



THE DEFENSE TEAM: John D. Forsyth, left, Patrick E. Clancy and John P. Hollinrake of Clancy, Weisinger & Associates say the Internet porn law violates Free Speech and Commerce Clause rights.

Caught in the Web

A state law designed to net people who use the Internet to lure kids is being called unconstitutional by some defense attorneys

By SONIA GIORDANI

Steve McEwan logs on to computer chat rooms and tells people he's a teenager. Then he waits for the sex talk and cyberporn to find him.

The San Jose detective assigned to the child exploitation detail spends countless hours chitchatting with complete strangers and monitoring the stream of sexually explicit conversation that flows steadily into his mailbox.

And when he feels he has enough evidence, McEwan arrests the senders at the other end for violating a state law designed to protect minors from lewd material on the Internet.

Bay Area police and prosecutors are cracking down on pedophiles who are using Internet chat, cybersex and cyberporn as the latest lollipops to befriend curious kids, and sometimes to lure them to real-world sexual meetings.

But many of the defendants have been filing into the Walnut Creek-based law offices of Clancy, Weisinger & Associates, where a trio of attorneys argue that the law their clients are charged with is unconstitutional.

See WEB page 10

Web Stings Raising Questions of Constitutionality

Continued from page 1

Specifically, the Clancy attorneys take issue with a section of the California Penal Code that makes it illegal for a person to transmit material intended to arouse or seduce if they know that the recipient is a minor.

Clancy associate John Forsyth said the law impinges on free speech, and points to a 1997 U.S. Supreme Court decision gutting the Communications Decency Act to support his position.

He says the state law also violates the Commerce Clause of the U.S.

Constitution because it attempts to regulate the Internet — a medium which by its nature crosses traditional borders and cannot be regulated by any one state.

"Here we are practicing criminal law and we're talking about First Amendment rights and the Commerce Clause," said Forsyth, whose firm for decades has specialized in representing defendants in child molestation and sexual assault cases.

The law — §288.2(b) — was added to the penal code only two years ago, Forsyth noted.

"The Legislature had a compelling interest in preventing sexual molestation and protecting children from pornography," he acknowledges.

"But is this the least restrictive way to go about it?"

Local prosecutors admit the law may need a tuneup: But they say as computers are being used to perpetrate more sex crimes and as Internet smut is more readily reaching minors, they need a strong state law to combat the problem.

"The Internet is giving pedophiles almost limitless access to kids," said Nancy O'Malley, Alameda County Assistant Chief District Attorney.

O'Malley, who specialized in prosecuting sex crimes before becoming No. 2 to DA Thomas Orloff, says pornography of-

ten is used as a way to introduce the subject of sex. Children are asked if they have ever seen a naked man or woman, if they have seen two adults having sex and, ultimately, if they have seen an adult and a child having sex.

Though federal legislation exists to attack the problem, O'Malley maintains it would be a mistake to turn the cases over wholesale to the U.S. attorney's office, where resources already are limited.

TWO-PRONGED STRATEGY

The Clancy attorneys maintain that many of the people getting hammered by the California law are not pedophiles and had no intention of molesting children. They attack the law with a two-pronged strategy, on free speech and commerce clause grounds.

The First Amendment argument rests on *Reno v. ACLU*, 117 S. Ct 2329, the U.S. Supreme Court decision that struck down a law imposing criminal and civil penalties on Internet users who make indecent material available to minors. The court held that the law in question at that time "unquestionably silences some speakers whose messages would be entitled to constitutional protection."

Justice John Paul Stevens went on to say the law "would confer broad powers of censorship . . . upon any opponent of indecent speech who might simply log on and inform the would-be discourses that his 17-year-old child . . . would be present."

Attorneys from the Clancy firm contend the California law suffers from the same defect.

"The Internet is all about role playing. Nobody's ugly on the Internet; everyone is fabulous at sex," said Patrick Clancy, the firm's founder.

He describes Internet chat rooms as a masquerade ball — a fantasy world where people go to play out their sexual fantasy



BEA AHBECK

THE BOTTOM LINE:

Nancy O'Malley, Alameda County Assistant Chief District Attorney, says Penal Code section 288.2(b) helps protect kids.

roles under the cloak of anonymity.

"An 80-year-old woman can go online and relive the loss of her virginity at 16 — and she could do it over and over again," he said. "The mind is the ultimate sex organ."

The Clancy attorneys also argue that the California statute violates the commerce clause by imposing a state rule in an arena that should be left to the feds.

They first tried to lay out their argu-

ments in a Contra Costa case this past spring. But that case pleaded out.

Now the trio has taken up the issue in an Alameda County case, *People v. Costello*, 446993, where a man is accused of sending pornographic images and explicit messages to a cop posing as a teen.

Last month, the attorneys asked Superior Court Judge Brenda Harbin-Forte to toss the *Costello* complaint. On Aug. 18

See page 11

the judge denied the motion, but in her order she conceded the law may have some problems.

"If California courts follow what may be the emerging trend suggested by the published and unpublished authorities cited in the parties' briefs," Harbin-Forte wrote, "the statute may be constitutionally vulnerable."

The case is set for preliminary hearing on Sept. 27.

As Harbin-Forte's order suggests, plenty of courts have found merit in arguments similar to Clancy's.

New Mexico and New York statutes similar to the California law have been struck down by federal courts that cited both *ACLU* and the commerce clause arguments. Those cases held in part that it is impossible to determine the age of the re-

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Professor Pamela Samuelson, Boalt Hall School of Law

ipient of an Internet communication and that such laws violate citizens' right to free speech.

In February, the Third Circuit U.S. Court of Appeals issued a preliminary injunction preventing the enforcement of Pennsylvania's Child Online Protection Act because it violates the First Amendment rights of adults. And in July, a U.S. District Court in Michigan said that "no aspect of the Internet can feasibly be closed to users from another state," concluding that state laws "would subject the Internet to inconsistent regulations across the nation."

WHO'S IN CHARGE HERE ANYWAY?

Federal law enacted after the *ACLU* decision prohibits the transmission of smut to kids over the Internet, carrying lengthier sentences than the California law.

But that doesn't prevent states, including California, from attempting to regulate the same conduct.

"And attempt is the right word," said Boalt Hall School of Law Professor Pamela Samuelson, a nationally recognized expert on cyberlaw.

While state legislators should be able to regulate the safety of California's children, Samuelson said the Internet poses a complex scenario in that not all Internet activities are restricted to one state.

For example, she noted, many people

subscribe to Internet servers outside their home state.

"So," she says, "a state's ability to control or regulate Internet activity may be difficult to accomplish in actuality."

Still, local prosecutors such as Alameda County Deputy District Attorney Brook Bennigson, who is handling *Costello*, point out that there are clear examples of Internet crimes committed strictly between two residents of the state, and he says in those instances state law should apply.

But even prosecutors realize that the Internet is forcing courts into reconsidering jurisdictional issues.

Contra Costa County Deputy District Attorney Julie Hast, who this spring handled seven Internet sex cases, concedes that the state law protecting minors from harmful matter on the Internet needs to be clarified.

She says that as she prosecuted the cases, she noticed ambiguities in the way courts interpreted terms such as "knowingly transmitting" to a minor and "harmful matter."

"One judge would say one thing, and another would say the exact opposite," she said.

But she says the state law is invaluable because it curbs a dangerous method of exploiting children that had gone unchecked for years.

"The part that bothers me about this whole thing is that some defense attorneys who don't like the stings leave the impression that these men didn't know the age of the person they were communicating with," Hast said.

All of the cases that landed on her desk earlier this year came out of an Internet sex sting involving a boy who received pornographic material via email and engaged in other illegal acts with men.

Defendants in four of those cases pleaded guilty. In two cases, Hast turned the prosecution over to the feds. One case is scheduled for trial in Martinez in October.

In Alameda County, O'Malley says the bottom line is that §288.2(b) helps protect kids.

She vividly remembers when the Internet first showed its ugly side in her case file two years ago.

O'Malley says the case involved a shy 14-year-old Livermore girl who turned to the Internet to make friends. She gained confidence behind the anonymity, and at some point discovered cybersex chat.

"We found about 20 attachments of naked people she was receiving from this guy," she said. "All of a sudden this little girl was having proficient dialogues about sex."

O'Malley said she ultimately prosecuted a San Ramon insurance agent who had driven to the girl's parents' house and raped her.

"I could see young and curious kids goofing around on the Internet — a kid who a pedophile might not have had access to before," says O'Malley, "and suddenly these kids find themselves in a situation where they are over their heads."

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