

**2) AMERICAN LIBRARY ASSOCIATION; FREEDOM TO READ FOUNDATION, INC.; NEW YORK LIBRARY ASSOCIATION; WESTCHESTER LIBRARY SYSTEM; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; BIBLIOBYTES, INC.; MAGAZINE PUBLISHERS OF AMERICA, INC.; INTERACTIVE DIGITAL SOFTWARE ASSOCIATION; PUBLIC ACCESS NETWORKS CORPORATION; ECHO; NEW YORK CITY NET; ART ON THE NET; PEACEFIRE; and AMERICAN CIVIL LIBERTIES UNION,
Plaintiffs,**

v.

**GEORGE PATAKI, in his official capacity as Governor of the State of New York; and DENNIS VACCO, in his official capacity as Attorney General of the State of New York,
Defendants.**

97 Civ. 0222 (LAP)

OPINION

LORETTA A. PRESKA, United States District Judge:

The Internet may well be the premier technological innovation of the present age. Judges and legislators faced with adapting existing legal standards to the novel environment of cyberspace struggle with terms and concepts that the average American five-year-old tosses about with breezy familiarity.¹ Not surprisingly, much of the legal analysis of Internet-related issues has focused on seeking a familiar analogy for the unfamiliar. Commentators reporting on the recent oral argument before the Supreme Court of the United States, which is considering a First Amendment challenge to the Communications Decency Act, noted that the Justices seemed bent on finding the appropriate analogy which would tie the Internet to some existing line of First Amendment jurisprudence: is the Internet more like a television? a radio? a newspaper? a 900-line? a village green? See. e.g., Linda Greenhouse, What Level of Protection for Internet Speech? High Court Weighs Decency-Act Case, N. Y. Times, March 24, 1997, at C5; see also *Denver Area Educ. Telecommunications Consortium v. Federal Communics. Comm'n*, 116 S. Ct. 2374, 2419-21 (1996) (Thomas, J., concurring in the judgment and dissenting in part) (criticizing the majority for declining to determine whether cable television is more closely analogous, for purposes of First Amendment analysis, to a print medium or a broadcast medium). This case, too, depends on the appropriate analogy. I find, as described more fully below, that the Internet is analogous to a highway or railroad. This determination means that the phrase "information superhighway" is more than a mere buzzword; it has legal significance, because the similarity between the Internet and more traditional instruments of interstate commerce leads to analysis under the Commerce Clause.

BACKGROUND

The plaintiffs in the present case filed this action challenging New York Penal Law § 235.21(3) (the "Act" or the "New York Act"), seeking declaratory and injunctive relief. Plaintiffs contend that the Act is unconstitutional both because it unduly burdens free speech in violation of the First Amendment and because it unduly burdens interstate commerce in violation of the Commerce Clause. Plaintiffs moved for a preliminary injunction enjoining enforcement of the Act; defendants opposed the motion. A factual hearing was held from April 3 to April 7, 1997 and oral argument conducted on April 22, 1997. For the reasons that follow, the motion for a preliminary injunction is granted.

I. Parties to the Action

Plaintiffs in the present action represent a spectrum of individuals and organizations who use the Internet to communicate, disseminate, display, and access a broad range of communications. All of the plaintiffs communicate online both within and outside the State of New York, and each plaintiff's communications are accessible from within and outside New York. Plaintiffs include:

- American Library Association, Freedom to Read Foundation, Inc., New York Library Association, and Westchester Library System are organizations representing the interests of libraries. Libraries serve as both access and content providers on the Internet, providing their patrons with facilities to access the Internet. Libraries also post their card catalogues, information about upcoming events and online versions of text or art from their collections, as well as sponsoring chat rooms.
- American Booksellers Foundation For Free Expression ("ABFFE") is a national association of general interest and specialized bookstores formed to protect free expression rights. ABFFE has many members who use the Internet and electronic communications to obtain from publishers information and excerpts, some of which may contain sexually explicit passages.
- Association of American Publishers ("AAP") is a national association of publishers of general books, textbooks, and educational materials. AAP has many members who actively use and provide content on the Internet, both creating and posting electronic products and using the Internet as a communication and promotional tool for their print publishing activities.
- BiblioBytes is a private, profit-seeking enterprise that uses the World Wide Web (the "Web") to provide information about and to sell electronic books. BiblioBytes offers titles in a variety of genres, including romance, erotica, classics, adventure, and horror.
- Magazine Publishers of America ("MPA") is a national association of publishers of consumer magazines. MPA's members publish magazines in print form, but are also beginning to offer publications in electronic formats available to the public on the Internet or through online service providers.
- Interactive Digital Software Association ("IDSA") is a non-profit trade association of United States publishers of entertainment software. IDSA has many members who both sell their software in retail outlets and make their entertainment software available to the public on the Internet for demonstration, purchase, and play.

- Public Access Networks Corporation ("Panix") is an Internet service provider serving subscribers located in the New York area. Panix also hosts various organizational Web pages, assists its subscribers in creating individual Web pages, and hosts online discussion groups and chat rooms.

- ECHO is a for-profit Internet service provider that offers a "virtual salon" to Internet users. ECHO and its subscribers provide content on the Internet through the posting of Web sites, including personal home pages, and through over 50 discussion groups oriented to subscribers' interests.

- New York City Net ("NYC Net") is a for-profit Internet service provider catering primarily to lesbians and gay men in the New York area. NYC Net provides access services and content specifically oriented to gay and lesbian interests, including a large number of online discussion groups and chat rooms.

- Art on the Net is a non-profit organization with an international artist site ("art.net") on the Web. Art on the Net assists over 110 artists from all over the world in maintaining online studios.

- Peacefire is an organization whose membership consists primarily of minors. It was formed to protect the rights of citizens under the age of 18 to use the Internet. Peacefire's members use the Internet to communicate and access a wide variety of information. Peacefire's founder points out in his Declaration that Internet access is particularly important to those members who are too young to drive and might otherwise be unable to view materials from museums, libraries, and other institutions to which their families are unwilling to transport them. (See Declaration of Bennett Haselton, sworn to on March 12, 1997, at p. 4.

- American Civil Liberties Union ("ACLU") is a national civil rights organization. The ACLU maintains a Web site on which it posts civil liberties information and resources, including material about arts censorship, obscenity laws, discrimination against lesbians and gays, and reproductive choice. In addition, the ACLU hosts unmoderated online discussion groups that allow citizens to discuss and debate a variety of civil liberties issues.

Defendants in this case are the Governor and the Attorney General of New York. Defendants have raised the question of whether an injunction against those parties would also bind the sixty-two District Attorneys in New York who would actually be mounting prosecutions against alleged violators of the Act. Fed. R. Civ. P. 65(d) provides:

Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. Thus, parties such as the local District Attorneys who "participate" in the enjoined activities with defendants and who have actual notice of the injunction would be bound. See *American Booksellers v. Webb*, 590 F. Supp. 677, 693-94 (N.D. Ga. 1984) (holding that an injunction against the Attorney General also binds state law enforcement officials who might seek to enforce the challenged Act); see also *United Transportation Union v. Long Island RR Co.*, 634

F.2d 19, 22 (2d Cir. 1980) (binding non-party Attorney General to the terms of an injunction against the defendants because Attorney General "undoubtedly had knowledge of the instant action and could have participated therein had he chosen to do so"), rev'd on other grounds, 455 U.S. 678 (1982). Thus, a preliminary injunction would effectively bar enforcement of the Act whether the prosecution happened to be brought directly by the Attorney General's office or by one of the individual District Attorneys.

II. The Challenged Statute

The Act in question amended N.Y. Penal Law § 235.21 by adding a new subdivision. The amendment makes it a crime for an individual:

Knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, to intentionally use any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor.

Violation of the Act is a Class E felony, punishable by one to four years of incarceration. The Act applies to both commercial and non-commercial disseminations of material.

Section 235.20(6) defines "harmful to minors" as:

that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

- (a) Considered as a whole, appeals to the prurient interest in sex of minors; an
 - (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
 - (c) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors.
- N.Y. Penal Law § 235.20 (6).

The statute provides six defenses to liability. First, Section 235.15(1) provides the following affirmative defense to prosecution under § 235.21(3):

In any prosecution for obscenity, or disseminating indecent material to minors in the second degree in violation of subdivision three of section 235.21 of this article, it is an affirmative defense that the persons to whom the allegedly obscene or indecent material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, governmental or other similar justification for possessing, disseminating or viewing the same.

The statute further provides four regular defenses to prosecution:

- (a) The defendant made a reasonable effort to ascertain the true age of the minor and was unable to do so as a result of the actions taken by the minor; or
- (b) The defendant has taken, in good faith, reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to materials specified in such

subdivision, which may involve any appropriate measures to restrict minors from access to such communications, including any method which is feasible under available technology; or
(c) The defendant has restricted access to such materials by requiring use of a verified credit card, debit account, adult access code or adult personal identification number; or
(d) The defendant has in good faith established a mechanism such that the labelling, segregation or other mechanism enables such material to be automatically blocked or screened by software or other capabilities reasonably available to responsible adults wishing to effect such blocking or screening and the defendant has not otherwise solicited minors not subject to such screening or blocking capabilities to access that material or circumvent any such screening or blocking.
N.Y. Penal Law § 235.23(3). And, finally, Section 235.24 provides that no individual shall be held liable:

Solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that do not include the creation of the content of the communication.

N.Y. Penal Law § 235.24. Exceptions to this defense for conspirators or co-owners and an additional employer liability defense are set forth in Section 235.24(1)(a)-(b) and (2).

III. The Internet 2

The Internet is a decentralized, global communications medium linking people, institutions, corporations, and governments all across the world. *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa.), prob. juris. noted, 117 S. Ct. 554 (1996), argued, March 19, 1997; *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), argued, March 19, 1997. The nature of the Internet makes it very difficult, if not impossible, to determine its size at any given moment. Undoubtedly, however, the Internet has experienced extraordinary growth in recent years. In 1981, fewer than 300 computers were linked to the Internet; in 1989, the number stood at fewer than 90,000 computers. By 1993, over 1,000,000 computers were linked. Today, over 9,400,000 host computers worldwide, 60% of them located in the United States, are linked to the Internet. This count does not include users who access the Internet via modem link-up from their personal computers. As many as 40 million people worldwide currently enjoy access to the Internet's rich variety of resources, and that number is expected to grow to 200 million by the year 1999.

The Internet is a network of networks -- a decentralized, self-maintaining series of redundant links among computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control. No organization or entity controls the Internet; in fact, the chaotic, random structure of the Internet precludes any exercise of such control.

The information available on the Internet is "as diverse as human thought," *ACLU*, 929 F. Supp. at 842. Every facet of art, literature, music, news, and debate is represented. There can be no question that the overwhelming variety of available information includes some sexually explicit materials. Sexually-oriented content is, however, not "the primary type of content on this new medium." *Id.*

Individuals obtain access to the Internet via a number of avenues. Students and faculty often obtain access via their educational institutions; similarly, some corporations provide their employees with direct or modem access to the Internet. Individuals in some communities can

access the Internet via a community network or a local library that provides direct or modem access to library patrons. Storefront "computer coffee shops" offer another option, serving up access to cyberspace accompanied by coffee and snacks for a small hourly fee. "Internet service providers" typically offer modem telephone access to a computer or computer network linked to the Internet. Many such providers -- including plaintiffs Panix, Echo, and NYC NET -- are commercial entities offering Internet access for a monthly or hourly fee. Another common way for individuals to access the Internet is through one of the major national commercial "online services" such as America Online, Compuserve, the Microsoft Network, or Prodigy, which collectively service almost twelve million individual subscribers across the United States. These online services offer nationwide computer networks (allowing subscribers to dial in via a local telephone number) and provide both proprietary content and links to the even more extensive resources of the Internet for a monthly or hourly fee. Finally, local dial-in computer services, called "bulletin board systems" or "BBSs" provide Internet access via direct or indirect links.

The Internet permits a user to communicate pictures and text in several ways including:

- (1) one-to-one messaging (such as "e-mail");
- (2) one-to-many messaging (such as "listserv" or "mail exploder");
- (3) distributed message databases (such as "USENET newsgroups");
- (4) real time remote computer utilization (such as "Internet Relay Chat");
- (5) real time remote computer utilization - (such as "telnet"); and
- (6) remote information retrieval (such as "ftp," "gopher," and the Web).

In addition to transmitting pictures and text, many of these communication methods can be used to transmit data, computer programs, sound, and moving video images.

Most users of the Internet are provided with a username, password and e-mail address that allow them to sign on to the Internet and communicate with other users. Many usernames are pseudonyms, known as "handles," which provide users with a distinct online identity and preserve anonymity. For example, Ms. Kovacs testified that she uses the handle "Harriet Vane" when communicating with fellow mystery aficionados in the "Dorothy L" listserv and the nom de cyber "Mrs. Archangel" when she's just "goofing off" on the Internet. (4/4/97 Tr., at 58). The username and e-mail address are the only indicators of a user's identity; generally speaking, neither datum discloses a party's age or geographic location.

E-mail is the simplest method of Internet communication. E-mail allows an online user to address and transmit an electronic message to one or more people. The ACLU court noted that e-mail is "comparable in principle to sending a first class letter." ACLU, 929 F. Supp. at 834. The analogy is not a perfect one, however, for two reasons. First, the sender directs his message to a logical rather than geographic address, and therefore need not know the location of his correspondent in real space. Second, most programs provide for a "reply" option which enables the recipient to respond to the sender's message simply by clicking on a button; the recipient will therefore not even need to type in the sender's e-mail address. A further distinction concerns the level of security that protects a communication. While first-class letters are sealed, e-mail communications are more easily intercepted. Concerns about the relatively easy accessibility of e-mail communications have led bar associations in some states to require that lawyers encrypt sensitive e-mail messages in order to protect client confidentiality. See Carey Ramos & Curtis

Carmack, *Beware of Cyberspace Marauders: Internet Security Addressed*, N.Y.L.J., February 24, 1997, at S1.

The Internet also includes a wide variety of online discussion fora that allow groups of users to discuss and debate subjects of interest. The three most common means by which such discussion groups come together are through mail exploders, USENET newsgroups, and chat rooms.

Mail exploders, also known as "listservs," allow online users to subscribe to automated mailing lists that disseminate information on particular subjects. Subscribers send an e-mail message to the "list," and the mail exploder automatically and simultaneously sends the message to all of the other subscribers on the list. Users of mailing lists can add or delete their names from the list automatically, without any direct human involvement. *Id.* at 834; Shea, 930 F. Supp. at 927.

USENET newsgroups are a very popular set of discussion groups arranged according to subject matter and automatically disseminated "using ad hoc peer to peer connections between approximately 200,000 computers . . . around the world." *ACLU*, 929 F. Supp. at 834-35. Users may read or send messages to newsgroups without any prior subscription, and there is no way for a speaker who posts an article to a newsgroup to know who is reading the message. *Id.*; Shea, 930 F. Supp. at 927-28. Currently, more than 15,000 different subjects are represented in USENET newsgroups, and over 100,000 new messages are posted to these groups every day. *ACLU*, 929 F. Supp. at 835.

Chat rooms allow online discussion in real time. Users are able to engage in simultaneous conversations with one or many "occupants" by typing in messages and reading the messages typed by others participating in the chat; the *ACLU* court analogized this Internet application to a telephone party line. *ACLU*, 929 F. Supp. at 835; Shea, 930 F. Supp. at 928. There are thousands of different chat rooms available "in which collectively tens of thousands of users are engaging in conversations on a huge range of subjects." *ACLU*, 929 F. Supp. at 835.

Finally, perhaps the most well-known method of communicating information online is the Web; many laypeople erroneously believe that the Internet is co-extensive with the Web. The Web is really a publishing forum; it is comprised of millions of separate "Web sites" that display content provided by particular persons or organizations. Any Internet user anywhere in the world with the proper software can create a Web page, view Web pages posted by others, and then read text, look at images and video, and listen to sounds posted at these sites. Many large corporations, banks, brokerage houses, newspapers and magazines provide online editions of their reports and publications or operate independent Web sites. Government agencies and even courts use the Web to disseminate information to the public. At the same time, many individual users and small community organizations have established individual "home pages" on the Web that provide information to any interested person who "surfs by."

Although information on the Web is contained on innumerable Web sites located on individual computers around the world, each of these Web sites and computers is connected to the Internet by means of protocols that permit the information to become part of a single body of knowledge accessible by all Web visitors. *ACLU*, 929 F. Supp. at 836, 837. To gain access to the resources of the Web, an individual employs a "browser." A browser is software, such as Netscape

Navigator, Mosaic, or Internet Explorer, that allows the user to display, print, and download documents that are formatted in the standard Web formatting language. Shea, 930 F. Supp. at 929.

There are a number of different ways that Internet users can browse or search for content on the Web. First, every document on the Web has an address that allows users to find and retrieve it, and a user can simply type in the address and go directly to that site. Again, however, the address is a logical rather than geographic concept, and the user will not necessarily know where the site is located in real space. Additionally, a user who wants to conduct a generalized search or wants to reach a particular site but does not know the address, can use a "search engine," which is available free of charge to help users navigate the Web. ACLU, 929 F. Supp. at 837. The user simply types a word or string of words as a search request, and the search engine provides a list of sites that match the search string. Id.

Finally, online users may "surf" the Web by "linking" from one Web page to another. Almost all Web documents contain "links," segments of text or images that refer to another Web document. Id. at 836. When the user clicks on the link, the linked document is automatically displayed, wherever in the world it is stored. Id. For example, the American Library Association ("ALA") home page contains several links. Some of these links are to other Web pages or documents within the ALA site, including documents entitled "Libraries Online," "Library Promotional Events," and the "ALA Bookstore." Other links from the ALA home page connect the user to sites maintained by other organizations or individuals and stored on other computers around the world. The ALA Web site, for example, provides links to the American Association of Law Libraries, the Art Libraries Society of North America, and the Medical Library Association. "These links from one computer to another, from one document to another across the Internet, are what unify the Web into a single body of knowledge, and what makes the Web unique." Id. at 836-37.

Regardless of the aspect of the Internet they are using, Internet users have no way to determine the characteristics of their audience that are salient under the New York Act -- age and geographic location. In fact, in online communications through newsgroups, mailing lists, chat rooms, and the Web, the user has no way to determine with certainty that any particular person has accessed the user's speech. "Once a provider posts content on the Internet, it is available to all other Internet users worldwide." Id. at 844. A speaker thus has no way of knowing the location of the recipient of his or her communication. As the poet said, "I shot an arrow into the air; it fell to the earth I know not where."

This highly simplified description of the Internet is not intended to minimize its marvels. While no one should lose sight of the inventiveness that has made this complex of resources available to just about anyone, the innovativeness of the technology does not preclude the application of traditional legal principles -- provided that those principles are adaptable to cyberspace. In the present case, as discussed more fully below, the Internet fits easily within the parameters of interests traditionally protected by the Commerce Clause. The New York Act represents an unconstitutional intrusion into interstate commerce; plaintiffs are therefore entitled to the preliminary injunction that they seek.

DISCUSSION

I. Standard Applicable to a Preliminary Injunction

To demonstrate their entitlement to a preliminary injunction, plaintiffs must show (a) that they will suffer irreparable harm and (b) either (i) a likelihood of success on the merits or (ii) sufficiently serious questions going to the merits to make them a fair ground for litigation³ and a balance of hardships tipping decidedly in the plaintiffs' favor. *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991); *Streetwatch v. National R.R. Passenger Corp.*, 875 F. Supp. 1055, 1058 (S.D.N.Y. 1995). In the present case, as discussed more fully below, plaintiffs have amply demonstrated the likelihood of their successful prosecution of their claim that the Act violates the Commerce Clause because it seeks to regulate communications occurring wholly outside New York, imposes a burden on interstate commerce that is disproportionate to the local benefits it is likely to engender, and subjects plaintiffs, as well as other Internet users, to inconsistent state obligations. See *Healy v. Beer Institute*, 491 U.S. 324, 332 (1989); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945).

Plaintiffs have also shown that they face irreparable injury in the absence of an injunction. Irreparable injury means "the kind of injury for which money cannot compensate," *Sperry Int'l Trade, Inc. v. Government of Israel*, 670 F.2d 8, 12 (2d Cir. 1982), and which is "neither remote nor speculative, but actual and imminent." *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989). Deprivation of the rights guaranteed under the Commerce Clause constitutes irreparable injury. *C & A Carbone, Inc. v. Town of Clarkstown*, 770 F. Supp. 848, 854 (S.D.N.Y. 1991) (holding that a local waste disposal law caused irreparable injury to the plaintiffs' rights under the Commerce Clause). Thus, by demonstrating that the Act threatens their rights under the Commerce Clause, as will be discussed more fully below, the plaintiffs have shown both irreparable injury and a likelihood of success on the merits.

II. Federalism and the Internet: The Commerce Clause

The borderless world of the Internet raises profound questions concerning the relationship among the several states and the relationship of the federal government to each state, questions that go to the heart of "our federalism." See *Yoncner v. Harris*, 401 U.S. 37, 44 (1971) ("One familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses.") The Act at issue in the present case is only one of many efforts by state legislators to control the chaotic environment of the Internet. For example, the Georgia legislature has enacted a recent law prohibiting Internet users from "falsely identifying" themselves online. Ga. Stat. 16-9-9.1. Similar legislation is pending in California. California Senate Bill SB-1533 (1996); see also Ilana DeBare, *State Trademark Bill Ignites Net Turmoil*, *The Sacramento Bee*, March 2, 1991, at F1. Texas and Florida have concluded that law firm web pages (apparently including those of out of state firms) are subject to the rules of professional conduct applicable to attorney advertising. See *Texas Bar Advertising Comm., Interpretive*

Comment on Attorney Internet Advertising (1996); see also *Texans Against Censorship v. State Bar of Texas*, 888 F. Supp. 1328, 1369-70 (E.D. Tex. 1995) (discussing applicability of Texas lawyers advertising regulation to the Internet), *aff'd*, 100 F.3d 953 (5th Cir. 1996); Ethics Update, Fla. Bar News, January 1, 1996. Further, states have adopted widely varying approaches in the application of general laws to communications taking place over the Internet. Minnesota has aggressively pursued out-of-state advertisers and service providers who reach Minnesotans via the Internet; Illinois has also been assertive in using existing laws to reach out-of-state actors whose connection to Illinois occurs only by virtue of an Internet communication. See Mark Eckenwiler, *States Get Entangled in the Web*, Legal Times, Jan. 22, 1996, at S35, S37. Florida has taken the opposite route, declining to venture into online law enforcement until various legal issues (including, perhaps, the one discussed in the present opinion) have been determined. *Id.* at S37. 4

The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed. Typically, states' jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet. The menace of inconsistent state regulation invites analysis under the Commerce Clause of the Constitution, because that clause represented the framers' reaction to overreaching by the individual states that might jeopardize the growth of the nation -- and in particular, the national infrastructure of communications and trade -- as a whole. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) ("Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills."); see also *The Federalist* Nos. 7, 11 (A. Hamilton).

The Commerce Clause is more than an affirmative grant of power to Congress. As long ago as 1824, Justice Johnson in his concurring opinion in *Gibbons v. Ogden*, 9 Wheat. 1, 231-32, 239 (1824), recognized that the Commerce Clause has a negative sweep as well. In what commentators have come to term its negative or "dormant" aspect, the Commerce Clause restricts the individual states' interference with the flow of interstate commerce in two ways. The Clause prohibits discrimination aimed directly at interstate commerce, see, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and bars state regulations that, although facially nondiscriminatory, unduly burden interstate commerce, see, e.g., *Kassel v. Consolidated Freightways Corp. of Del.*, 450 U.S. 662 (1981). Moreover, courts have long held that state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment is offensive to the Commerce Clause. See e.g., *Wabash St. L. & P. Rv. Co. v. Illinois*, 118 U.S. 557 (1887) (holding railroad rates exempt from state regulation).

Thus, as will be discussed in more detail below, the New York Act is concerned with interstate commerce and contravenes the Commerce Clause for three reasons. First, the Act represents an unconstitutional projection of New York law into conduct that occurs wholly outside New York. Second, the Act is invalid because although protecting children from indecent material is a legitimate and indisputably worthy subject of state legislation, the burdens on interstate commerce resulting from the Act clearly exceed any local benefit derived from it. Finally, the Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze

development of the Internet altogether. Thus, the Commerce Clause ordains that only Congress can legislate in this area, subject, of course, to whatever limitations other provisions of the Constitution (such as the First Amendment) may require.

A. The Act Concerns Interstate Commerce

At oral argument, the defendants advanced the theory that the Act is aimed solely at intrastate conduct. This argument is unsupportable in light of the text of the statute itself, its legislative history, and the reality of Internet communications. The section in question contains no such limitation; it reads:

A person is guilty of disseminating indecent material to minors in the second degree when:

....

(3) Knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor.

N.Y. Penal Law § 235.21(3) (McKinney's 1997). Section 235.20, which contains the definitions applicable to the challenged portion of the Act, does not import any restriction that the criminal communication must take place entirely within the State of New York. By its terms, the Act applies to any communication, intrastate or interstate, that fits within the prohibition and over which New York has the capacity to exercise criminal jurisdiction. See *Boyd v. Meachum*, 77 F.3d 60, 65 (2d Cir. 1996) (holding that a criminal court "has personal jurisdiction over any party who appears before it, regardless of how his appearance was obtained"), cert. denied, 117 S. Ct. 114 (1996); see also *United States v. Lussier*, 929 F.2d 25, 27 (1st Cir. 1991); *United States v. Stuart*, 689 F.2d 759, 762 (8th Cir. 1982), cert. denied, 460 U.S. 1037 (1983).

Further, the legislative history of the Act clearly evidences the legislators' understanding and intent that the Act would apply to communications between New Yorkers and parties outside the State, despite occasional glib references to the Act's "intrastate" applicability. The New York State Senate Introducer's Memorandum in Support of the Act contains a paragraph under the subtitle, "Justification," which states:

Law enforcement agencies around the nation are becoming increasingly alarmed at the growing use of computer networks and other communications by pedophiles. As one observer noted, "perverts are moving from the playground to the internet." Several cases have come to light wherein a pedophile has traveled clear across the country to have sexual relations with a minor initially contacted and engaged through various computer networks.

(Affidavit of James Hershler, Exh. D) (emphasis added). A letter from the Bill's sponsor to Governor Pataki characterized sexually-infused Internet communications between adults and minors as "long-distance, high-tech sexual abuse." (See Letter dated July 11, 1996 from William Sears to Governor Pataki, designated page 3 in the Bill Jacket, Hershler Aff., Exh. A). Jeanine Pirro, the Westchester County District Attorney, wrote a letter to Governor Pataki dated February 13, 1996 that similarly reflects the expectations of the Act's proponents that it would apply to interstate communications. Ms. Pirro's letter states:

This bill was proposed partly in response to a Westchester County case wherein an adult male resident of Seattle, Washington, one Alan Paul Barlow, communicated about sexually explicit matters by computer with a thirteen year old girl over several months.

(Hershler Aff., Exh. F); see also John Heileman, *The Crusader*, *The New Yorker*, February 24 and March 3, 1997 (detailing Ms. Pirro's "crusade" to achieve the passage of the Act in the aftermath of the Barlow incident).⁵ Ms. Pirro's references to this incident, known as the Barlow case, are echoed throughout defendants' memorandum of law. (See Defendants' Memorandum of Law in Opposition to Preliminary Injunction, pp. 15, 16, 17-18). Obviously, however, the Act would be completely ineffective in forestalling a pedophile like Barlow if it applied only to purely intrastate communications.

The conclusion that the Act must apply to interstate as well as intrastate communications receives perhaps its strongest support from the nature of the Internet itself. The Internet is wholly insensitive to geographic distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document geographic location; while computers on the network do have "addresses," they are logical addresses on the network rather than geographic addresses in real space. The majority of Internet addresses contain no geographic clues and, even where an Internet address provides such a clue, it may be misleading. For example, in his article, *Federalism in Cyberspace*, 28 *Conn. L. Rev.* 1095, 1112 (1996), Professor Dan Burk described how he uses Seton Hall University's computer system to access the Internet, providing anyone who communicates with him (and is aware of Seton Hall's locale) a hint that he is in New Jersey. However, Professor Burk also has a guest account at a university in California which he continues to use even when he is in New Jersey; any clue derived from the California university's name within the Internet address would therefore be deceptive. In a similar vein, Ms. Kovacs testified that as she was using her computer to give an in-court demonstration of various Internet applications, she received an e-mail from a colleague who believed she was sending the message to Cincinnati, Ohio (where Ms. Kovacs is normally located); in fact, Ms. Kovacs was in New York and received the message here. (4/4/97 Tr., p. 61).

Moreover, no aspect of the Internet can feasibly be closed off to users from another state. An internet user who posts a Web page cannot prevent New Yorkers or Oklahomans or Iowans from accessing that page and will not even know from what state visitors to that site hail. Nor can a participant in a chat room prevent other participants from a particular state from joining the conversation. Someone who uses a mail exploder is similarly unaware of the precise contours of the mailing list that will ultimately determine the recipients of his or her message, because users can add or remove their names from a mailing list automatically. Thus, a person could choose a list believed not to include any New Yorkers, but an after-added New Yorker would still receive the message.⁶

E-mail, because it is a one-to-one messaging system, stands on a slightly different footing than the other aspects of the Internet. Even in the context of e-mail, however, a message from one New Yorker to another New Yorker may well pass through a number of states en route. The Internet is, as described above, a redundant series of linked computers. Thus, a message from an Internet user sitting at a computer in New York may travel via one or more other states before reaching a recipient who is also sitting at a terminal in New York.

The system is further complicated by two Internet practices: packet switching and caching. "Packet switching" protocols subdivide individual messages into smaller packets that are then sent independently to the destination, where they are automatically reassembled by the receiving computer. If computers along the route become overloaded, packets may be rerouted to computers with greater capacity. A single message may -- but does not always -- travel several different pathways before reaching the receiving computer. "Caching" is the Internet practice of storing partial or complete duplicates of materials from frequently accessed sites to avoid repeatedly requesting copies from the original server. The recipient has no means of distinguishing between the cached materials and the original. Thus, the user may be accessing materials at the original site, or he may be accessing copies of those materials cached on a different machine located anywhere in the world.

The New York Act, therefore, cannot effectively be limited to purely intrastate communications over the Internet because no such communications exist. No user could reliably restrict her communications only to New York recipients. Moreover, no user could avoid liability under the New York Act simply by directing his or her communications elsewhere, given that there is no feasible way to preclude New Yorkers from accessing a Web site, receiving a mail exploder message or a newsgroup posting, or participating in a chat room. Similarly, a user has no way to ensure that an e-mail does not pass through New York even if the ultimate recipient is not located there, or that a message never leaves New York even if both sender and recipient are located there.

This conclusion receives further support from the unchallenged testimony that plaintiffs introduced in the form of declarations. For example, Stacy Horn, the president of ECHO, an electronic cultural salon, testified that "conference participants do not know, and have no way to determine, the . . . geographic location of other participants." (Decl. of Stacy Horn, sworn to on March 12, 1997, at p. 6). Oren Teicher, the President of the American Booksellers Foundation for Free Expression, indicated that:

Much of the Internet use by booksellers is interstate in nature. For example, any bookseller's Web page can be accessed by Internet users not only throughout the United States, but throughout the world. Similarly, ABFFE members from across the country communicate with one another as well as Internet users across the country via e-mail. Moreover, ABFFE users cannot effectively prevent their Web sites or discussion groups from being accessed by New York users.

(Decl. of Oren Teicher, sworn to on March 26, 1997, at p. 4). Lawrence J. Kaufman, the Vice President of the Magazine Publishers of America, Inc., a trade association for the consumer magazine industry, noted that "On-line users anywhere in the world can access the content provided by MPA members on the Web and via e-mail. These members cannot effectively prevent their Web sites from being accessed by New York users." (Decl. of Lawrence J. Kaufman, sworn to on March 26, 1997, at p.2).

The Act is therefore necessarily concerned with interstate communications. See *Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 397 (1988) (holding that only if a statute is "readily susceptible" to a narrowing construction will the court apply such a construction to save an otherwise unconstitutional law). The next question that requires an answer as a threshold

matter is whether the types of communication involved constitute "commerce" within the meaning of the Clause.

The definition of commerce in the Supreme Court's decisions has been notably broad. Most recently, in *Camps Newfound Owatonna, Inc. v. Town of Harrison, Maine*, 1997 WL 255351 (May 19, 1997), the Court rejected defendant's arguments that the Commerce Clause was inapplicable to a discriminatory real estate tax deduction, either because "campers are not 'articles of commerce'" or because the plaintiff camp's "product is delivered and 'consumed' entirely within Maine." *Id.* at *5. In the past, the Court has held that interstate commerce is affected by private race discrimination that limited access to a hotel and thereby impeded interstate commerce in the form of travel. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 244, 258 (1964).

In the present case, the parties have stipulated that:

The Internet is not exclusively, or even primarily, a means of commercial communication. Many commercial entities maintain Web sites to inform potential consumers about their goods and services, or to solicit purchases, but many other Web sites exist solely for the dissemination of non-commercial information. The other forms of Internet communication -- e-mail, bulletin boards, newsgroups, and chat rooms -- frequently have non-commercial goals. For the economic and technical reasons set forth in the following paragraphs, the Internet is an especially attractive means for not-for-profit entities or public interest groups to reach their desired audiences. There are examples in the plaintiffs' affidavits of some of the non-commercial uses that the Internet serves. Plaintiff Peacefire offers information on its Internet site regarding the rights of minors on the Internet. Plaintiff Art on the Net allows artists to post their works on the World Wide Web. Plaintiff American Civil Liberties Union offers information on civil liberties issues. (Joint Stipulation of Facts, 79). This stipulation, however inartfully worded, cannot insulate the statute at issue from Commerce Clause scrutiny. The non-profit nature of certain entities that use the Internet or of certain transactions that take place over the Internet does not take the Internet outside the Commerce Clause. See *Camps Newfound*, at *6; *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979); *Philadelphia v. New Jersey*, 437 U.S. 617, 621-23 (1978).

The Supreme Court has expressly held that the dormant commerce clause is applicable to activities undertaken without a profit motive. In *Edwards v. California*, 314 U.S. 160 (1941), the Court examined the constitutionality of a California statute prohibiting the transport of indigent people into the state. The Court struck the statute as violative of the dormant Commerce Clause, reasoning that "the transportation of persons is 'commerce,'" and that the California law at issue raised an "unconstitutional barrier to that commerce." *Id.* at 172-73. In making its threshold determination, the Court emphasized that " i t is immaterial whether or not the transportation is commercial in character." *Id.* at 172, n.1; see also *Caminetti v. United States*, 242 U.S. 470, 491 (1917); *Hoke v. United States*, 227 U.S. 308, 320 (1913).

Commercial use of the Internet, moreover, is a growing phenomenon. See, e.g., Don Clark, *Disney Launching Children's Web Site Only on Microsoft's On-Line Service*, *Wall St. Journal*, March 31, 1997 (describing Disney's efforts to create and market a fee-based Web service); see also Andrew Bowser, *Advertising on the Net*, *New Orleans Citybusiness*, March 6, 1995; John

Casey, Growing Potential of World Wide Web, Business & Finance, The Irish Times, June 3, 1996. In addition, many of those users who are communicating for private, noncommercial purposes are nonetheless participants in interstate commerce by virtue of their Internet consumption. Many users obtain access to the Internet by means of an on-line service provider, such as America Online, which charges a fee for its services. "Internet service providers," including plaintiffs Panix, Echo, and NYC NET, also offer Internet access for a monthly or hourly fee. Patrons of storefront "computer coffee shops," such as New York's own CyberCafe, similarly pay for their access to the Internet, in addition to partaking of food and beverages sold by the cafe. Dial-in bulletin board systems often charge a fee for access. See *Katzenbach v. McClung*, 379 U.S. 294, 300-301 (1964) (holding that an entity that purchases goods used in the provision of its services from interstate sources is an actor in interstate commerce even in connection with the provision of services within a single state).

The courts have long recognized that railroads, trucks, and highways are themselves "instruments of commerce," because they serve as conduits for the transport of products and services. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 780 (1945). The Internet is more than a means of communication; it also serves as a conduit for transporting digitized goods, including software, data, music, graphics, and videos which can be downloaded from the provider's site to the Internet user's computer. For example, plaintiff BiblioBytes and members of plaintiff IDSA both sell and deliver their products over the Internet.

The inescapable conclusion is that the Internet represents an instrument of interstate commerce, albeit an innovative one; the novelty of the technology should not obscure the fact that regulation of the Internet impels traditional Commerce Clause considerations. The New York Act is therefore closely concerned with interstate commerce, and scrutiny of the Act under the Commerce Clause is entirely appropriate. As discussed in the following sections, the Act cannot survive such scrutiny, because it places an undue burden on interstate traffic, whether that traffic be in goods, services, or ideas.

B. New York Has Overreached by Enacting a Law That Seeks To Regulate Conduct Occurring Outside its Borders

The interdiction against direct interference with interstate commerce by state legislative overreaching is apparent in a number of the Supreme Court's decisions. In *Baldwin v. G.A.F. Seelig Inc.*, 294 U.S. 511, 521 (1935), for example, Justice Cardozo authored an opinion enjoining enforcement of a law that prohibited a dealer from selling within New York milk purchased from the producer in Vermont at less than the minimum price fixed for milk produced in New York. Justice Cardozo sternly admonished, "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk," finding that "such a power, if exerted, would set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." *Id.*

The Court has more recently confirmed that the Commerce Clause precludes a state from enacting legislation that has the practical effect of exporting that state's domestic policies. In *Edgar v. MITE*, 457 U.S. 624 (1982), the Court examined the constitutionality of an Illinois anti-

takeover statute that required a tender offeror to notify the Secretary of State and the target company of its intent to make a tender offer and the terms of the offer 20 days before the offer became effective. During the twenty-day period, the offeror was barred from communicating its offer to the shareholders, but the target company was free to disseminate information to its shareholders concerning the impending offer. *Id.* at 633. The statute defined "target company" as a corporation of which Illinois shareholders own 10% of the class of securities subject to the takeover offer, or for which any two of the following conditions are met: the corporation has its principal office in Illinois, is organized under Illinois law, or has at least 10% of its stated capital and paid-in surplus within Illinois. *Id.* at 625. The Court acknowledged that states traditionally retained the power to regulate intrastate securities transactions by enacting "blue-sky laws." *Id.* at 641. Nonetheless, the Court asserted that "the Illinois Act differs substantially from state blue-sky laws in that it directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois." *Id.* In striking the law as violative of the Commerce Clause, the Court found particularly egregious the fact that the Illinois law on its face would apply to a transaction that would not affect a single Illinois shareholder if a corporation fit within the definition of a "target company." *Id.* at 642. The Court concluded "the Illinois statute is a direct restraint on interstate commerce and has a sweeping extraterritorial effect," because the statute would prevent a tender offeror from communicating its offer to shareholders both within and outside Illinois. Acceptance of the offer by any of the shareholders would result in interstate transactions; the Illinois statute effectively stifled such transactions during the waiting period and thereby disrupted prospective interstate commerce. Under the Commerce Clause, the projection of these extraterritorial "practical effects," regardless of the legislators' intentions, "exceeded the inherent limits of the State's power." *Id.* at 642-43 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)).