

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, Ira Glasser, of New York, New York, do hereby depose and swear:

1. I am the Executive Director of the American Civil Liberties Union (ACLU), a nationwide, nonpartisan organization of nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. I submit this affidavit on behalf of the ACLU.

2. The ACLU is incorporated in District of Columbia and has its principal place of business in New York City.

3. In addition to its legal advocacy to uphold the Bill of Rights, the ACLU has long devoted considerable resources to educating the public about civil liberties. Since 1993, the ACLU's public education efforts have included extensive online resources that offer electronic copies of ACLU publications, reports, court briefs, news releases, and other material related to the ACLU's legal, legislative, educational and advocacy work. The ACLU's online resources also include interactive discussion groups, chat rooms, and special online events that allow users to discuss and debate a variety of civil liberties issues.

4. The National Office of the ACLU maintains its public online resources through two separate online services, America Online (AOL) and the Internet's World Wide Web. The ACLU has a contract with America Online (AOL) to provide online resources through the AOL online service. The ACLU has a separate contract with New Media Publishing, Inc. to provide online resources through the Internet's World Wide Web. The AOL site offers interactive discussion groups, chat rooms, and special online events that are not offered through the Internet site. Otherwise, the material offered through the two services is substantively the same.

5. The ACLU's World Wide Web site, due to be publicly launched on February 7, 1996, has already received over 8000 accesses although it has only been accessible since January 26, 1996. Over 500 people visit the ACLU's site on America Online each week. In 1995, the ACLU posted hundreds of separate documents to its America Online site, and it expects to increase the number of online publications in 1996 on both the AOL site and the web site.

6. The Public Education Department of the ACLU's National Office in New

York, New York creates and formats ACLU information for both the America Online site and the Internet site. Using electronic mail, the ACLU's affiliate offices in all fifty states forward relevant information to the ACLU's Public Education Department to be included in the ACLU's online resources.

7. While the ACLU's online resources on America Online are physically located in computers owned and maintained by America Online, Inc. of Vienna, Virginia, the ACLU has sole editorial control over the site. Only AOL subscribers can access the ACLU information on the AOL system.

8. While the ACLU's online resources on the Internet web site are physically located in computers owned and maintained by New Media Publishing of Falls Church, Virginia, the ACLU has sole editorial control over the site. All online subscribers that have access to the Internet can access the ACLU's web site.

9. New Media Publishing has expressed concern that it could be held liable under the statute for the material on the ACLU's web site. The company has not yet decided what action, if any, to take as a result of this concern.

10. In addition to the Internet web site and the America Online site maintained by the ACLU's Public Education Department at the National Office, many ACLU affiliate offices provide their own online resources through separate service providers. More and more of the ACLU's fifty state affiliate offices have established their own web pages, usually through a service provider in their own state. The National Office web site creates links to these affiliate web sites, but the affiliate web site information is physically stored on various computers depending upon the service provider used by the state affiliate office.

11. The ACLU is involved in cases and advocacy regarding arts censorship, obscenity law and indecency law, discrimination against gays and lesbians, and

reproductive freedom. Because of the nature of these and other civil liberties issues, many ACLU documents necessarily use sexually explicit speech or vulgar language. Thus, many of the ACLU's online resources contain material that could be considered "indecent" or "patently offensive." For example, the ACLU has posted the text of the famous "Seven Dirty Words" comic monologue which the Federal Communications Commission ruled "indecent," and which the Supreme Court upheld in the 1978 FCC v. Pacifica case. (The Supreme Court itself reproduced the "seven dirty words" monologue as an appendix to its opinion in the Pacifica case.) In order to illustrate the ever-changing public conception of what words are "indecent," the ACLU has an online feature that allows users to guess what the famous "seven dirty words" are. The ACLU allows the user to access the correct answer by reading the Court decision or the ACLU's brief in the case. In honor of its recent 75th anniversary, the ACLU also published a list entitled "The ACLU's 75 Greatest Hits" that documents the ACLU's involvement in 75 important United State Supreme Court victories. The online version of the list includes the text of the brief that the ACLU filed for each case with the Supreme Court. One of these cases was the Cohen v. California case, 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," while walking through a courthouse corridor. In addition, the ACLU's online resources include an important trial court opinion dealing with free speech in cyberspace. In U.S. v. Jake Baker, a federal district court dismissed criminal charges against a student who had posted online fictional stories and messages involving violent sexual fantasies. The opinion quotes graphic passages from the defendant's postings.

12. The ACLU's Internet sites also provide links to other Internet sites

as a resource for online users. For example, when accessing an ACLU online file on civil liberties in cyberspace, the ACLU site provides a link so that the user can "jump" to a related site hosted by the Electronic Frontier Foundation. In turn, EFF's site provides further links to additional relevant online sites that deal with the subject.

13. The ACLU's site on America Online also hosts unmoderated online discussion groups that allow citizens to discuss and debate a variety of civil liberties issues. These include a "free speech zone," in which users can simultaneously chat online about current issues; the Bill of Rights bulletin board, an online bulletin board that allows users to post messages on particular civil liberties topics; and live "auditorium" events, in which a featured speaker "talks" online on a particular issue and users can respond simultaneously with online questions. Past speakers have included such controversial figures as Camille Paglia (academic and commentator on sexual politics) and Harvey Fierstein (actor and gay rights activist). The ACLU's Public Education Department changes the online topics frequently to address current civil liberties concerns. Users are also permitted to create bulletin board topics of their own choice. All of these interactive services provide an opportunity for online users to express their uncensored views on civil liberties issues. Many of the communications have sexual content or vulgar language; for example, users of the ACLU site on AOL have discussed the content of Howard Stern's best-selling book, Private Parts; the taboo of masturbation, in the context of the firing of Jocelyn Elders; reasons why the word "fuck" has such expressive power; and the First Amendment rationale for defending pornography.

14. The ACLU does not moderate its online discussion groups because any

editing would be antithetical to the ACLU's strong belief in freedom of speech and a free marketplace of ideas. Thus, the online discussion groups provide both an opportunity to learn about civil liberties and an opportunity to exercise one of the most important of those liberties -- free speech.

15. The ACLU considers minors to be an important audience for its online resources. The ability of minors to obtain online information and to participate in chat rooms or discussion groups with other minors and with adults is a vital part of their education. It is particularly important that minors be able to access information about their own civil rights so that they can recognize when their rights are being infringed.

16. The ACLU understands that one possible course of action under the statute that could protect the ACLU from possible criminal prosecution or sanctions would be to delete all materials that might be considered "indecent" or "patently offensive." Because the ACLU believes that "indecent" and "patently offensive" material is protected by the Constitution even for minors, it does not currently intend to delete such materials from its online communications in order to avoid criminal liability. However, even if the ACLU wanted to screen "indecent" or "patently offensive" material, the ACLU does not know how to determine which material might be considered indecent or patently offensive. In addition, because of the large amount of information that flows into the ACLU online sites from users of its interactive services, the ACLU would have to devote tremendous resources to such screening, which would be economically infeasible. In addition, because of the large number of other online sites that are linked to the ACLU site, and in turn the additional links on those sites, it would be technically and economically infeasible to try to screen all "indecent" or "patently offensive"

material.

17. The ACLU understands that another possible course of conduct that could protect the ACLU 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 the ACLU believes that "indecent" and "patently offensive" material is protected by the Constitution even for minors, it does not currently intend to 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, the ACLU's online services are currently provided for free. Requiring such verification would shut out minors and also prevent adults without credit from accessing ACLU online resources. In addition, a credit card or check verification requirement would prevent anonymous access and would require the ACLU to maintain records of users who accessed their site in order to prove that a particular user was not a minor. The ACLU believes that users should be able to access its online resources anonymously and without creating a record showing that they have accessed the site.

18. The ability of the ACLU to continue to use online communications to educate and communicate is essential to its mission and its future advocacy. The ACLU's educational mission would be undermined, and it would suffer economic hardship, if it were required to write separate versions of its print publications -- one for adults, and one for minors -- for distribution online because of the "indecent" standard. The ACLU does not currently screen requests for print publications to determine whether the request is from a minor. (Current law requires no such screening for print publications.) In addition to the economic

hardship, it would make no sense to deny a minor access to an online version of an ACLU publication that the minor could easily request in printed form.

19. In addition to its public online resources, the ACLU maintains a private space on American Online that may be accessed by ACLU staff but not by other America Online subscribers. The AOL private space allows ACLU staff and members to exchange documents and information on bulletin boards and through private e-mail. ACLU staff and members also use other online services (sometimes through America Online, and sometimes through other Internet Service Providers) that include e-mail, online mailing lists and discussion groups, and private bulletin board systems. These additional services are an important low-cost method of communicating and sharing documents and information between individuals and select groups. Because ACLU staff and members work on issues such as art censorship, obscenity, reproductive freedom, and gay rights, some of these communications also contain sexually explicit or vulgar speech or descriptions of the human body or human reproduction.

20. Many ACLU staff and members receive requests for information by private e-mail messages. Some of these requests are for information on issues such as art censorship, obscenity, reproductive freedom, and gay rights, and thus may include sexually explicit or vulgar speech or descriptions of the human body or human reproduction. The ACLU does not currently verify the age of the person requesting the information, and does not currently intend to begin verification procedures in order to avoid criminal liability under the statute for the reasons stated in paragraph 16 above.

21. Many of the ACLU's nearly 300,000 members use online communications. ACLU members both receive and transmit information through a variety of online

communications including the Internet's World Wide Web, online mailing lists, discussion groups, chat rooms, computer bulletin boards, and private e-mail. To avoid liability under the statute, ACLU members will either have to self-censor "indecent" speech or risk prosecution. In addition, many ACLU members are minors. The statute will radically restrict access by ACLU members who are minors to constitutionally protected material.

22. The ACLU, on behalf of itself and its members, 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. The ACLU also fears that if the statute goes into effect, America Online, New Media Publishing, and other online services will ban ACLU communications that they consider potentially "indecent" or "patently offensive," thereby depriving the ACLU, its members, and others who use its online services of the ability to communicate about important issues.

23. The ACLU conducts litigation to protect reproductive rights nationwide, including women's access to abortions. The ACLU regularly represents abortion providers and individual women seeking abortions. The ACLU informs individual clients about various abortifacient drugs and devices, including how they function and where they are available. In addition, the ACLU's World Wide Web site contains a link to the Feminist Majority Online Web site, which contains the information that the abortifacient drug RU 486 (also called mifepristone) is available in France and that a specific health clinic in England will administer it to American women. The ACLU also provides information to our colleagues, the media, and the

public about the legal status of various abortifacient drugs and devices. In the process of giving this information, the ACLU staff often explain how the drugs and devices work and where they are available. The ACLU distributes this information through the mails, over telephone and FAX lines, and through interactive computer services.

24. To assess the legality of using particular abortifacient drugs and devices, the ACLU receives information from physicians, abortion providers, abortion rights activists, and others regarding how the drugs and devices work and who provides them. For example, to help the ACLU determine the reach of laws restricting access to abortion, its physician-clients send medical literature differentiating between drugs and devices (such as low-dosage birth control pills and intrauterine devices) that prevent the implantation of a fertilized ovum, and so may be defined as abortifacients, and others (such as condoms or high-dosage birth control pills) that prevent conception and so are not properly defined as abortifacients. The ACLU also receives information about the availability and functioning of RU 486, the combination of methotrexate and misoprostol, and the morning-after pill, which are all abortifacient drugs. Abortion providers and others send the ACLU this information through the mails, over telephone and FAX lines, and through interactive computer services.

25. In addition to communicating about abortifacient drugs and devices, the ACLU informs its individual clients about various

surgical abortion procedures, including how they are done and where they are available. Furthermore, the ACLU's World Wide Web site contains a link to the Abortion Clinics Online Web site, which lists the addresses and telephone numbers of abortion clinics across the country, and to other Web sites that describe abortion procedures. The ACLU also provides information to our colleagues in the field, the media, and the public about the legal status of various surgical abortion procedures. In the process of giving this information, ACLU staff often explain how the procedures work and where they are available. The ACLU distributes this information through the mails, over telephone and FAX lines, and through interactive computer services.

26. The ACLU receives information from physicians, abortion providers, abortion rights advocates, and others regarding how specific surgical abortions are performed and who performs them. For example, in making a record to demonstrate the scarcity of abortion providers in a state where it is challenging an abortion restriction, the ACLU compiles information about where and by what means abortions are performed in that state. Abortion providers and others send the ACLU this information through the mails, over telephone and FAX lines, and through interactive computer services.

27. Members of the ACLU send and receive information about abortion and about various abortifacient drugs and devices through the mails, over telephone and FAX lines, and through interactive computer services.

28. The ACLU, on behalf of itself and its members, fears prosecution or other enforcement under 18 U.S.C. § 1462(c) for sending or receiving through the mails, telephone and FAX lines, and its online resources, "information . . . where, how, or of whom, or by what means any" "drug, medicine, article, or thing designed, adapted, or intended for producing abortion . . . may be obtained or made."

Ira Glasser

Subscribed and sworn before me on this ____ day of February, 1996.
