CENTER FOR DEMOCRACY & TECHNOLOGY, AMERICAN CIVIL LIBERTIES UNION; PLANTAGENET, INC
v.
GERALD J. PAPPERT, Attorney General of the Commonwealth of Pennsylvania

337 F. Supp. 2d 606 (E.D. Pa. 2004)

September 10, 2004, Decided

MEMORANDUM

I. INTRODUCTION

In February of 2002, Pennsylvania enacted the Internet Child Pornography Act, 18 Pa. Cons. Stat. §§ 7621-7630, ("the Act"). The Act requires an Internet Service Provider ("ISP") to remove or disable access to child pornography items "residing on or accessible through its service" after notification by the Pennsylvania Attorney General. It is the first attempt by a state to impose criminal liability on an ISP which merely provides access to child pornography through its network and has no direct relationship with the source of the content.

The plaintiffs are Center for Democracy and Technology ("CDT"), the American Civil Liberties Union of Pennsylvania ("ACLU"), and Plantagenet, Inc. CDT is a non-profit corporation incorporated for the purpose of educating the general public concerning public policy issues related to the Internet. The ACLU is a non-partisan organization of more than 13,000 members [*611] dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. Plantagenet, Inc., is an ISP that provides a variety of services related to the Internet. Defendant is Gerald J. Pappert, Attorney General of the Commonwealth of Pennsylvania. . . .

II. PROCEDURAL HISTORY

. . . Thereafter, plaintiffs filed a Motion for Declaratory Relief and for Preliminary and Permanent Injunctive Relief on December 12, 2003 that essentially sought the same relief as was sought in the Complaint. A hearing on this Motion commenced on January 6, 2004. Based on an agreement between the parties, the hearing on the Motion for Declaratory Relief and Preliminary Injunctive Relief was consolidated with a trial on the merits by Order dated March 1, 2004. Because of the schedule of the Court and the parties, the trial continued over twelve non-consecutive days before it concluded with oral argument on June 23, 2004. Following the trial, the parties submitted supplemental memoranda and post-trial proposed findings of fact.

III. FINDINGS OF FACT

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C. INTERNET CHILD PORNOGRAPHY ACT ("THE ACT")

48. On February 21, 2002, Pennsylvania enacted the Internet Child Pornography Act, codified at 18 Pa. Cons. Stat. § 7330 and effective in 60 days (April 22, 2002) ("the Act"). On December 16, 2002, the Act was recodified at 18 Pa. Cons. Stat. §§ 7621-7630, without change in substance. Jt. Stip. P 29.

49. The Act permits defendant or a district attorney in Pennsylvania to seek a court order requiring an ISP to "remove or disable items residing on or accessible through" an ISP's service upon a showing of probable cause that the item constitutes child pornography. The application for a court order must contain the Uniform Resource Locator providing access [**30] to the item. Pls.' FOF PP 2, 145; 18 Pa. Cons. Stat. §§ 7626-7628.

50. Child pornography is defined as images that display a child under the age of 18 engaged in a "prohibited sexual act." A prohibited sexual act is defined as "sexual intercourse . . . masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction." Pls.' FOF P 141; 18 Pa. Cons. Stat. § 6312.

51. The court order may be obtained on an ex parte basis with no prior notice to the ISP or the web site owner and no post-hearing notice to the web site owner. Pls.' FOF P 142; 18 Pa. Cons. Stat. §§ 7626-7628.

52. Under the Act, a judge may issue an order directing that the challenged [**31] content be removed or disabled from the ISP's service upon a showing that the items constitute probable cause evidence of child pornography. A judge does not make a final determination that the challenged content is child pornography. Pls.' FOF P 143; 18 Pa. Cons. Stat. § 7627.

53. Once a court order is issued, the Pennsylvania Attorney General notifies the ISP in question and provides the ISP with a copy of the court order. The ISP then has five days to block access to the specified content or face criminal liability, including fines of up to $ 30,000 and a prison term of up to seven years. Pls.' FOF P 144; 18 Pa. Cons. Stat. §§ 7624, 7628.

54. According to defendant, the purpose of the Act is: "To protect children from sexual exploitation and abuse. To serve this purpose by interfering with distribution of child pornography, particularly its distribution over the Internet." Pls.' Ex. 75 (Def.'s Resp. to Pls.' Fourth Set of Interrogs.) P1.

55. Government law enforcement agencies have attempted to locate and criminally prosecute persons who produce or knowingly distribute child pornography. However, a state agency in the United [**32] States cannot easily prosecute producers and distributors of child pornography because they are rarely found in that particular state and often are not found in the [*620] United States. Tr. 1/9/04 (Burfete) p. 17-19. . . .

F. IMPACT OF THE ACT ON INTERSTATE COMMERCE

210. Some ISPs were only able to implement blocking orders on a nationwide basis. Pls.' Ex. 9 (Mar. 20, 2002 e-mail from Guzy Sr. to Burfette). Some of these ISPs communicated this fact to the OAG before the Act took effect. The OAG's Chief Information Officer, Peter Sand, recognized that implementation of the Act might extend outside of Pennsylvania, stating: "I think [the

ISPs are] all distracted [*646] by their belief that they will have to make a technical distinction between [Pennsylvania] customers and their other customers. They might be technically unable to make that distinction. . . I think we may face a larger, legal problem by someone who might argue that what we are in fact doing is regulating 'stuff' outside of our geographic jurisdiction." Pls.' Ex. 8 (Mar. 19, 2002 e-mail from Sand to Burfete) at 2.

211. The blocking actions taken by AOL to comply with the Informal Notices were applied to AOL's entire global network and thus halted communications that took place entirely outside [**110] of Pennsylvania (and the U.S.). AOL told the OAG that it was "technologically incapable" of confining the impact of compliance with blocking orders to the Commonwealth of Pennsylvania. Pls.' Ex. 7 (March 18, 2002 e-mail from Burfete to Sand). Dep. of C. Bubb (AOL) at 125-26; Pls.' FOF P569.

212. The court order issued to WorldCom under the Act resulted in obstruction of communications on WorldCom's entire North American network. Dep. of C. Silliman (WorldCom) at 20, 97. This blocking affects all WorldCom customers in the United States and Canada and some WorldCom customers located overseas. As a hypothetical, a WorldCom customer in Minnesota would not be able to access a web site located in Georgia if it was blocked as a result of WorldCom's compliance with a Pennsylvania blocking order. Tr. 1/27/04 (Krause) pp.107-08. WorldCom informed the OAG that it was not technically feasible for it to block access only to Pennsylvania subscribers and that it would have to block access to all users of WorldCom's North American network. Jt. Ex. 8 (Sep. 23, 2002 letter from Silliman to Burfette) p.3; Pls.' FOF P 569.

213. Verizon informed the OAG about the interstate impact of blocking orders [**111] on its network. As Verizon explained, "blocking access to content or URLs accessible to Pennsylvania residents through Verizon-owned DNS servers requires Verizon also to block access to the same content and URLs by customers in other states who use these same DNS servers." Pls.' Ex. 84 (Aug. 16, 2002 letter from Verizon to OAG) at 2, note 2; Dep. of S. Lebredo (Verizon) at 42-44.

214. ISPs do not organize or design their internal networks along state boundaries, and thus it would be "extremely challenging" for an ISP to limit the impact of URL filtering to the State of Pennsylvania. Tr. 2/18/04 (Stern) pp. 85-86.

215. Even communications between Pennsylvanians are likely to be interstate communications. For example, all World Wide Web traffic of AOL's dial-up customers in Pennsylvania passes through an AOL data center located in Virginia. Dep. of B. Patterson (AOL) at 21; Pls.' FOF P 573.

IV. CONCLUSIONS OF LAW

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D. INTERSTATE COMMERCE CLAUSE

Plaintiffs argue that the Act and Informal Notices violate the Commerce Clause because, given the fact that most ISP's networks cross state boundaries, the blocking orders "impose restrictions on communications occurring wholly outside of a Pennsylvania, effect an impermissi-

ble burden on interstate commerce, and risk subjecting Internet speech to inconsistent state obligations." Pls. Mot. at 58.

The Constitution grants Congress the power "to regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has decided that the Commerce Clause has a negative aspect, commonly called "the dormant Commerce Clause," that limits the states' power to regulate interstate commerce. "The dormant Commerce Clause prohibits the states from imposing restrictions that benefit in-state economic interests at out-of-state interests' expense." Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd., 298 F.3d 201, 210 (3d Cir. 2002) (citing West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192-93, 129 L. Ed. 2d 157, 114 S. Ct. 2205 (1994)). [**157]

The first question the Court must answer in conducting a dormant Commerce Clause analysis is "whether the state regulation at issue discriminates against interstate commerce 'either on its face or in practical effect.' If so, heightened scrutiny applies." Id. "On the other hand, if the state regulation does not discriminate against interstate commerce, but 'regulates even-handedly' and merely 'incidentally' burdens it, the regulation will be upheld unless the burden is 'clearly excessive in relation to the putative local benefits.'" Id. at 211 (quoting Pike v. Bruce Church, Inc. 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)).

Plaintiffs do not argue that the Act favors in-state commerce over out-of-state commerce on its face or in practical effect. As a result, the balancing test applied in Pike v. Bruce Church quoted above will be applied. Plaintiffs also argue that a Act is per se invalid under the dormant Commerce Clause because it has the "practical effect" of regulating commerce occurring wholly outside state's borders. Pls.' Mot. at 58 (quoting Healy v. Beer Institute Inc., 491 U.S. 324, 336, 105 L. Ed. 2d 275, 109 S. Ct. 2491 (1989)). [**158]

1. Pike Balancing Test

The Act cannot survive the dormant Commerce Clause balancing test set forth in Pike v. Bruce Church, Inc. 397 U.S. 137, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970). Under Pike, if the Act is an "evenhanded regulation to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed is clearly excessive in relation to local benefits." Id. at 142. In this case, there is a legitimate local interest - combating child pornography and sexual abuse of children - and the effects on interstate commerce are only incidental. Thus, the Court must determine if the burden imposed is clearly excessive in relation to local benefits.

The courts in PSInet, Johnson, and Pataki concluded that the burdens of state pornography laws were clearly excessive in relation to local benefits. PSInet, 362 F.3d at 240, ACLU v. Johnson, 194 F.3d at 1160-61, Pataki, 969 F. Supp. at 177-181. In fact, every federal court that examined a state law that directly regulated the Internet determined that the state law [**159] failed the Pike balancing test. Id.; but see Ford Motor Co. v. Tex. DOT, 264 F.3d 493, 505 (5th Cir. 2001) (distinguishing "incidental regulation of internet activities" in that case from direct regulation in Pataki).

This Court also concludes that the burdens imposed by the Act are clearly excessive in relation to the local benefits. Defendant claims the Act is justified by reducing the sexual abuse of children. However, as discussed, defendant did not produce any evidence that the Act effectuates this goal. See supra § IV.B.2. To the contrary, there have been no prosecutions of child pornographers and the evidence shows that individuals interested in obtaining or providing child pornography can evade blocking efforts using a number of different methods. Id.

Moreover, there is evidence that this Act places a substantial burden on interstate commerce. Defendant argues that the Act only burdens child pornography, which is not a legitimate form of commerce. To the contrary, the evidence demonstrates that implementation of the Act has impacted a number of entities involved in the commerce of the Internet - ISPs, web publishers, and users of the [**160] Internet. To comply with the Act, ISPs have used two types of filtering - IP filtering and DNS filtering - to disable access to alleged child pornography. This filtering resulted in the suppression of 376 web sites containing child pornography, certainly a local benefit. However, the filtering used by the ISPs also resulted in the suppression of in excess of 1,190,000 web sites not targeted by defendant and, as demonstrated at trial, a number of these web sites, probably most of them, do not contain child pornography. FOF PP 164-189. The overblocking harms web publishers which seek wide distribution for their web sites and Internet users who want access to the broadest range of content possible. For example, as a result of a block implemented by AOL in response to an Informal Notice, Ms. Goldwater, a self employed documentary film maker, was unable to access a web site selling movie posters. FOF P 98; Tr. 1/28/04 (Goldwater) pp. 111, 121.

Based on this evidence, the Court concludes that the burden imposed by the Act is clearly excessive in relation to the local benefits. Thus, the Act must fail under the dormant Commerce Clause as an invalid indirect regulation of interstate commerce.

2. Per se Invalidity

A number of cases have invalidated state laws regulating the Internet because the laws regulated activity occurring wholly outside the state's borders or because they have had an "extraterritorial" effect. The court in American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 177 (S.D.N.Y. 1997) invalidated a New York state law that regulated the Internet because "the nature of the Internet makes it impossible to restrict the effects of the New York Act to conduct occurring within New York. . . . Thus, conduct that may be legal in the state in which the user acts can subject the user to prosecution in New York and thus subordinate the user's home state's policy - perhaps favoring freedom of expression over a more protective stance - to New York's local concerns." This ruling was followed in American Booksellers Foundation v. Dean, 342 F.3d 96 (2d Cir. 2003), ACLU v. Johnson, 194 F.3d 1149, 1161 (10th Cir. 1999), and cited with approval in PSInet v. Chapman, 362 F.3d 227 (4th Cir. 2004). As explained in Healy v. The Beer Institute, 491 U.S. 324, 105 L. Ed. 2d 275, 109 S. Ct. 2491 (1989), [**162] the Commerce Clause protects against "against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." Id. at 337.

This Act has the practical effect of exporting Pennsylvania's domestic policies. Pataki, 969 F. Supp. at 174. As an example, a WorldCom witness testified that a customer in Minnesota would

not be able to access a web site hosted in Georgia if an [*663] IP Address was blocked by a Pennsylvania order. FOF P 210-215. The Act is even more burdensome than the legislation examined in Pataki because Pennsylvania has suppressed speech that was not targeted by the Act. Thus, a Minnesotan would be prevented from accessing a Georgia web site that is not even alleged to contain child pornography.

A number of courts have concluded that the Internet should not be subject to state regulation. Am. Booksellers Found. v. Dean, 342 F.3d 96, 104 (2d Cir. 2003) ("We think it likely that the internet will soon be seen as falling within the class of subjects that are protected from State regulation because they 'imperatively demand[] a single uniform rule.'"), American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 181 (S.D.N.Y 1997) [**163] ("The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level. The Internet represents one of those areas; effective regulation will require national, and more likely global, cooperation. Regulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations."). Although the Court is not prepared to rule that states can never regulate the Internet, the Act's extraterritorial effect violates the dormant Commerce Clause.

V. CONCLUSION

For the foregoing reasons, plaintiffs' Motion for Declaratory Relief and Preliminary and Permanent Injunctive Relief is granted. Pennsylvania's Internet Child Pornography Act, 18 Pa. Stat. Ann. § 7621-7630 and the Informal Notice process used by defendant to implement the Act are declared unconstitutional. Defendant is enjoined from taking any action against an ISP for failing to comply with an Informal Notice or court order under the Act. The ISPs which blocked web sites pursuant to Informal Notices and, with respect [**164] to WorldCom, a court order shall promptly remove the blocks.

An appropriate Order follows.