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REPORT

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Freedom of Speech

California Trial Judge Says Net Porn Law Violative of Speech Rights, Commerce Clause

A California law that makes it illegal to knowingly transmit sexual material to a minor via the Internet is unconstitutionally overbroad in violation of the First Amendment, the California Superior Court, Contra Costa County, held Jan. 3. Two other trial court rulings involving the constitutionality of the law are pending in the state's appellate courts (*People v. Wheelock*, Cal. Super. Ct., Contra Costa Cty., 990875-7, 1/3/00).

Contra Costa County Superior Court Judge John C. Minney, who issued an oral opinion from the bench, also said the state law offends the federal commerce clause. Minney cited as controlling authority the U.S. Supreme Court's ruling in *American Civil Liberties Union v. Reno*, 117 S. Ct. 2329 (1997) (2 ECLR 646, 6/27/97), which struck down the Communications Decency Act of 1996.

The CDA, which prohibited the online transmission and display of indecent material to minors, was overbroad, the Supreme Court held in *Reno*. Unlike broadcast media, the court said, the Internet deserves the fullest degree of First Amendment protection, and Congress failed to choose the least restrictive means in advancing the government interest of protecting minors from indecent content.

Minney also made mention of the U.S. Court of Appeals for the Tenth Circuit decision last year in *American Civil Liberties Union v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (4 ECLR 1027, 11/10/99), which struck down a similar state law in New Mexico. The Tenth Circuit held that the New Mexico law was overbroad, saying it created a possibility that all communication on the Internet could meet the statute's definition of "knowingly" in the absence of a viable age verification method online.

Under First Amendment and commerce clause rationales, federal courts have struck down similar laws in New York and Michigan as well (*American Libraries Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (2 ECLR 659, 6/27/97); *Cyberspace Communications Inc. v. Engler*, 55 F. Supp.2d 737 (E.D. Mich. 1999) (4 ECLR 690, 8/4/99)).

At issue in California is Penal Code § 664/288.2b, which makes it a crime to send material defined as harmful by the statute to a minor via the Internet, with the knowledge that the recipient is a minor and with the intent of sexually arousing or seducing the minor.

Other Cases on Appeal. Two cases similar to *Wheelock* that could have bearing upon the California law are being considered in the state's appellate courts, and have yet to be decided (*Hatch v. Superior Court*, Cal. 4th Dist. Ct. App., Div. 1, DO32423, argued 10/99; *People v. Hsu*, Cal. 1st Dist. Ct. App., Div. 5, AO88201, appeal filed 11/22/99).

In *Hatch*, a 31-year-old kindergarten teacher in the San Diego area was arrested after police were tipped off

by a Fox Television news crew that had set up its own sting operation. Fox hired a local investigative news operation that employed a 22-year-old woman to pose online as a young teenage girl. Hatch exchanged e-mail with the woman in chat rooms and reportedly sent her pornography. He was arrested when he attempted to meet the woman police say he believed was a 13-year-old girl.

In *Hsu*, a 39-year-old financial advisor from Walnut Creek, Calif., was arrested after he allegedly exchanged sexually explicit e-mail with a police officer posing as a 15-year-old boy in a chat room frequented by gay men.

Julie Hast, the Contra Costa County deputy district attorney who prosecuted the *Wheelock* and *Hsu* cases, said she has a total of seven separate cases whose outcomes could be affected by the appellate court rulings.

California law enforcement agencies have used the section in a string of sting operations since the law's adoption in 1997, John D. Forsyth, an attorney with Clancy, Weisinger & Associates, a Walnut Creek, criminal defense firm which has lodged a facial challenge to the statute.

Forsyth, whose firm specializes in sex crimes, said the doctrine of legal impossibility does not apply in the cases because they were attempts to commit a crime. The statute specifically criminalizes attempts, saying that the accused's belief that the person on the other end of the communication is a minor is enough to constitute a criminal act.

Forsyth said the Fourth District Court of Appeals was expected to rule in *Hatch* last month, but asked for amicus briefs on the constitutional issues from the state attorney general and Appellate Defenders Inc. A potential problem with the appeal, Forsyth said, was that a constitutional challenge to the statute was not raised in the trial court, and the appellate court could choose to bypass the issue on this ground. However, the request for amicus briefs indicates the court may issue a ruling that addresses the statute's constitutional status, he said.

Arguments have yet to be set in *Hsu*, but a decision in *Hatch* is expected by the end of March.

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