

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

CENTER FOR DEMOCRACY & TECHNOLOGY, et al, : CIVIL ACTION
v. :
GERALD J. PAPPERT, :
ATTORNEY GENERAL OF :
PENNSYLVANIA : NO. 03-5051

**DEFENDANT'S SUR-REPLY MEMORANDUM
RE PLAYBOY AND RENO CASES**

Defendant had intended to withhold further briefing until after the presentation of all evidence, at which time all relevant issues can be further addressed as needed. However, Defendant fears that Plaintiffs' discussion of *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) and *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) in Plaintiffs' Reply Memorandum may influence evidentiary rulings. Defendant wishes to address those cases now, while the Court is still receiving evidence.

To prove infringement of their First Amendment speech rights, Plaintiffs must first (before any consideration or application of strict or intermediate or other level of scrutiny) establish that Defendant's actions are likely to restrain speech. Defendant's only possible actions under the challenged statute will not be directed to speakers or their listeners. They will be notices to ISPs and, if the ISPs do not comply with the notices, criminal prosecutions of the ISPs. If the Court permits informal notices, they too will be directed to ISPs. The notices (court authorized and informal) will ask ISPs to remove or disable access to child pornography items, which are not protected speech.

Plaintiffs argue that Defendant's notices to disable access will restrain protected speech because the ISPs can rationally decide to use a method of disabling access (IP Address filtering) that often disables ISP customers' access to sites that are not child pornography and are protected by the First Amendment. Plaintiffs cite *Playboy* to support this causation theory. However, under *Playboy*, if the challenged law does not by its language impose restrictions on the challenging plaintiffs, those plaintiffs cannot prove that the law burdens their speech rights through actions of the persons upon whom the law does impose obligations unless the plaintiffs prove that the obligated persons' *only* reasonable means of compliance is one that burdens speech.

The law under examination in *Playboy* imposed requirements on cable television operators regarding the signals of optional channels primarily showing "sexually oriented," but not obscene, programming. The cable operators scrambled the signals of these optional channels unless their customers paid for the channels. However, the scrambling sometimes still allowed visible images, and Congress feared that children would see them. This incomplete scrambling was called "signal bleed."

In an attempt to assure that children did not see "signal bleed" images of sexually oriented programming, the law required that the operators "fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it." 529 U.S. at 827. It defined "scramble" to mean that the content be

rearranged “so that the programming cannot be viewed or heard in an understandable manner.” 529 U.S. at 828. As an alternative, the law allowed operators to limit their provision of all sexually-oriented programming to certain hours of the day, which the assigned administrative agency determined were 10:00 p.m. to 6 a.m. This was known as “time channeling.”

Most cable providers chose to time channel. Because the sexually oriented programming was not obscene but was First Amendment protected for adult viewing, the time limitation burdened speech.

Playboy owned and produced sexually oriented programming which it transmitted to the cable operators (and for which it was, of course, paid). The cable operators then re-transmitted the material to its customers’ homes, scrambled, but viewable by those who paid for it. Playboy sued the government claiming that the law violated the First Amendment because it caused the cable operators to time channel, which reduced adults’ opportunities to watch Playboy’s programs, which reduced the purchases of Playboy’s channels and programs. *Playboy Entertainment Group, Inc. v. U.S.*, 30 F.Supp. 2d 702, 711, 712 (D.Del. 1998).

The first question was whether the law caused the time channeling. The courts found that it did. The Supreme Court reached that conclusion applying the following standard: “the only reasonable way for a substantial number of cable operators to comply with the letter of § 505 is to time channel.” 529 U.S. at 812. That is the standard that the Court must apply in this case, both to

the ultimate merits and to evidentiary questions.¹

Later in its opinion the Court commented on the cable operators' decisions using language upon which Plaintiffs here rely. However, those comments were not made regarding proof of restraint on speech but on an issue unique to the *Playboy* case. There, another section of the law under consideration required cable operators to fully scramble or fully block any channel, of any kind, upon the request of a subscriber. The Court saw this optional individual customer requested blocking as a possible less restrictive alternative to the full scrambling-blocking of all sexually explicit programming to all customers. The government argued that scrambling-blocking by request was not an effective alternative because, during thirteen months that across the board full scrambling was enjoined, very few people requested individual blocking. *Playboy* and the Court responded that people may not have requested blocking because signal bleed was not really a serious problem. Therefore, requested blocking could still be an effective, if underutilized, alternative. The government replied that signal bleed must be a serious

¹ In *Playboy*, the district court found, and the Supreme Court accepted, that under the current technology, no cable operator could consistently fully scramble or fully block the video and audio as required by the law and still provide the optional channels without spending "billions of dollars" and providing new equipment to all of their customers. *Playboy Entertainment Group, Inc. v. U.S.*, 30 F.Supp. 2d 702, 711 (D.Del. 1998). In fact, the scrambling technology in general use did not scramble audio at all. A scrambling upgrade to the next level would have cut the cable providers' revenues by 50%. *Id.* During the time that the law was in effect, at least 69% of cable providers time channeled. The others stood on their existing scrambling methods, some of which were better than others.

problem because many cable providers did take some action, *i.e.*, they time channelled. In this context, the Court then responded back to the government that, in light of the law's stringent requirements (*fully* scrambled or *fully* blocked), "a rational cable operator, faced with the possibility of sanctions for intermittent bleeding, could well choose to time channel even if the bleeding is too momentary to pose any concern to most households." 529 U.S. at 821. Thus, signal bleed might be a problem for which customer requested blocking was an effective alternative remedy, but not so serious a problem that many customers actually requested the blocking.

The foregoing argument thread followed in *Playboy* does not apply here. None of the less restrictive alternatives Plaintiffs propose depend on decisions of ISPs' customers. That a rational ISP *could* use a disabling method that collaterally burdens speech has no ultimate relevance. Plaintiffs, like all First Amendment plaintiffs, must prove that the statute in question here actually burdens speech. On that issue, they must prove that, under existing technology, the *only* reasonable methods available to ISPs to comply with notices under the statute seriously burden speech. If a rational ISP could use a method that does not collaterally block much protected speech, the law does not significantly burden speech.

To determine whether Plaintiffs have proven that the only reasonable method available to ISPs to disable their customers' access to specific child pornography sites is one that also disables access to substantial quantities of

protected speech, the Court should consider evidence of all methods possibly available to ISPs. Defendant contends that the evidence shows that at least one method of disabling access, DNS filtering, is reasonable for all ISPs and restrains little protected speech.² It disables access to the targeted child pornography site with reasonable effectiveness. It imposes little or no administrative or operational burdens on the ISP or its customers. The only instance where it does risk blocking untargeted speech (online communities) can easily be dealt with by contacting the communities' administrators, who invariably will remove the offending material, and only the offending material, from their services.³ Defendant also contends that URL filtering is a reasonable method of filtering, at least for simpler or smaller ISPs. It is effective as to the targeted child pornography site and does not affect untargeted sites. While some ISPs may have to install additional equipment or software and plan the process carefully to assure that the filtering does not seriously slow service, it should still be reasonable, at least for the smaller or simpler ISP.⁴ URL filtering is used on corporate networks. The large ISP America Online uses it for a

² On February 3, 2004, an America Online technician, who works with domain name servers, testified that AOL owns and operates the domain name servers that it provides to its customers.

³ The evidence shows that starting in October 2002, an Office of Attorney General agent, Dennis Guzy, Sr., himself contacted online communities, and they did remove the offending material from their services.

⁴ Law may "force" technology to develop new designs to serve the public interest. *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 49 (1983).

segment of its customer base that requests it. See Deposition of Christopher Bubb, pp. 127-129; Deposition of Brook Patterson (to be submitted when transcribed).

As the Supreme Court recognized in *Playboy*, reasonableness must in part be measured by the statutory requirements. The statute in this case gives ISPs considerable leeway. It is less stringent and imposes fewer restrictions on the ISPs than the law at issue in *Playboy*. It does not modify the word “disable” with the word “fully.” It does not prescribe any method of disablement of access to the child pornography items. The ISPs are free to choose their methods. Under Pennsylvania’s rules of statutory construction, the degree of disablement need only be reasonable. See 1 Pa.C.S. §§ 1921, 1922, 1928, summarized at Defendants’ Brief in Opposition to Plaintiffs’ Motion for Declaratory Relief, p. 54, note 14. Although the attitudes of customers regarding need for blocking have no relevance here, the attitude of the law enforcement authorities does, and the principal authority, the Office of Attorney General, has accepted both the DNS filtering method and the URL filtering method.⁵

Plaintiffs also look to cases regarding laws that have attempted to control content published on the Internet, particularly *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). However, those cases have little relevance here.

⁵ The attitude of ISP customers has relevance in another way. They do not want their access to non-child pornography sites blocked. This attitude makes IP address blocking a less reasonable choice for ISPs than DNS filtering or URL filtering.

The laws questioned in those cases attempt to make illegal the publication of material on the Internet that may harm children who access it but is constitutionally protected for adult consumption. The cases focus on the language of the prohibitions, finding it vague or overbroad. Technology only has become relevant in connection with affirmative defenses written into the statutes. The defenses attempt to protect publishers (and their speech) if the publishers limit children's access to their sites through online verification by credit card or adult identification certificate or through some other technological means. The government has argued that these kinds of defenses make the content fully available to adults, removing the constitutional objections to the statutory language. In *Reno*, the Court rejected this argument. It observed that the technological defensive method the government proposed did not even exist. It found that non-commercial publishers, who were covered by the law's prohibitions, could not afford to employ credit card verification. At any rate, credit card verification would not have restricted children's access to the sites because children can so easily pose as adults over the Internet. Without any technological means to qualify for the defenses, the publishers would be stuck with the vague and overbroad statutory prohibitions and would most likely decline to publish at all, foregoing First Amendment protected speech.

The Third Circuit has more recently examined the latest federal attempt to control Internet publishers, applicable in its latest form only to commercial

publishers. *American Civil Liberties Union v. Ashcroft*, 322 F.3d 240 (3d Cir.) *cert. granted*, 124 S.Ct. 399 (2003). It again has found the language of the prohibitory portions of the law vague and overbroad. The law contains affirmative defenses designed to protect publishers who technologically restrict access to their sites to adults through credit card, digital age verification certificate, or other reasonable and feasible methods. But the court has held that the defenses do not narrow the effects of the law's vague and overbroad prohibitory definitions. 322 F.3d at 258-260. Neither digital age verification certificates nor any other technologically feasible methods to verify age online exist. But overriding these technological impossibilities, and addressing credit cards too, the court held for non-technological reasons that the defenses did not save the statute: any means of verification that requires recipient users to identify themselves itself discourages adult access to the sites and burdens speech.

In the present case, Pennsylvania's Internet Child Pornography law does not attempt to regulate publishers or recipients of protected speech. Plaintiffs do not claim that the language of the law is vague or overbroad. The law contains no technological affirmative defense upon which Defendant relies. Technology has relevance because Plaintiffs claim that technology causes the law to restrain protected speech. Plaintiffs have the burden of proving that the law combined with the technology inevitably causes a restraint. The Court should consider the various methods, and combinations of methods, ISPs

might use to disable access to sites. The evidence will show that current technology reasonably applied does permit ISPs to comply reasonably with the law without excessively burdening protected speech. Plaintiffs cannot meet their initial burden under the correct *Playboy* standard.

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CERTIFICATE OF SERVICE

I, John O. J. Shellenberger, hereby certify that the foregoing Defendant's Sur-Reply Memorandum Re *Playboy* and *Reno* Cases has been filed electronically and is available for viewing and downloading from the Court's Electronic Case Filing (ECF) system. A true and correct copy of the foregoing Memorandum was provided on January 11, 2004 by e-mail and hand delivery to:

Stefan Presser, Esquire
American Civil Liberties Union
125 S. Ninth St., Suite 701
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and by e-mail and regular mail, postage prepaid, to:

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