

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

)
AMERICAN CIVIL LIBERTIES UNION, et al.,)
)
Plaintiffs,)
)
v.)
)
JANET RENO, in her official capacity as)
ATTORNEY GENERAL OF THE UNITED STATES,)
)
Defendant.)
)

Affidavit

I, MARC ROTENBERG, hereby depose and state:

1. I am the Director of the Electronic Privacy Information Center (EPIC), a non-profit research organization that collects and disseminates information concerning civil liberties and privacy issues arising in new electronic communications media. I submit this affidavit on behalf of EPIC.

2. EPIC is a project of the Fund for Constitutional Government (FCG), a publicly supported, charitable, nonprofit corporation incorporated in the District of Columbia. FCG was established in 1974 to protect civil liberties and constitutional rights. Both EPIC and FCG have their principal places of business in Washington,

DC.

3. Since its creation in 1994, EPIC has committed itself to educating the public about emerging civil liberties and privacy issues. EPIC's public education efforts include the maintenance of extensive online resources that offer electronic copies of EPIC publications, reports, court briefs, news releases, international treaties, U.S. government documents obtained under the Freedom of Information Act, and other materials related to EPIC's educational work.

4. EPIC maintains its public online resources through a "site" on the Internet's World Wide Web, and through a "listserver" mailing list to which any person with an Internet electronic mail address may subscribe. EPIC's Web site has been cited as a source of public policy information in national publications such as the New York Times, Washington Post and USA Today. These resources reside on a computer system physically located within EPIC's offices in Washington, DC, but can be accessed from computers located throughout the world.

5. On average, over 500 people visit EPIC's World Wide Web site each day. During the month of December, 1995, individuals visiting the Web site downloaded approximately 560 megabytes of information. (560 megabytes equals approximately 140,000 pages of single spaced printed text). During that month, connections to the site originated from approximately 15,000 identifiable organizations, educational institutions, commercial entities and

governmental agencies.

6. EPIC's electronic resources include materials concerning free speech, censorship and privacy issues. Because of the nature of these issues, some of the materials necessarily use sexually explicit speech or vulgar language. Thus, some of EPIC's online resources contain material that could be considered "indecent" or "patently offensive." For example, the EPIC Web site contains the text of the U.S. Supreme Court's opinion in Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978), in which the Court itself reproduced the so-called "seven dirty words" monologue as an appendix to its opinion. The Web site also contains the text of the Supreme Court's opinion in Cohen v. California, 403 U.S. 15 (1971), in which the Court reversed the conviction of a man who allegedly disturbed the peace by wearing a jacket that bore the words, "Fuck the draft."

7. EPIC's Web site also contains a section titled "Internet Censorship." The materials available in this area include the text of the Communications Decency Act and other legislation that would restrict online speech. Also included is the text of poems written by subscribers of the America Online (AOL) service and removed from that system by AOL management. The material was removed from the AOL system on the ground that it contains "vulgar or sexually oriented language" and therefore demonstrates the kinds of expression that might be deemed "indecent." The "Internet Censorship" area also contains a list of Usenet newsgroups that recently were removed from

the CompuServe system in response to German government restrictions on the publication of "indecent" material. EPIC believes that the publication of such information is crucial to public understanding of the potential effects of online censorship. 8. EPIC

considers minors to be an important audience for its online resources. The ability of minors to obtain online information concerning civil liberties and privacy issues is a vital part of their education. EPIC staff frequently receive inquiries from high school and college students seeking information for use in research projects. These students are referred to EPIC's Web site as a potential source of relevant information. Many of these students are likely to be minors.

9. EPIC understands that one possible course of action under the statute that could protect EPIC from possible criminal prosecution or sanctions would be to delete from its Web site all materials that might be considered indecent or patently offensive. Because EPIC believes that "indecent" and "patently offensive" material is protected by the Constitution even for minors, it will not delete such materials from its online communications in order to avoid criminal liability. However, even if EPIC wanted to screen "indecent" or "patently offensive" material, EPIC believes these terms are vague and does not know how to determine which material might be considered indecent or patently offensive.

10. EPIC understands that another possible course of conduct that could protect EPIC from possible criminal prosecution or sanctions under the statute would be to forbid minors from accessing

online resources that might be "indecent" or "patently offensive." Again, because EPIC believes that "indecent" and "patently offensive" material is protected by the Constitution even for minors, it will not refuse access to minors in order to avoid criminal liability. While requiring payment via credit card or check would be one way to verify the age of most users, and thus to exclude most minors, EPIC's online services are currently provided for free. Requiring such verification would shut out minors and also prevent adults without credit from accessing EPIC's online resources. In addition, a credit card or check verification requirement would prevent anonymous access and would require EPIC to maintain records of users who accessed its site in order to prove that a particular user was not a minor. EPIC believes that users enjoy a Constitutionally-protected right to access its online resources anonymously and without creating a record showing that they have accessed the site. EPIC further believes that EPIC has a Constitutional right to disseminate information to anonymous recipients.

11. The ability of EPIC to continue to use online communications to educate and communicate is essential to its mission and its future advocacy. EPIC's educational mission would be undermined if it were required to remove information from its Web site because of the "indecency" standard. As an organization committed to the preservation of personal privacy rights, EPIC's mission would likewise be undermined by requiring users of its online

resources to verify their ages and identities.

12. EPIC fears prosecution or other enforcement under the statute for communicating, sending, or displaying "indecent" or "patently offensive" material in a manner available to persons under age 18.

Under penalty of perjury, I hereby affirm that the foregoing is true and correct to the best of my knowledge and belief.

MARC ROTENBERG