

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

**THE KING'S ENGLISH, INC.; SAM WELLER'S ZION BOOKSTORE; NATHAN FLORENCE; W. ANDREW MCCULLOUGH; IPNS OF UTAH, LLC; RIGIDTECH.COM, INC.; THE SEXUAL HEALTH NETWORK, INC.; UTAH PROGRESSIVE NETWORK EDUCATION FUND, INC.; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; AMERICAN CIVIL LIBERTIES UNION OF UTAH; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION; and PUBLISHERS MARKETING ASSOCIATION,**

**Plaintiffs,**

**V.**

**MARK SHURTLEFF, in his official capacity as ATTORNEY GENERAL OF THE STATE OF UTAH; VON J. CHRISTIANSEN, STEPHEN HADFIELD, N. GEORGE DAINES, GENE E. STRATE, BRYAN SIDWELL, TROY RAWLINGS, STEPHEN FOOTE, DAVID A. BLACKWELL, BARRY L. HUNTINGTON, HAPPY J. MORGAN, SCOTT F. GARRETT, JARED W. ELDRIDGE, JOHN E. HUMMEL, RICHARD WADDINGHAM, JANN L. FARRIS, MARVIN D. BAGLEY, GEORGE W. "JUDD" PRESTON, LOHRA L. MILLER, CRAIG C. HALLS, ROSS C. BLACKHAM, DALE EYRE, DAVID R. BRICKEY, DOUGLAS HOGAN, JOANN STRINGHAM, JEFFREY BUHMAN, THOMAS L. LOW, BROCK R. BELNAP, MARVIN D. BAGLEY and MARK R. DECARIA, in their official capacities as UTAH DISTRICT and COUNTY ATTORNEYS,**

**Defendants.**

**Civil No. 2:05cv00485**

**AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

## **PRELIMINARY STATEMENT**

1. The Internet has revolutionized our society, representing the most participatory marketplace of mass speech yet developed – it is in many ways a far more speech-enhancing medium than radio or television, print, the mails, or even the village green. Hundreds of millions of people can now engage in interactive communication on a national and global scale via computer networks that are connected to the Internet. The Internet enables average citizens, with a few simple tools and at a very low cost, to participate in local or worldwide conversations, publish an online newspaper, distribute an electronic pamphlet, and communicate with a broader audience than ever before possible. The Internet provides millions of users with access to a vast range of information and resources. Internet users are far from passive listeners – rather, they are empowered by the Internet to seek out exactly the information they need and to respond with their own communication, if desired.

2. The Internet presents extremely low entry barriers to anyone who wishes to provide or distribute information or gain access to it. Unlike television, cable, radio, newspapers, magazines or books, the Internet provides the average citizen with an affordable means for communicating with, accessing and posting content to a worldwide audience.

3. In 2005, the State of Utah enacted a broadly restrictive censorship law that imposes severe content-based restrictions on the availability, display and dissemination of constitutionally-protected speech on the Internet. House Bill 260, enacted on March 2, 2005, and signed by Governor Jon Huntsman, Jr. on March 21, 2005 (the "Act"), among other things:

- Expands existing Utah law with respect to distribution to minors of harmful to minors material and pornographic material to include Internet content and Internet service providers ("ISPs").
- Requires the Attorney General to create a public "Adult Content Registry" of websites that he has unilaterally declared to include constitutionally-protected harmful to minors material, without any judicial review.
- Requires ISPs either to block access to websites included in the registry and other constitutionally-protected content or to provide filtering software to users.
- Requires Utah-connected content providers to self-evaluate and label the content of their speech, at the risk of criminal punishment.

A copy of the Act is attached hereto as Appendix A.

4. The Act infringed the liberties of the residents of the State of Utah, imposing the restrictive hand of the State to supplant the power and responsibility of parents to control that which may be viewed by their children. It also infringed the liberties of millions of persons outside Utah who are affected by these restrictions.

5. Portions of the Act took effect on March 21, 2005, the date of the Governor's signature. The remaining provisions became effective at various times in 2006. The portions of the Act challenged in this lawsuit, however, were enjoined first by a stipulated order entered by the Court on November 28, 2005, and then by a superseding preliminary injunction entered by the Court on August 25, 2006. Pursuant to these and other orders, most proceedings in this case were generally stayed – at the request of the defendants – to give defendants and the Utah legislature opportunities in both 2006 and 2007 to repeal or otherwise correct the challenged provisions of the Act.

6. On February 28, 2007, the Utah legislature, in response to plaintiffs' claims in this lawsuit and in an attempt to remedy some of the unconstitutional provisions imposed by the Act, passed House Bill 5, which was signed by the Governor on March

19, 2007. A copy of H.B. 5 is attached hereto as Appendix B. Among other things, H.B. 5 repealed the provisions of the Act with respect to the Adult Content Registry. While the provisions of H.B. 5, by the terms of the bill, took effect on the date of signature by the Governor, as to the amendments to §§ 76-10-1205, -1206, -1231, and -1233, they have as yet no practical effect by reason of the preliminary injunction entered by this Court on August 25, 2006.

7. While certain portions of H.B. 5 made changes to the provisions of H.B. 260 that are challenged in this action, apart from the fully repealed Adult Content Registry, the changes made by H.B. 5 do not cure the constitutional defects in the resulting statutory provisions.

8. This action seeks to have the Act, as amended by H.B. 5 (the "Amended Act") declared facially unconstitutional and void, and to have the State enjoined from enforcing the Amended Act, by reason of the First, Fifth, and Fourteenth Amendments to, and the Commerce Clause of, the United States Constitution.

9. With respect to the application to the Internet of the criminal provisions relating to distribution to minors of harmful to minors materials, 18 federal judges, including three Courts of Appeal and one State Supreme Court, have struck down as unconstitutional laws in Arizona, Michigan, New Mexico, New York, South Carolina, Vermont, Virginia, and Wisconsin similar to the Act. In addition, the United States Supreme Court invalidated a similar federal law on First Amendment grounds in Reno v. ACLU, 521 U.S. 844 (1997), affg 929 F. Supp. 824 (E.D.Pa. 1996), and, only weeks ago, the U.S. District Court for the Eastern District of Pennsylvania invalidated the

subsequent federal statute (ACLU v. Gonzales, \_\_\_ F. Supp.2d \_\_\_, No. 98-5591 (E.D. Pa. Mar. 22, 2007)).

10. While the application of restrictions on the distribution of harmful to minors materials over the Internet is limited by the terms of the preliminary injunction, ambiguity is raised by the amendment of § 76-10-1201(4)(a) by H.B. 5 (the "Of/with Amendment"). That amendment changed Utah's harmful to minors statute from addressing a "prurient interest in sex of minors" to addressing a "prurient interest in sex with minors." It is not clear whether this change is meant to limit "harmful to minors" materials to (a) descriptions or representations of nudity, sexual conduct, sexual excitement or sadomasochistic abuse ("Explicit Sex") where one or both of the participants is a minor; (b) descriptions or representations of Explicit Sex where neither of the participants is a minor but which appeals to the prurient interest of a minor in sex with or among minors; or (c) some other category of materials. Under any explanation as to the meaning of the statute as amended by the "Of/with Amendment," the resulting statute violates the First Amendment.

11. With respect to requiring ISPs to block access to particular websites on the Internet, the U.S. District Court for the Eastern District of Pennsylvania invalidated a similar Pennsylvania state law, finding the law to be unconstitutional on both First Amendment and Commerce Clause grounds. Center for Democracy & Technology v. Pappert, 337 F. Supp. 2d 606 (E.D. Pa. 2004). In that case, the court found that as a result of the ISPs' attempts to comply with blocking orders requiring ISPs to block access to fewer than 400 websites, the ISPs unavoidably also blocked access to more

than one million completely unrelated websites. Id. at 624, 642 (Findings of Facts ¶¶ 77, 189).

12. Since essentially all speech on the Internet is accessible in Utah, regardless of the geographical location of the person who posted it, the Act threatened Internet users nationwide and even worldwide. Moreover, because blocking a website often results in blocking wholly unrelated websites communicating constitutionally protected speech, the Act threatened an enormous array of websites and their users.

13. Because of the way the Internet works, the Amended Act's prohibition on distributing to minors material by the Internet that is "harmful to minors" effectively bans distribution of that same material to adults.

14. The speech targeted by the Amended Act – material that is asserted to be "harmful to minors" – is or includes that which is constitutionally protected for adults. This includes, for example, valuable works of literature and art, safer sex information, examples of popular culture, and a wide range of robust human discourse about current issues and personal matters that may include provocative or sexually oriented language and images.

15. The Amended Act inevitably means that Internet content providers will limit the range of their speech, because there are no reasonable technological means that enable users of the Internet to ascertain the age of persons who access their communications, or to restrict or prevent access by minors to certain content. Consequently, the Amended Act reduces adult speakers and users in cyberspace to reading and communicating only material that is suitable for young children.

16. In addition, the Amended Act prohibits speech that is valuable and constitutionally protected for minors, especially older minors.

17. To the extent any ISPs comply with certain sections of the Amended Act by blocking access to certain websites, the Amended Act inevitably means that access to other unrelated and wholly innocent websites will also be blocked. Moreover, the blocking of websites (both those targeted by the Amended Act and the unrelated websites) will in most cases prevent all customers of an ISP, both in Utah and elsewhere in the country, from accessing the websites. In some other cases, an ISP will not have the technical capability to block their customers' access to specified websites on the Internet.

18. The Amended Act violates the First Amendment and Commerce Clause rights of plaintiffs, their members, their users and tens of millions of other speakers and users of the Internet, and threatens them with irreparable harm.

19. In addition, the Amended Act violates the Commerce Clause of the United States Constitution because it regulates commerce occurring wholly outside of the State of Utah, because it imposes an impermissible burden on interstate and foreign commerce, and because it subjects interstate use of the Internet to inconsistent state regulations. An online content provider outside of Utah cannot know whether someone in Utah might download his or her content posted on the Web; consequently, the content provider must comply with Utah law or face the threat of criminal prosecution.

20. Plaintiffs seek permanent injunctive relief prohibiting enforcement of the Amended Act.

## **JURISDICTION AND VENUE**

21. This case arises under the U.S. Constitution and the laws of the United States and presents a federal question within this Court's jurisdiction under Article III of the Constitution and 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3). It seeks remedies under 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. §§ 1983 and 1988, and F.C.R.P. 65.

22. Venue is proper in this district under 28 U.S.C. § 1391(b).

## **THE PARTIES**

23. Plaintiffs represent a broad range of individuals and entities who are speakers, content providers and access providers on the Internet. Plaintiffs post and discuss content including resources on sexual advice for disabled persons, AIDS prevention, visual art and images, literature and books and resources for gay and lesbian youth.

24. Plaintiffs have a direct interest in representing, and providing services to, their members and users, including in their ability to send First Amendment-protected content through the Internet.

25. Plaintiff THE KING'S ENGLISH, INC. is a 30-year-old, locally-owned independent book store in Salt Lake City. The King's English Bookshop carries a broad range of books, publishes a newsletter with book reviews and other news about books and hosts frequent readings and signings by a variety of authors. It maintains a website at [kingsenglish.booksense.com](http://kingsenglish.booksense.com) and distributes a monthly Internet newsletter. The King's English, Inc. has its principal place of business in Salt Lake City, Utah. It sues on its own behalf and on behalf of users of its website.

26. Plaintiff SAM WELLER'S ZION BOOKSTORE was established in Salt Lake City in 1929. Sam Weller's Zion Bookstore carries a wide variety of new, used and rare books, and maintains an extensive online collection available through its website, [www.samwellers.com](http://www.samwellers.com), as well as through a number of other third party websites. It also publishes its newsletter on the website. Sam Weller's has its principal place of business in Salt Lake City, Utah. It sues on its own behalf and on behalf of users of its website.

27. Plaintiff NATHAN FLORENCE is a Salt Lake City artist who sells and displays his artwork on the World Wide Web, as well as in local and regional galleries. Some of Mr. Florence's art depicts nude figures in a tradition that is centuries old. Mr. Florence maintains a website at [www.nflorencefineart.com](http://www.nflorencefineart.com). He sues on his own behalf and on behalf of users of his website.

28. Plaintiff W. ANDREW MCCULLOUGH was a candidate for Attorney General of Utah in the 2004 election, and operates a campaign website at [www.andrewmccullough.org](http://www.andrewmccullough.org). He anticipates running for state-wide office again in the future, and therefore continues to maintain his website. Mr. McCullough's website is dedicated to legal issues that are of interest to him and his supporters. His website shares an Internet Protocol Address with more than 45,000 other, unrelated sites, some of which contain material that may be deemed harmful to minors. Mr. McCullough sues on his own behalf and on behalf of users of [www.andrewmccullough.org](http://www.andrewmccullough.org) on the World Wide Web.

29. Plaintiff IPNS OF UTAH, LLC, the successor to COMPUTER SOLUTIONS INTERNATIONAL, INC., d/b/a CSolutions ("CSolutions"), is an Internet service provider that provides Internet access and web hosting services to customers in and outside of

the state of Utah. CSolutions is organized in Utah and has its principal place of business in Salt Lake City. CSolutions sues on its own behalf, and on behalf of its customers, who are both users of the Internet and publishers of content available on the Internet.

30. Plaintiff RIGIDTECH.COM, INC. ("RigidTech") is an Internet service provider that provides Internet access and web hosting services to customers in and outside of the state of Utah. RigidTech is incorporated in Utah and has its principal place of business in Salt Lake City, Utah. RigidTech sues on its own behalf, and on behalf of its customers, who are both users of the Internet and publishers of content available on the Internet.

31. Plaintiff THE SEXUAL HEALTH NETWORK, INC. ("The Sexual Health Network") is a small, Internet-based company incorporated in the State of Connecticut. It maintains a Web site at [www.sexualhealth.com](http://www.sexualhealth.com). The Sexual Health Network was founded in May 1996, by Dr. Mitchell Tepper while he was working on his doctoral dissertation at the University of Pennsylvania Program in Human Sexuality Education. Dr. Tepper also has a Master in Public Health degree from the Yale University School of Medicine. Dr. Tepper is currently the President of the Sexual Health Network. The Sexual Health Network is dedicated to providing easy access to sexuality information, education and other sexuality resources for people with disability, chronic illness or other health-related problems. The Sexual Health Network sues on its own behalf and on behalf of users of sexualhealth.com on the World Wide Web.

32. Plaintiff UTAH PROGRESSIVE NETWORK EDUCATION FUND, INC. ("UPNet") is a coalition of organizations and individuals committed to promoting social,

racial, economic and environmental justice. The groups involved in the coalition are committed to civil rights and liberties and use communication to unite people around a better understanding of issues. UPNet operates a website at [www.upnet.org](http://www.upnet.org) that serves as a resource for the community on a wide range of issues. Its website shares an Internet Protocol Address with more than 1700 other, unrelated websites, some of which contain material harmful to minors. UPNet sues on its own behalf, on behalf of its members, and on behalf of users of its website.

33. Plaintiff AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION ("ABFFE") was organized as a not-for-profit organization by the American Booksellers Association in 1990 to inform and educate booksellers, other members of the book industry and the public about the dangers of censorship, and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials. ABFFE is incorporated in Delaware and has its principal place of business in New York City. ABFFE, most of whose members are bookstores in the United States, sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of the patrons of their member bookstores.

34. Plaintiff AMERICAN CIVIL LIBERTIES UNION OF UTAH ("ACLU of Utah") is the Utah affiliate of the American Civil Liberties Union, a nationwide, nonpartisan organization of nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution, including the Bill of Rights. The ACLU of Utah has more than 2,300 members, is incorporated in Utah and has its principal place of business in Salt Lake City. The ACLU of Utah sues on its own behalf, and on behalf

of its members who use online computer communications systems. The ACLU of Utah maintains a website at [www.acluutah.org](http://www.acluutah.org).

35. Plaintiff ASSOCIATION OF AMERICAN PUBLISHERS, INC. ("AAP") is the national association of the United States book publishing industry. AAP's approximately 300 members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly associations. AAP members publish hardcover and paperback books in every field, scholarly journals, and a range of educational materials for the elementary, secondary, post-secondary and professional markets. Members of AAP produce computer software and electronic products and services. AAP is incorporated in New York, and has its principal places of business in New York City and in the District of Columbia. AAP represents an industry whose very existence depends on the free exercise of rights guaranteed by the First Amendment. AAP sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of the readers of its members' books.

36. Plaintiff COMIC BOOK LEGAL DEFENSE FUND ("CBLDF") is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, which has its principal place of business in New York, New York, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians and readers located in Utah, throughout the country and the world. Some of the comic books created, published, distributed and offered for sale by CBLDF's members, though constitutionally protected, could be deemed to be harmful to minors and therefore subject to the Amended Act. The First Amendment rights of CBLDF and

its members will be adversely affected unless the Amended Act is enjoined. CBLDF sues on its own behalf, on behalf of its members, and on behalf of the readers of their materials.

37. Plaintiff FREEDOM TO READ FOUNDATION, INC. ("FTRF") is a non-profit membership organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen, to support the rights of libraries to include in their collections and make available to the public any work they may legally acquire and to set legal precedent for the freedom to read on behalf of all citizens. FTRF is incorporated in Illinois and has its principal place of business in Chicago. FTRF sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of the patrons of its member libraries.

38. Plaintiff PUBLISHERS' MARKETING ASSOCIATION ("PMA") is a nonprofit trade association representing more than 4,200 publishers across the United States and Canada. The PMA represents predominantly nonfiction publishers and assists members in their marketing efforts to the trade. PMA is incorporated in California, and has its principal office in Manhattan Beach, California. PMA sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of readers of its members' publications.

39. Defendant MARK SHURTLEFF is the Attorney General of the State of Utah and is sued in his official capacity as such. He is the chief law enforcement officer of the State of Utah. In addition to specific duties given to him under the Amended Act, pursuant to Utah Code § 67-5-1, defendant Shurtleff shall "prosecute...all causes to

