDATED REQUESTS FOR FINDINGS OF FACT AND
8 CONCLUSIONS OF LAW, AS I REMEMBER THAT DATE MAY BE THE
9 7TH OF DECEMBER, BUT I MAY BE WRONG.

10 MR. GOMEZ: YES, YOUR HONOR, DECEMBER
11 7TH.

12 THE COURT: DO WE HAVE OTHER THINGS THAT
13 NEED TO BE RECONFIRMED? I DON'T THINK SO.

14 MR. HANSEN: I DON'T BELIEVE SO, YOUR
15 HONOR.

16 MR. GOMEZ: THE ONLY -- I THINK THERE MAY
17 BE ONE ISSUE WITH RESPECT TO THE EXHIBITS AND IT'S
18 SOMETHING THAT WE MAY BE ABLE TO ADDRESS AFTER CLOSE,
19 BUT THE ISSUE IS WHAT ACTUALLY -- THE DEFENDANT'S
20 UNDERSTANDING OF THE EXHIBITS THAT ARE TO BE FINAL.

21 THE COURT: YOU MEAN THE TRIAL EXHIBITS.

22 MR. GOMEZ: YES, TRIAL EXHIBITS THAT WERE
23 -- FIRST EXHIBITS THAT WERE OFFERED AND ADMITTED,
24 EXHIBITS THAT WERE OFFERED BUT NOT ADMITTED. AND OUR
25 UNDERSTANDING IS THAT THERE ARE NO OTHER EXHIBITS, FOR

1 INSTANCE DEMONSTRATIVE EXHIBITS THAT WERE NOT OFFERED
2 AND WERE NOT ADMITTED OR ANY OTHER EXHIBIT. AND I THINK
3 THERE MAY BE A DIFFERENCE OF OPINION BETWEEN THE
4 DEFENDANT AND PLAINTIFF, AND I DIDN'T KNOW HOW THE COURT
5 WANTED TO HANDLE THAT.

6 MR. HANSEN: I THINK THERE IS A
7 DIFFERENCE OF OPINION.

8 THE ISSUE I THINK IS EXHIBITS THAT WERE
9 REFERRED TO BUT WERE NEVER FORMALLY MOVED INTO
10 ADMISSION. I UNDERSTOOD YOUR HONOR TO HAVE SUGGESTED
11 LAST WEDNESDAY OR THURSDAY WHEN WE WERE HERE THAT THAT
12 ALSO SHOULD BE INCLUDED IN THE RECORD. THAT IS THE REAL
13 QUESTION.

14 THE COURT: THEY SHALL BE INCLUDED IN THE
15 RECORD FOR THE FOLLOWING REASON. IN THE POST-TRIAL
16 REVIEW IF A REVIEWING COURT IS LOOKING AT THE TESTIMONY
17 OF A WITNESS AND THE WITNESS IS CONFRONTED WITH WRITTEN
18 MATERIAL THAT WAS NEVER OFFERED INTO EVIDENCE, BUT IS
19 PROPER CROSS EXAMINING MATERIAL, IF SOMEBODY OBJECTED TO
20 THAT QUESTION AND LATER WANTS TO PRESS THAT POINT IN
21 POST-TRIAL REVIEW, THE PERSON WHO IS PRESSING THE
22 OBJECTION WON'T HAVE THE WRITTEN MATERIAL AVAILABLE TO
23 THAT SIDE IF IT ISN'T PUT IN THE RECORD FOR THE
24 POST-TRIAL REVIEW. IT JUST WON'T BE AVAILABLE. I HAVE
25 SEEN -- THE REASON I INSIST ON IT IS IN THE COUPLE OF

1 YEARS THAT I HAVE BEEN MESSING AROUND WITH THIS STUFF I
2 HAVE SEEN THIS CREATE A PROBLEM. I DON'T KNOW HOW MANY
3 OF THOSE EXHIBITS THERE ARE. I CAN CONCEDE THAT THEY
4 WILL BE DIFFICULT -- MAYBE DIFFICULT TO FIND THEM, BUT I
5 TASK COUNSEL WITH FINDING THEM TO THE BEST OF
6 THEIR ABILITY. IF YOU MISS SOME BECAUSE IT'S JUST A
7 VERY LARGE TASK AND PEOPLE WERE NOT GEARED UP TO
8 THINKING LIKE THAT BEFORE, I STILL ASK YOU TO REACH AN
9 AGREEMENT THAT YOU HAVE IT ALL IN THERE. THIS ISN'T A
10 FANCIFUL TASK OR DESIGNED TO CAUSE EXTRA WORK. IT HAS
11 LEGITIMATE BASIS IN MY OWN EXPERIENCE, THEREFORE I
12 REQUIRE THAT TO BE DONE.

13 WITH RESPECT TO DEMONSTRATIVE EXHIBITS,
14 THEY SHOULD BE PUT IN THE RECORD. FOR INSTANCE, IN A
15 JURY TRIAL WHERE SOMEONE USES A TOTE BOARD AND A FLIP
16 CHART AND MAGIC MARKER AND TOTES UP A LIST OF ITEMS,
17 THOSE ARE TAKEN OFF THE BOARD, FOLDED UP AND MARKED AS
18 AN EXHIBIT AND PUT IN THE RECORD. OTHERWISE IF THEY
19 FORM THE BASIS FOR POST-TRIAL REVIEW, ONCE AGAIN, THE
20 POST-TRIAL REVIEWING COURT IS GOING TO BE WANDERING
21 AROUND TRYING TO FIND THESE ITEMS. THERE WAS INDEED A
22 MOTION FILED TODAY ABOUT DEMONSTRATIVE EXHIBITS USED BY
23 THE PLAINTIFFS. AND IF IT TURNS OUT TO BE SOMETHING
24 THAT COUNSEL WANTS TO PURSUE, HOW ARE YOU GOING TO FIND
25 THAT MATERIAL IF IT'S NOT IN THE RECORD? YOU'D HAVE TO

1 HAVE AN AFFIDAVIT OR SOMETHING, SORT OF DETRACTS FROM
2 THE VALUE OF THE MATERIAL. I THINK THAT -- AND I ASK
3 THAT ALL OF THE DEMONSTRATIVE EXHIBITS, EVEN THOSE THAT
4 WERE NOT ADMITTED INTO EVIDENCE, BE IDENTIFIED AND PUT
5 IN THE EVIDENTIARY RECORD THAT CONSTITUTES THE COMPLETE
6 RECORD FOR THIS TRIAL.

7 I GATHER THAT THE MOTION AND THE
8 CERTIFICATION ATTACHED TO THE MOTION THAT THE DEFENSE
9 ATTEMPTED TO FILE OVER THE WEEKEND WILL FINALLY GET
10 FILED. I'M SURE YOU WANT TO SEE TO THAT. I WOULD ASK
11 THAT YOU DO THAT.

12 MR. GOMEZ: YES, YOUR HONOR.

13 THE COURT: THEN WE WILL BE LEFT WITH THE
14 HEARING THAT WE HAD THIS MORNING AS A WAY OF RESOLVING
15 IT. FOR TIDYNESS PURPOSES, I MAY ISSUE A SHORT ORDER
16 THAT REPLICATES OR CONSISTENT WITH THE ORDER THAT I
17 ISSUED IN THE COURTROOM. OTHERWISE WE CAN'T GET IT OFF
18 THE DOCKET. THE DOCKET HAS STICKY FINGERS. IT'S LIKE
19 FLY PAPER, PEANUT BUTTER ON THE ROOF OF THE MOUTH. IT'S
20 HARD TO GET OFF.

21 MR. LANG, CAN YOU THINK OF ANYTHING ELSE
22 WE HAVE TO COVER FROM A TECHNICAL POINT OF VIEW?

23 THE CLERK: NOTHING THAT I CAN THINK OF.

24 THE COURT: ALL RIGHT. THE TRIAL OF ACLU
25 AND OTHERS VERSUS GONZALES IS CONCLUDED. AND THE COURT

1 WILL AWAIT WITH INTEREST THE UPDATED REQUEST FOR
2 FINDINGS. AND OTHER THAN THAT THE COURT TAKES THE
3 RESOLUTION OF THIS CASE UNDER ADVISEMENT. THE
4 PROCEEDINGS ARE CONCLUDED. COUNSEL ARE EXCUSED AND WE
5 ARE OFF THE RECORD.

6 (COURT CONCLUDED AT 11:55 A.M.)

7

8

9

10

11

12 I CERTIFY THAT THE FOREGOING IS A CORRECT
13 TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
14 ABOVE-ENTITLED MATTER.

15

16

17

18 DATE

OFFICIAL COURT REPORTER

19

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