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# American Libraries Association v. Pataki 969 F. Supp. 160 (S.D.N.Y. June 20, 1997)

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# AMERICAN LIBRARIES ASSOCIATION
# v.
# PATAKI

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## INTRODUCTION

This case was bought before the United States District Court for the Southern District of New York challenging the constitutionality of New York Penal Law § 235.21(3). The injunction sought by the plaintiff's to suspend enforcement of the statute was granted due to the court's determination that the statute violated the Commerce Clause. The statute was passed to protect children from being exposed to pornography on the Internet. New York Penal Law § 235.21(3) makes it a crime for an individual to knowingly communicate to a minor, via computer, information which, in whole or in part, depicts actual or simulated nudity, sexual conduct, or sado-masochistic abuse, and which is harmful to minors[1]. 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; (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.[2]

Analogizing the Internet to an interstate railroad, the United States District Court for the Southern District of New York decided that the New York statute violated the Commerce Clause of the United States Constitution for three reasons. The court held that the practical impact of the New York statute results in the

1. N.Y. § 235.21(3) (McKinney 1997).
2. N.Y. § 235.20(6) (McKinney 1997).

extraterritorial application of New York law to transactions involving citizens of other states, and as a result, is a per se violation of the Commerce Clause. The court further held the benefits derived from the statute are not sufficient to justify the burden on interstate commerce.[3] Finally, the court determined the unique nature of the Internet necessitates uniform national treatment and bars the states from enacting inconsistent regulatory schemes.[4]

## FACT SUMMARY

The plaintiffs in this action comprise a group of individuals and organizations that use the Internet to distribute, disseminate, and communicate information across the country.[5] The plaintiff's in this action challenged the New York statute on the grounds that it violated the First Amendment and the Commerce Clause. The plaintiff's moved for a preliminary injunction to enjoin enforcement of the statute, while the defendants opposed the motion.

All of the parties involved communicate on-line both inside and outside of the state of New York. Each of the plaintiff's communications are accessible by individuals inside and outside of New York.[6] The list of plaintiffs comprised of several library associations including the American Library Association, the Freedom to Read Foundation and the Westchester Library System.[7] The associations participated in this suit because they are both content providers as well as access points for the Internet.[8] Additional plaintiffs in this case include Peacefire, a youth organization founded in order to protect the rights of those under 18 to use the net, and Public Access Networks Corporation

3. *Pataki,* 969 F. Supp. at 184.
4. *Id.*
5. *Id.* at 169.
6. *Id.* at 161.
7. *Id.*
8. *Pataki,* 969 F. Supp. at 162.

("Panix"), a for-profit organization from New York City that helps users create their own pages and hosts on-line discussion groups.[9]

The defendants include the Governor and the Attorney General of the state of New York.[10] They were concerned that sixty-two District Attorneys in New York were in the process of prosecuting claims and feared having their prosecutions preempted by the proposed injunction. A preliminary injunction would effectively bar enforcement of the statute whether the action was brought by the governor or the attorney general.[11]

To open the court's decision the court began a lengthy discussion of the Internet and its inherent inability to be contained within the boundaries of any given state. "The Internet is a decentralized, global communications medium linking people, institutions, corporations, and governments all across the world."[12] The nature of the Internet makes it very difficult to determine its size at any given moment.[13] Currently there are 9.4 million host computers linked to the Internet and over 40 million people worldwide using the Internet.[14] No organization or entity controls the Internet. The random structure of the Internet itself, precludes any exercise of control.[15]

The information available on the Internet is "as diverse as human thought."[16] Thus, sexually oriented content is only a small part of the total content on the Internet.[17] Access to this wealth of information is distributed in many different ways. The court delineated six different ways of communicating, (1) One to One messaging -- E-mail, (2) One to Many messaging--Mail Exploder, (3) distributed message databases--Usenet groups, (4) Real Time remote computer utilization--Internet Relay Chat, (5) Real Time

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9. *Id.*
10. *Id.* at 163.
11. *Id.* at 163.
12. ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1997).
13. *Pataki,* 969 F. Supp. at 164.
14. *Id.*
15. *Id.*
16. *ACLU,* 929 F. Supp. at 842.
17. *Id.*

remote computer utilization--Telnet, and (6) remote information retrieval--the Web.[18]

Most users sign on to the Internet by using pseudonyms as usernames.[19] A username is a name arbitrarily selected by the user that gives the user a distinct identity while preserving anonymity.[20] Through the use of a username a party's age or geographic location is not disclosed.[21] Moreover, the use of e-mail allows one to send a message to another person that is comparable to a first class letter.[22] Problems arise, however, through what is known as a "chat room". A chat room allows the user to participate in a real time conversation with the other members of the chat room on a variety of topics and subjects.[23] USENET groups and mail exploders, which distribute information worldwide, allow large groups of people to have information disseminated to them without knowing where or from whom the information originated. [24]

The Web is a publishing forum that is comprised of millions of "web sites" that display content provided by particular persons or organizations.[25] Every document on the Internet has a logical address,[26] one that is not in physical space. Any of these addresses can be either typed directly into the computer or can be navigated to by use of a search engine.[27]

Common to each of these platforms is the fact that Internet users have no way to determine the characteristics of their audience, such as age and geographic location.[28] Similarly, users have no way of knowing who has accessed their information.[29] The speaker thus has no way of knowing the location, age, or sex of the recipient of the communication.

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18. *Pataki*, 969 F. Supp. at 165.
19. *Id.*
20. *Id.*
21. *Id.*
22. *ACLU*, 929 F. Supp. at 834.
23. *Id.* at 835.
24. *Id.* at 834-35.
25. *Pataki*, 969 F. Supp. at 166.
26. *Id.* at 165.
27. *ACLU*, 929 F. Supp. at 837.
28. *Id.* at 167.
29. *Id.*

## LEGAL ANALYSIS

### *A. The Preliminary Injunction Standard*

To be granted a preliminary injunction, the plaintiffs' must demonstrate that they will suffer irreparable harm and show either a likelihood of success on the merits of a case or a sufficiently serious question on the merits to warrant litigation.[30] The court determined the plaintiffs showed a likelihood of success proving that the New York statute seeks to regulate communications entirely outside New York. The court held it placed an undue burden on interstate commerce, and subjects Internet users to inconsistent obligations.[31] Additionally, the court determined the plaintiffs showed that they face irreparable injury, an injury that money cannot compensate for and which is imminent and actual.[32] Any deprivation of rights under the Commerce Clause constitutes irreparable injury.[33] Since the plaintiffs met this burden they showed both irreparable injury and a likelihood of success on the merits.[34]

### *B. Federalism and the Internet: The Commerce Clause*

Issues dealing with the Internet, by their very nature, raise questions of federalism.[35] The court pointed out that a person on the Internet might be subject to inconsistent regulation by states that the actor never intended to reach.[36] Geography is a meaningless concept on the Internet. Even though geography is the normal method of determining a state's jurisdiction, the logical

30. Paulsen v. County of Nassau, 925 F.2d 65, 68 (2d Cir. 1991).
31. *Pataki*, 969 F. Supp. at 167.
32. *Id.*
33. *Id.* at 168.
34. *Id.*
35. Younger v. Harris, 401 U.S. 37, 44 (1971).
36. *Pataki*, 969 F. Supp. at 168.

nature of the Internet precludes this settled line drawing of boundaries.[37]

The Commerce Clause is a grant of power to Congress, which limits the state's ability to interfere with interstate commerce. This limiting or "dormant" power restricts a state's power in two ways.[38] The Commerce Clause prohibits regulations that discriminate against interstate commerce[39], as well as those that while nondiscriminatory, unduly burden interstate commerce.[40] State regulation of those aspects of commerce that require national treatment is a violation of the Commerce Clause.[41] In this case the court determined that, the New York statute contravenes the Commerce Clause in three ways: (1) it is an unconstitutional projection of New York law into conduct that occurs outside of New York; (2) the burdens placed on interstate commerce outweigh any benefit New York seeks to obtain; and (3) the Internet is one of those areas of commerce that the government has marked off as a national preserve which is protected from inconsistent state regulation.[42] As a result, the court concluded, only Congress can legislate in this area.[43]

*1. The Act Concerns Interstate Commerce*

At oral argument, the defendants proffered testimony to prove that New York only intended to regulate intrastate conduct.[44] However, the court held the statute, by its terms, applied to any communication, interstate or intrastate, that fits within the prohibition. Next, the court held that the legislative history of the statute evidenced that the legislature intended this statute to apply to New Yorkers and parties outside the state.[45] As part of the legislative history, the state introduced the story of Alan Paul

37. *Id.* at 169.
38. *Id.*
39. Philadelphia v. New Jersey, 437 U.S. 617 (1978).
40. Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).
41. *Id.*
42. *Pataki*, 969 F. Supp. at 169.
43. *Id.*
44. *Id.*
45. *Id.*

Barlow. Mr. Barlow was a pedophile that communicated with a 13 year-old girl about sexually explicit material over a period of several months.[46] The citizens of New York were in an outrage and several newspaper stories were printed calling for reforms.[47] If the New York law had not applied outside the state of New York then they would have no authority to bind Mr. Barlow over for trial because he lived in Seattle, well outside of New York.[48]

The nature of the Internet helps to justify the holding that this statute applies to interstate commerce.[49] The Internet is impervious to geographic boundaries and the operation of the Internet provides very little, if any, information about the location of the person on the other end.[50] No aspect of the Internet can be cut off from use by users from another state, nor can a participant in a chat room choose to exclude only those callers from New York.[51] Additionally, the mechanical transfer of the data itself makes it virtually impossible to insure that an e-mail message did not travel through New York. This process, called "packet switching," breaks up the data contained in an e-mail into smaller "packets." After the message is broken down, it is sent through a variety of phone lines to its eventual destination.[52] Thus, the New York statute is unable to regulate purely intrastate commerce because on the Internet, no such communication exists.[53]

Having decided that the statute affected interstate communications, the court next turned to the question of whether the types of subject matter at issue constitute commerce as contemplated by the Commerce Clause.[54] Throughout their history, courts have interpreted the Commerce Clause broadly.[55] In arriving at its decision, the district court determined that the

46. *Id.* at 170.
47. *Pataki*, 969 F. Supp. at 170.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 171.
52. *Pataki*, 969 F. Supp. at 171.
53. *Id.*
54. *Id.* at 172.
55. *Id.*

Internet is not exclusively a means of commercial communication.[56] There are many Web sites that exist for nothing more than the dissemination of information. However, even though a large part of the services provided by the Internet are commercial free, that does not take the Internet out of the reach of the Commerce Clause. The Supreme Court has expressly held that the dormant Commerce Clause is applicable to activities undertaken without a profit motive.[57] The court reasoned that commercial use of the Internet is on the rise and even those who are using the Internet for a noncommercial purpose are participants in interstate commerce by virtue of their consumption of the resource.[58]

Here, the court made an analogy to the Internet as being a railroad or a highway and thus an "instrument of commerce."[59] They serve as conduits for the transport of goods and services.[60] The court found that the Internet is not only a means of communication, but also carries digitized goods and services around the world.[61] As a result, the court held that the New York statute is properly scrutinized under the Commerce Clause.[62]

*2. Overreaching by Extraterritorial Regulation*

The Supreme Court for many years has held that overreaching by state legislatures is conduct in conflict with the Commerce Clause.[63] Additionally, the Court held that the Commerce Clause precludes a state from enacting legislation that seeks to export its domestic policies to the other states.[64] The court here, however, said the intent of the legislature was not an issue in the case at bar

56. *Id.*
57. *Pataki*, 969 F. Supp. at 173.
58. *Id.*
59. *Kassel*, 450 U.S. at 662.
60. *Id.*
61. *Pataki*, 969 F. Supp. at 174.
62. *Id.*
63. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935).
64. *Id.*

because the extraterritorial effect of legislation is beyond the scope of a state's power.[65]

Many of the witnesses testified to the extraterritorial nature of the New York statute. The court relayed the experiences of Rudolf Kinsky, an artist, Oren Teicher, the President of American Booksellers Foundation for Free Expression, and Lawrence Kaufman, the Vice President of the Magazine Publishers of America.[66] In each of these situations, the witnesses testified that they felt the "chill" of the New York statute on their businesses.[67] Each said they were losing both sales and accumulated customer goodwill because of the cutback in availability of some of their previously available material.[68] In all of their respective businesses, these people were at a decided disadvantage for complying with the Act.

Consequently, the court delineated a three step analysis to addressing state statutes of this nature.[69] It was reasoned that: (1) the Commerce Clause precludes the application of a statute to commerce that takes place entirely outside the state, even if its effects are felt inside;[70] (2) where a state statute seeks to regulate commerce occurring outside its borders then it is invalid even if the extraterritorial reach was intended by the legislature;[71] (3) the court will also consider the burden the statute places on other states and the effect the statute would have if a similar one was adopted by every state.[72] The court stated that the need to contain individual state overreaching is predicated by the fact that one state's autonomy cannot be protected without limitations being observed by all fifty states.[73]

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65. *Id.*
66. *Pataki*, 969 F. Supp. at 174-75.
67. *Id.* at 174.
68. *Id.* at 174-75.
69. *Id.*
70. *Id.*
71. *Pataki*, 969 F. Supp. at 174-175 (citing Brown-Forman v. New York State Liquor Authority, 476 U.S. 573 (1986)).
72. *Id.*
73. *Id.* at 176.

In applying this test to the case at bar, the court found that the nature of the Internet makes it impossible for New York to restrict intrastate commerce alone.[74] The extraterritorial effects of such intervention tend to evidence a favoritism of one state's policies over those where the commerce in question may have originated.[75] The court held that the statute was a deliberate attempt by New York to impose its policies on the citizens of every other state that uses the Internet.[76] Such indirect regulating has specifically been reserved for the federal government by the Constitution and, thus, any violation thereof is a per se violation of the Commerce Clause.[77]

### 3. *The Burdens Exceed the Value of Any Local Benefit*

The court assumed, arguendo, that even if the effects described above did not rise to the level of a per se violation, the burdens imposed on interstate commerce clearly exceeded the value of any local benefit derived.[78] Any question of indirect regulation must be solved by employing a two step analysis, whereby, the court examines the legitimacy of the state's interest and determines whether the burden imposed exceeds the value of the local benefit.[79]

The court did not dispute the value of the state's interest in protecting its children from viewing pornography or from the danger of pedophilia on an anonymous Internet.[80] The court did not end its inquiry here, however, further finding that the second stage of the analysis was not cast aside merely because the state has declared a legitimate interest.[81] The court concluded that this is the portion of the test that the New York statute fails because the

74. *Id.* at 177.
75. Bigelow v. Virginia, 421 U.S. 809, 824 (1975).
76. *Pataki,* 969 F. Supp. at 177.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 177.
81. *Pataki*, 969 F. Supp. at 178.

local benefits were not overwhelming.[82] It analogized to the Supreme Court's findings on the federal Communications Decency Act ("CDA"). The Supreme Court found that the CDA will almost certainly fail in its intended purpose because so much of the pornography on the Internet does not originate in the United States. Further the court held that, as a practical matter, the extradition of defendants from other states will prove burdensome to New York, making application of the statute that much harder.[83]

The court also looked at the interpretation of the statute by New York itself. The legislature of New York believed that only pictorial images need be prohibited while purely textual communications did not,[84] seemingly contradicting to the reasoning the state proposed for this statute.[85] As mentioned above, one of the most important justifications for this law was the fact that Alan Barlow had contacted a 13 year old girl on the Internet and then met up with her. Mr. Barlow's messages were textual communications, not pictures.[86] The court said that New York's justification rings hollow using this analysis.[87]

The court also viewed this statute as cumulative since New York already has several laws to protect children from the types of crimes being committed here, including laws against obscenity and child pornography.[88] Bolstering its opinion, the court noted the testimony of an investigator for the New York Attorney General's office, Michael McCartney.[89] Mr. McCartney testified that an investigation over a 600 hour period found only two cases that could not be tried under the existing child pornography laws, and in neither of the two cases was a prosecution instigated.[90]

The court concluded that, when weighed against the minimal benefits provided to the citizens of New York, this statute places

82. *Id.*
83. *Id.*
84. *Id.* at 179.
85. *Id.*
86. *Pataki*, 969 F. Supp. at 179.
87. *Id.*
88. United States v. Thomas, 74 F.3d 701, 704-5 (6th Cir. 1996).
89. *Pataki*, 969 F. Supp. at 179.
90. *Id.*

an extreme burden on interstate commerce.[91] The statute casts its net worldwide and thus creates a "chilling effect" on all of those who will curtail their use of the Internet out of fear of reprisal.[92]

The state, in an attempt to qualify its position, stated that the pictures of pornography on the Internet constitute only a small piece of a giant puzzle.[93] However, the court viewed the reach of this statute as considerably more broad.[94] The court said the state would include works by Botticelli, Reubens, Matisse and Cezanne.[95] While highly unlikely that anyone would be prosecuted for sending *Birth of Venus* across the Internet,[96] the court saw the statute as sending a conflicting message.[97] The court said this type of inconsistent application cannot be tolerated because of the self-censorship it engenders.[98] This self-censorship makes it more difficult and more expensive for users of the Internet to disseminate their artwork, thus placing an unreasonable burden on interstate commerce.[99]

Consequently, the court held that the New York statute is not justifiable and fails the second portion of the test. An injunction should, therefore, be granted to the plaintiffs.

### 4. *The Act Subjects Users to Inconsistent Regulations*

Courts have long held that certain types of regulations may only be done at the national level.[100] Following this reasoning the court determined that the Internet not only falls into this category, but may also reach a worldwide level of cooperation.[101] Any individual regulation will only result in chaos.[102] For the regulation of

91. *Id.*.
92. *Id.*
93. *Id.* at 180.
94. *Pataki*, 969 F. Supp. at 180.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Pataki*, 969 F. Supp. at 180.
100. *Id.* at 181.
101. *Id.*
102. *Id.*

commerce, there can only be one system of rules applicable to the whole country.[103] The court revisited several historic cases dealing with the regulation of interstate commerce such *as Wabash v. Illinois*,[104] and *Bibb v. Navajo Freight Lines, Inc.*[105] The court returned to its analogy of the highway or railway and analogized to the logic above that in these cases, just as in the case at bar, national, consistent, regulation was necessary.[106]

Moreover, the court looked at the differing interpretations possible from the same law saying that uniformity is impossible even if the word of each state's statute is entirely the same.[107] Even if all 50 states were to pass verbatim copies of the New York statute, the interpretation of each jurisdiction would produce discrepancies in application.[108] The Supreme Court has said that our nation is too big and diverse to formulate what can be considered obscene in all 50 states into one formulation.[109] It would impose to great a burden on the artist to make him or her comply with the regulations of the strictest state or force the author to create multiple copies for different markets.[110] The court said haphazard and uncoordinated efforts to regulate the Internet will surely stunt its growth.[111] The demand for uniformity demands this law be stricken as a violation of the Commerce Clause.[112]

## CONCLUSION

The court held that the New York statute runs afoul of the Commerce Clause for three reasons. First, the extraterritorial application of the statute is a per se violation of the Commerce

103. *See* Wabash St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557, 574-75 (1886).
104. *Id.*
105. 359 U.S. 520 (1959).
106. *Pataki*, 969 F. Supp. at 182.
107. *Id.*
108. *Id.*
109. *Id.* at 183.
110. *Id.*
111. *Pataki*, 969 F. Supp. at 183.
112. *Id.*

Clause. Second, the burdens on interstate commerce exceed the value of any local benefit derived from the statute. Finally, the unique nature of the Internet requires federal regulation that is consistent from state to state.[113] Thus, having demonstrated a likelihood of success on the merits in the face of irreparable injury, the injunction requested by the plaintiff's was approved.[114]

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113. *Id.* at 184.
114. *Id.*