

TITLE Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action. Hearing on S.892, a Bill To Amend Section 1464 of Title 18, United States Code, To Punish Transmission by Computer of Indecent Material to Minors, before the Committee on the Judiciary, United States Senate. One Hundred Fourth Congress, First Session.

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ABSTRACT

This document presents witness testimony and supplemental materials from a Congressional hearing called to address pornography in cyberspace. It features opening statements by Senator Charles E. Grassley and Senator Patrick J. Leahy; and statements by Senators Strom Thurmond, Russell D. Feingold, Orrin G. Hatch, Chairman of the Senate Committee on the Judiciary, Paul Simon, and Herbert Kohl. Testimony is included from three panels of witnesses. The first includes: Donelle Gruff; Patricia W. Shao; and Susan Tillman Elliott, M.D.; all of whom describe experiences with pornography on the Internet. The second panel includes: Barry F. Crimmins, investigative journalist; William W. Burrington, assistant general counsel and director of governmental affairs, America Online, Inc.; and Stephen Balkam, Recreational Software Advisory Council; who discuss the role of online service providers in restricting online child pornography and a content labeling system for violence, nudity/sex, and language for recreational software and other media. The third panel includes: Dee Jepsen, executive director, Enough is Enough Campaign; Michael S. Hart, executive director, Project Gutenberg, and professor of electronic texts, Illinois Benedictine College; and Jerry Berman, executive director, Center for Democracy and Technology; who discuss the issues of censorship and determining which materials are appropriate or inappropriate for children.

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S. Hrg. 104-438

CYBERPORN AND CHILDREN: THE SCOPE OF THE PROBLEM, THE STATE OF THE TECHNOLOGY, AND THE NEED FOR CONGRESSIONAL ACTION

ED 400 779

HEARING BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

S. 892

A BILL TO AMEND SECTION 1464 OF TITLE 18, UNITED STATES CODE, TO PUNISH TRANSMISSION BY COMPUTER OF INDECENT MATERIAL TO MINORS

JULY 24, 1995

Serial No. J-104-36

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(II)

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

| | Page |
|---|--------|
| Grassley, Hon. Charles E., U.S. Senator from the State of Iowa | 1 |
| Leahy, Hon. Patrick J., U.S. Senator from the State of Vermont | 7, 11 |
| Thurmond, Hon. Strom, U.S. Senator from the State of South Carolina | 32 |
| Feingold, Hon. Russell D., U.S. Senator from the State of Wisconsin | 33, 35 |
| Hatch, Hon. Orrin G., U.S. Senator from the State of Utah, Chairman of the Senate Committee on the Judiciary | 37 |
| Simon, Hon. Paul, U.S. Senator from the State of Illinois | 50 |
| Kohl, Hon. Herbert, U.S. Senator from the State of Wisconsin | 169 |

CHRONOLOGICAL LIST OF WITNESSES

| | |
|--|-----|
| Panel consisting of Donelle Gruff, victim, accompanied by Michael Murray, Safety Harbor, FL; Patricia W. Shao, parent, Bethesda, MD; and Susan Tillman Elliott, M.D., parent, McLean, VA | 38 |
| Panel consisting of Barry F. Crimmins, investigative journalist, Lakewood, OH; William W. Burrington, assistant general counsel and director of gov- ernmental affairs, America Online, Inc., Vienna, VA; and Stephen Balkam, Recreational Software Advisory Council, Cambridge, MA | 55 |
| Panel consisting of Dee Jepsen, executive director, Enough is Enough Cam- paign, Fairfax, VA; Michael S. Hart, executive director, Project Gutenberg, and professor of electronic texts, Illinois Benedictine College; and Jerry Berman, executive director, Center for Democracy and Technology, Wash- ington, DC | 111 |

ALPHABETICAL LIST AND MATERIAL SUBMITTED

| | |
|---|-----|
| Balkam, Stephen: Testimony | 92 |
| Prepared statement | 94 |
| Berman, Jerry: Testimony | 119 |
| Prepared statement | 120 |
| Burrington, William W.: Testimony | 67 |
| Prepared statement with appendixes A and B | 71 |
| Crimmins, Barry F.: Testimony | 55 |
| Prepared statement with attachments A through E | 58 |
| Elliott, Dr. Susan Tillman: Testimony | 41 |
| Exon, Hon. J. James, U.S. Senator from the State of Nebraska | 109 |
| Grassley, Hon. Charles E.: Letter from Bruce Fein, attorney at law, July 23, 1995 | 3 |
| Letter from John C. Harrison, associate professor of law, July 24, 1995 | 5 |
| Gruff, Donelle: Testimony | 38 |
| Hart, Michael S.: Testimony | 116 |
| Jepsen, Dee: Testimony | 111 |
| Prepared statement | 112 |
| Leahy, Hon. Patrick J.: Cato Institute report, "New Age Comstockery: Proposed Censorship of Cyberspace," by Robert Con-Revere | 12 |
| Letter to Hon. Janet Reno, Attorney General of the United States, U.S. Department of Justice, July 13, 1995 | 43 |

IV

| | Page |
|--|------|
| Leahy, Hon. Patrick J.—Continued | |
| Letter from Andrew Fois, Assistant Attorney General, U.S. Department of Justice, July 24, 1995 | 44 |
| Statement of the Department of Justice: "Brief History of Departmental Efforts To Combat Computer Facilitated Child Sexual Exploitation and Abuse" | 45 |
| Letter from Jerry Berman, coordinator, Interactive Working Group, July 24, 1995 | 128 |
| Interactive Working Group report, "Parental Empowerment, Child Protection, and Free Speech in Interactive Media" | 129 |
| Shao, Patricia W.: Testimony | 39 |

APPENDIX

PROPOSED LEGISLATION

| | |
|---|-----|
| S. 892, a bill to amend section 1464 of title 18, United States Code, to punish transmission by computer of indecent material to minors | 155 |
|---|-----|

QUESTIONS AND ANSWERS

| | |
|---|-----|
| Responses to written questions of Senator Grassley from Jerry Berman, executive director, Center for Democracy and Technology | 160 |
| Written questions of Senator Leahy to Dee Jepsen, executive director, Enough is Enough Campaign | 163 |
| Responses to written questions of Senator Leahy from Dee Jepsen | 164 |

ADDITIONAL SUBMISSIONS FOR THE RECORD

| | |
|--|-----|
| Statement of William Moroney, president, Electronic Messaging Association ... | 170 |
| Memorandum from Wiley, Rein & Fielding, analysis of S. 892 | 176 |
| Statement of Mike Godwin, staff counsel, Electronic Frontier Foundation, including various letters of concerned citizens | 176 |
| News release of the Family Research Council to protect families from porn on the Internet | 186 |
| Statement of: | |
| Heidi Stirrup, director, Governmental Relations, Christian Coalition | 187 |
| Lawrence C. Stewart, chief technology officer, Open Market, Inc., Cambridge, MA | 187 |
| America Online's Parental Control Methods | 188 |

CYBERPORN AND CHILDREN: THE SCOPE OF THE PROBLEM, THE STATE OF THE TECHNOLOGY, AND THE NEED FOR CONGRESSIONAL ACTION

MONDAY, JULY 24, 1995

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:08 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Charles E. Grassley, presiding.

Also present: Senators Thurmond, DeWine, Leahy, Simon, Feingold, and Exon.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY [presiding]. Good afternoon, everybody. At the outset, I want to welcome everyone to the first ever congressional hearing on the topic of pornography in cyberspace. This issue is one of the more important and difficult issues facing Congress today. I have introduced the Protecting Children from Computer Pornography Act of 1995 which targets this problem, I think in a reasonable and disciplined way.

Fundamentally, the controversy this committee faces today is about how much protection we are willing to extend to children. Sadly, this has become a dangerous country in which to raise a family. Certainly there is far more for parents to worry about now than when I was a child or, more recently, a parent raising kids.

Playgrounds have become hunting grounds for child molesters. Schools have become places where drugs are rampant. Teenage pregnancy is on the rise. Just look at the recent polls. Teenage drug use is way up, and teen pregnancy rates are at near epidemic proportions.

Until very recently, parents could breathe a little easier in their own homes. After all, the home is supposed to be safe and is supposed to be a barrier between your children and the dark forces which seek to corrupt and destroy our youth. But enter the Internet and other computer networks. Suddenly, now not even the home is safe. Now the dark forces which were once stopped by the front door have found their way into the home through personal computers. Something needs to be done.

(1)

Now, I do not pretend to have all the answers. I do not think anybody knows all the answers. But I do know that we in Congress cannot just sit by and sit this one out.

Giving Federal prosecutors a tool to use to punish those who would prey on America's children is a good step in the right direction. My bill is that tool. I also believe that the computer communications industry has a role to play as well. I believe that efforts to create software programs to try to block some sexually explicit content on computers are commendable. In fact, in substitute language that I have circulated to committee members, I have included a 2-year report-back provision, requiring the Justice Department to report to Congress on technological innovations which might warrant the alteration or repeal of my legislation.

But at least for now I do not believe that technology is the entire answer either, and I do not accept the notion that parents should have the sole responsibility to spend their hard-earned money to ensure that cyberporn does not flood into their homes through their personal computers.

If you were to follow that reasoning, parents should pay then protection money to third persons so that drug pushers would not sell drugs to their children. Now, that is upside down logic and contrary to the way that we have always done things in this country.

Those elements in the computer communications industry which choose to provide sexually explicit material should bear the responsibility and the cost of preventing children from accessing sexually explicit material. That is what my bill does. It uses criminal sanctions to punish those in the computer communications industry who knowingly transmit indecent pornography to children or who willfully aid and abet such activity.

My bill is perfectly reasonable, and virtually every State in the Nation has had laws on the books against selling or displaying certain types of pornography to children for decades. Now that the problem of children's exposure to pornographic materials has taken on a significant interstate character, it is time for Congress to get into the act. And I want to be very clear about what we are trying to do here.

To my knowledge, there is only one comprehensive study dealing with the overall issue of pornography and cyberspace, and after criticism, that study is under review, as it should be. But today we are not even focusing on this general issue. The specific issue we are dealing with today involves knowingly or willfully transmitting indecent pornographic material to children. And that is it. Very simply, that is it.

What adults want to receive or take part in with other adults is not the focus of this hearing. Opponents of my legislation will try to downplay the problems, saying that there is only anecdotal evidence. Well, our first panel of witnesses who have been victimized will reflect the problem in real human terms and highlight the need to address the problem effectively.

Now, in order to clarify what my bill does, I would point my colleagues to this chart that I have prepared. As the chart shows, my bill creates criminal liability in two very narrow circumstances. Under the Protection of Children from Computer Pornography Act, it is unlawful for computer system operators to knowingly transmit

indecent material to a child. That is under scenario 1. Second, my bill makes it unlawful for computer system operators to willfully permit their system to be used as a conduit for indecent communications intended for children. That is it—simple, clear, and reasonable.

As is readily clear, my bill is very focused. I believe that it is vitally important for us in Congress to target our efforts so that they have a practical impact. That is why I focus my bill on the computer systems through which communications flow. That is where the process is sending computer pornography to children is most vulnerable. That is where we can do the most good to protect children.

As a comparison, I encourage my colleagues to consider the cocaine trade. There are a lot of coca plants in South America, and there are countless ways to transport and distribute refined cocaine. Now, where is the one place where it all comes together? It all comes together at the coca-processing refineries where the coca leaves are converted into cocaine. That is why the DEA makes every effort to locate these refining facilities. That is what my bill does as well. It concentrates on the pressure point.

I want to thank my friend from Vermont who has coordinated the minority for this hearing. I appreciate his efforts to see that this hearing is fair and civilized. I personally have made every effort to ensure that all relevant points of view have been represented at the hearing. To ensure that the Protection of Children Act will withstand the inevitable ACLU court challenge, I have consulted well-regarded constitutional scholars who specialize in first amendment issues. Two scholars reviewed the Protection of Children Act, and I am pleased to announce that they agree that the act is fully constitutional.

At this time, I ask unanimous consent that two letters I have here be entered into the hearing record. The first letter is from Bruce Fein, a constitutional scholar who writes for the Washington Times and a former scholar in residence at the Heritage Foundation, and the second letter is from Prof. John C. Harrison, who teaches constitutional law at the University of Virginia Law School. Mr. Harrison is well respected in academic circles, and as we all know, the University of Virginia Law School is one of the finest and most prestigious law schools in the country. For my colleagues' convenience, I have copies of these letters available. I urge you all to give serious consideration to what these scholars have in their well-reasoned opinions. They come to an unremarkable but undeniably true conclusion. There is no constitutional right to knowingly distribute indecent pornography to children, whether by computer or otherwise.

[The letters of Bruce Fein and Prof. John C. Harrison follow:]

BRUCE FEIN,
ATTORNEY AT LAW,
Great Falls, VA, July 23, 1995.

Senator CHARLES E. GRASSLEY,
*Committee on the Judiciary,
Washington, DC.*

DEAR SENATOR GRASSLEY: This letter responds to your request for an examination of the constitutionality of S. 892, the "Protection of Children From Computer Pornography Act of 1995." I believe the bill would pass constitutional muster if Con-

gress makes satisfactory factual findings and a proper scienter requirement is established for those who control computer networks

The bill would make criminal the knowing transmission of indecent material to minors by a remote computer facility operator, electronic communications service provider, or electronic bulletin board service provider. If the operator or provider declines to monitor transmissions, then criminal liability does not attach. Operators or providers are also criminally culpable if they permit others to employ their computer networks to transmit indecent material originated by an end user. It seems unclear, however, whether the bill requires the operator or provider to know that a particular minor is targeted to receive the indecent material, whether knowledge of a high likelihood that a minor will be a receiver is sufficient to establish a violation, or, whether criminality attaches if a minor in fact is a recipient, even if the transmitter believed that only adults would be in the computer audience (a form of strict liability). The distinctions are important since millions of households enjoy computer facilities that are routinely used by minors.

The First Amendment generally prohibits government restrictions on speech that deny adults access to material that is unfit only for children. But that doctrine is not categorical. Thus, the compelling government interest in the morals and upbringing of youth justifies a ban on indecent broadcasting, at least when children are likely to be in the audience. *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), *Sable Communications v. F.C.C.*, 492 U.S. 115 (1989). A ban on indecent programming except from 10:00 p.m. to 6:00 a.m. is undisturbing to the First Amendment although it curtails adult access. *ACT v. F.C.C.* (D.C. Cir. June 30, 1995) (en banc). The constitutionally decisive issue regarding S. 892 is whether the indecency prohibitions are the least restrictive means of safeguarding child welfare consistent with the free speech rights of adults. See *Sable Communications*, supra, at 128-131. The answer pivots on what is technologically feasible. If Congress makes sound factual findings that neither credit card, access code, scrambling devices nor other technologically workable mechanisms exist, at present, to block indecent material through computer transmitters from reaching minors yet permit adult access, then *Sable* teaches that complete blocking could be constitutional. That conclusion rests in part on the innumerable alternate sources of indecent material readily accessible by adults, and, on the relatively low standing of indecency in the First Amendment hierarchy. See *Pacifica Foundation*, supra; *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

If a sound finding of infeasibility is established, then Congress would be entitled consistent with the First Amendment to prohibit any indecent computer transmission to a minor aided by an operator or provider, at least if liability requires proof that the violator knew the contents of the offending material. See *Smith v. California*, 361 U.S. 147 (1959). I do not know whether the operators and providers covered by the bill characteristically monitor the contents of material they assist in transmitting, but if they do not, then the prohibition on indecency is but sound and fury signifying nothing. Moreover, it seems clear under the *Smith* precedent that computer facility operators whose networks are used as transfer points for indecent communications to minors cannot be held liable absent proof that either they knew the contents of the offending material or unreasonably bypassed an opportunity to know. A strict liability rule would prompt a self-censorship that would make deep inroads on protected First Amendment communications. *Smith*, supra at 153-155. The language of the bill should clarify the scienter requirement for controllers of computer networks.

Finally, it seems unclear to me whether the bill would cover Internet transmissions which operate without any central or regional hub or specific transfer point. Would end users of the Internet be deemed electronic communications service providers?

Your proposed amendment to S. 892 that would task the Attorney General to keep abreast and report on technological developments consistent with the least restrictive alternative imperative of the First Amendment would be a constructive signal to courts that Congress is not cavalier in balancing the free speech interests of adults and the morals of youth. The amendment would thus strengthen the bill's constitutionality.

Sincerely,

(Signed) Bruce Fein

(Typed) BRUCE FEIN.

JOHN C. HARRISON,
ASSOCIATE PROFESSOR OF LAW,
Charlottesville, VA, July 24, 1995.

Hon. CHARLES E. GRASSLEY,
Chairman, Subcommittee on Administrative Oversight and the Courts,
U.S. Senate, Washington DC.

DEAR SENATOR GRASSLEY: At the request of your staff I have considered S. 892 (including amendments that I am told will be proposed) with respect to its constitutionality in light of the Supreme Court's First Amendment doctrine. It seems to me that the bill is clearly constitutional under the Court's current cases.¹

The bill regulates the conduct of operators of computer facilities that offer remote access to computer users—an electronic bulletin board service is an example.² It establishes two criminal offenses. First, it forbids such operators from knowingly transmitting indecent material to a minor; the knowledge requirement extends to both the content of the transmitted material and the minor's status as a minor. Second, it forbids such operators from willfully permitting their facilities to be used as a transfer point for the knowing transmission of indecent material to a minor.³

Although the Supreme Court's jurisprudence of obscenity and indecency is at times difficult to describe and often difficult to apply, it includes some well established principles. One is that the Constitution permits Congress and the States to forbid the knowing distribution or transmission to minors of material the distribution of which to adults generally may not be banned. To use the Court's main doctrinal formulation, the protection of minors from indecent material is a compelling state interest that can support a ban on speech, provided that ban is narrowly tailored to its end. A direct prohibition on communication of the forbidden message to minors is narrowly tailored. Indeed, it is the central instance of a properly narrow restriction.

The cases that bear most directly on this issue are *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). In *Pacifica Foundation* the Court found that the Federal Communications Commission, consistently with the First Amendment, could prohibit the broadcast of indecent messages during parts of the day, in order to prevent their transmission to children. The Court recognized that in doing so the FCC would also be prohibiting the broadcast of such messages to adults and that broadcast to adults alone could not be proscribed; the prohibition was permissible because of the interest in protecting minors, despite the collateral interference with otherwise-free communications to adults. In *Sable Communications*, by contrast, the Court found that Congress could not, consistently with the First Amendment, forbid the transmission of indecent messages by telephone in order to keep those messages from children. The Court agreed that protection of children from indecent material was a compelling state interest but found that the blanket ban was not sufficiently narrowly tailored to achieve its end, because of the extent to which it limited the messages that could be transmitted to adults.

Under those cases the interest underlying S. 892 is compelling. Moreover, the Court long has taken it as given that a direct and specifically targeted ban on indecent communication to minors, which entails no collateral limits on communication to adults, is sufficiently narrowly tailored to satisfy the First Amendment. That was the premise of the Court's decision to approve the more sweeping ban at issue in *Pacifica Foundation*: "Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children." 438 U.S. at 749.⁴ The analysis in *Pacifica Foundation* centered around the more difficult question of the extent to which communication to adults could be limited in order to limit communication to children. As Justice Powell explained in concurrence, the difficulty with respect to radio regulation is that the clearly constitutional approach of limiting only speech to minors is not readily available. "In most instances, the dissemina-

¹The views in this letter represent my independent conclusions as an academic student of First Amendment doctrine. They are offered as assistance to the Subcommittee, not on behalf of any client or of the university where I teach.

²My description of the bill is designed to capture its characteristics from the standpoint of First Amendment analysis; I am not providing a precise technical rendition of its contents.

³My discussion is cast in terms drawn from the first prohibition. The two are the same for these purposes, however, because both involve the knowing transmission of indecent matter to a minor, so my conclusions apply to both provisions.

⁴The Court made the same point in *Sable Communications*. "We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." 492 U.S. at 126 (citations omitted).

tion of this kind of speech to children may be limited without also limiting willing adults' access to it. Sellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children, but such a requirement has no effect on adults' access." 438 U.S. at 758. This legislation, unlike the regulation approved in *Pacifica Foundation* (and unlike the statutory, provision disapproved in *Sable Communications*), is able to and does take the simple, direct approach of forbidding transactions with minors and those transactions alone.⁵

There is no reason to believe that the situation of electronic bulletin boards and similar facilities is factually different from that of book sellers or movie theaters in any relevant respect. In both instances, providers of indecent material who are subject to a restriction relating to children are free to give such material to adults. Because of the dual knowledge requirement of S. 892—the provision is violated only if the computer service operator knows both the content of the material and the minority of the recipient—we need not fear any significant level of self-censorship by operators, any more than by book sellers.

It is difficult to imagine a less restrictive means of protecting minors from indecent materials than forbidding the transmission to minors (and no one else) of indecent materials. In order to keep the law abreast of technical changes, the bill charged the Attorney General to report to Congress within two years concerning the availability of technology that would enable parents to control their children's access to indecent material. The report is specifically to address the question whether the use of such technology should be treated as a defense to the offenses created by S. 892. The presence of this provision underscores the point that the bill is designed to minimize interference with the material available to adults.

The legislation also would survive challenge on vagueness and overbreadth grounds. The category of "indecent" material as currently understood by Congress, the courts, and the Federal Communications Commission, is well enough defined to give adequate notice to operators of their responsibilities under the bill. The concept has a well-known core of sexually explicit material that makes up the bulk of the prohibition. The bill is thus not void on its face for vagueness.⁶ In any genuinely borderline case concerning the meaning of the statute, the defendant of course would enjoy the protection of the rule of lenity, under which criminal statutes are construed not to apply to seriously doubtful cases. Nor is there an overbreadth problem. When Congress uses a term that has come to refer to the very category of material from which minors constitutionally may be protected, it is clear that the statute applies only in those situations in which the Constitution permits it to apply.

The Court has long taken the position that the compelling interest in protecting children from improper influence does not always justify restrictions on what is available to adults. It held, through Justice Frankfurter, in *Butler v. Michigan*, 352 U.S. 380, 383 (1957), that the State could not "reduce the adult population of Michigan to reading only what is fit for children." This legislation, however, does nothing of the sort. *Butler* involved a total ban on the distribution of certain materials lest they fall into the hands of minors. Justice Frankfurter said, "Surely, this is to burn the house to roast the pig." *Id.* By contrast, S. 892 is a roasting pit precisely the size of—narrowly tailored to—the pig.

I hope the Subcommittee finds this analysis useful. Please let me know if I can be of any further assistance.

Sincerely,

(Signed) John Harrison

(Typed) JOHN C. HARRISON.

BIOGRAPHY OF JOHN C. HARRISON, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA

Subjects taught:

Administrative Law, Constitutional Law, Federal Courts, First Amendment.

Publications:

⁵ In the closely related area of speech that is obscene as to minors but not as to adults, the Court has approved a ban on the sale of such matter to minors. *Ginsberg v. New York*, 390 U.S. 629 (1968).

⁶ In the interests of maximum specificity, the Subcommittee might consider limiting the bill's coverage to a defined subset of indecent material. I do not think, however, that such a further limitation is required by the Court's doctrine.

If the Eye Offend Thee, Turn Off the Color, 91 Michigan Law Review 1213 (1993) (book review).

Reconstructing the Privileges or Immunities Clause, 101 Yale Law Journal 1385 (1992).

Whose Gods Are These, Anyway? 2 Public Interest Law Review 108 (1992) (book review).

The Free Exercise Clause As a Rule About Rules, 15 Harvard Journal of Law & Public Policy 170 (1992).

Prior employment:

United States Department of Justice, 1983–1993:

Deputy Assistant Attorney General, Office of Legal Counsel, 1990–1993.
Counselor to the Assistant Attorney General, Office of Legal Counsel, 1989–1990.

Associate Deputy Attorney General, 1988–1989.

Assistant to the Solicitor General, 1987–1988.

Associate Deputy Attorney General, 1986–1987.

Deputy Associate Attorney General, 1986.

Special Assistant to the Attorney General, 1985–1986.

Attorney-Advisor, Office of Legal Policy, 1983–1985.

Clerk, Honorable Robert H. Bork, United States Court of Appeals for the District of Columbia Circuit, 1982–1983.

Associate, Patton, Boggs & Blow, Washington, D.C., 1980–1982.

Education:

Yale Law School: J.D., 1980.

Editor, *Yale Law Journal*.

Articles Editor, *Yale Studies in World Public Order*.

University of Virginia: B.A. (highest distinction), 1977.

Senator GRASSLEY. So, in closing, I want to say that computer communications holds much promise, as we all know. The world of Internet and cyberspace is one that should be used to better humankind, not tear it down. I believe that we in Congress must give America's parents a new comfort level in public and commercial computer networks if these are to be transformed from the private preserve of a special class of computer hackers into a widely used communications medium. This necessary transformation will never happen if parents abandon the Internet and computer communications technology remains threatening.

I would now to go to Senator Leahy.

**OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S.
SENATOR FROM THE STATE OF VERMONT**

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Chairman, interestingly enough, this is, as you already said, the first congressional hearing held on the issue of regulating indecent and obscene material on the Internet. In fact, when the problem of children's access to objectionable online material first came up for a vote, when the Senate passed a version of the Exon-Coats Communications Decency Act on June 14, remarkably the Senate acted without the benefit of hearings or anything approaching the thorough examination of the matter that you have set out.

It really struck me in your opening statement when you mentioned, Mr. Chairman, that it is the first ever hearing, and you are absolutely right. And yet we had a major debate on the floor, passed legislation overwhelmingly on a subject involving the Internet, legislation that could dramatically change—some would say even wreak havoc—on the Internet. The Senate went in willy-

nilly, passed legislation, and never once had a hearing, never once had a discussion other than an hour or so on the floor.

It is especially interesting because most of the Senators who voted would not have the foggiest idea how to get on the Internet in the first place. They do not use it. They do not have any idea of how to get on to it. They would have to have their staffs show them how to do it. There are only a few of us who regularly use it. I do for town meetings and communications and many other uses. But most do not. They voted in large part based on inflammatory stories about pornography on the Internet, like the study by Mr. Rimm. Incidentally, he was supposed to be here, but got disinvented once a number of people brought out the fact that the study, which was treated as gospel on the Senate floor, was a little bit less than gospel. And I would expect any time now to see Time Magazine, for example, which did a cover story based on it, too, point out that even great media can be conned.

But these issues of child pornography are valid issues and ought to be talked about, and you are to be commended for having the hearing because of that. They are issues that concern me. We have all these issues interconnected here: the future of the Internet, the best way for parents to control their children's access to the Internet and to protect against inappropriate and offensive materials; and the appropriate role of law enforcement.

I am a parent. I have raised three children. I spent nearly a decade in law enforcement. I think I have a pretty good idea of how to differentiate between what the responsibility of law enforcement is and what the responsibility of parents is. We sometimes have this attitude that the Government should take over for the parents. I think parents ought to carry some of that basic responsibility.

In fact, I asked the Attorney General of the United States as well as a coalition of private and public interest groups known as the Interactive Working Group to look at these issues and to provide recommendations on addressing the problem of children's access to objectionable online material, but do it in a constitutionally effective manner. The Interactive Working Group is releasing their report today. I happen to have a copy of it here. It describes some of the technology available to help parents supervise their children's activities on the Internet and how parents can protect their children from objectionable online material. In fact, some of this technology was demonstrated last week in a meeting hosted by Representative Cox, who may testify here today.

We hear a lot about the free market in this Congress and trying to give it a chance to work. Well, we are finding that software entrepreneurs and the vibrant forces of the free market are providing tools that can empower parents to restrict their children's access to offensive material and address the problem of online pornography by empowering parents and not the Government to screen children's computer activities.

Again, I hear the rhetoric about letting us go back to having parents take some responsibility, letting us get government out of dictating what we do. I worry that maybe the rhetoric is a little bit off from the reality as we approach some of the legislation like the Exon-Coats legislation that passed the Senate. It is parents who should decide what restrictions to place on their children's access

to that which the parents considerable objectionable. In fact, there are parents who may consider things objectionable that most of us would not. They ought to have the right to cut that out if they want. Not cut it out for you or for me, but cut it out for their children.

We have an article in one of the local papers today, the Washington Post, on beer advertising. If they want to cut out beer advertising for their children, they ought to have a right to. The same principle applies to "fantastic card" games that some parents believe promote interest in the occult. Parents ought to be able to cut that out. There is available blocking technology. They can make pornographic use-net news groups or World Wide Web sites off-limits to children. You also have technology that allows you to check to see where your child has been.

All of us may wonder what magazines, books, or anything else our children buy. We do not know how to check that out, but we can check on the computer exactly where they have been and what they have looked at. Other commercially available products limit children's access to "chat rooms" where they might be solicited. They limit children's ability to receive pornographic pictures through electronic mail that we could not limit otherwise in the print press media. Other products, as I said, allow parents to monitor their children's usage of the Internet: where have you been, who have you rung up, what chat group have you looked at.

Interested organizations like the Christian Coalition or Mothers Against Drunk Driving could provide parents that use blocking technology with lists of sites, and these lists of sites that they consider inappropriate could be programmed in, and the kids could not log on to them.

But, if instead of giving parents the tools to police their kids, you rely on government regulation, I think you stifle the Internet. The Internet has grown as well as it has and as dramatically and amazingly because it has not had the Government second-guessing every move. When you talk about communication technology, the worst thing in the world is to invite government regulation, which always slows up advances, always slows up advances in computer and communication technology. The Internet has been growing at an exponential rate with new uses for devices daily. Overly restrictive bans against indecency on the Internet will prove not only unconstitutional, but will hamper the growth of this communication medium.

The Internet does not function like a broadcast or a newspaper or a station manager. An editor chooses which images or stories to send out. It is kind of like a combination of a great library and a town square, where you may have some things in there you do not like, but you have a lot of things you do like. And you have the give and take where people can make available vast amounts of information and free and open discussion.

Our disabled citizens have found great opportunities on it. It has enabled our children to discuss issues with some of society's greatest minds.

As I said, I conduct electronic town meetings where Vermonters can tap on in my own State and tell me that they agree with me

and they can tell me, as they do most emphatically, when they disagree with me.

Imposing the same government regulation applied to broadcasters to the Internet, I think it is inappropriate. Anyone with a computer and a modem can send something out on the Internet. But unlike a broadcaster, if you want to listen to it, you have got to seek out the information. You have got to download it. And a parent can stop a child from downloading it if they want. But that parent acting through the Government should not be able to stop you or me or others from downloading it if we want to.

Any legislative approach has to take into consideration online users' privacy and free speech interests. If we grant too much power to online providers to screen for indecent material, then public discourse and online content in cyberspace would be controlled by the providers and not by the users. We want our laws to encourage and not discourage online providers from creating a safe environment for children, but we do not want to say "do not let the children on the Internet altogether." If they are liable for any exposure of indecent material to children, people under the age of 18 are just going to be shut out of the technology, relegated by the Government to sanitized "kids-only" services that contain only a fraction of the entire Internet. It is sort of like locking kids out of whole sections of libraries.

What are we going to do if we discourage the Project Gutenberg from placing online the works of not only Charles Dickens but Geoffrey Chaucer or D.H. Lawrence for fear of prosecution because somebody somewhere might find something in there indecent?

Basically I will sum up with this, Mr. Chairman: Parents know their children better than any government official. I did not want the Government telling my children, especially when they were younger, what they could read or write or see. I want that ability. As a parent, I believe I am in the best position to know the sort of online material to which children might be exposed. I reviewed what books my children brought home from the library or bought or read. I discussed those books with them. I told them that some I did not think were appropriate; I thought others were.

The remarkable thing about that is my children would talk with me, and we would discuss books, and they had a love of reading as a result, and we had a closer family. I would so much rather do that than have the Government tell my child what he or she could read or write. I would rather my wife and I did that, and I think we have better children for it, and I think we have a better relationship with our children as a result of that.

Maybe some parents might find it is nice to talk with their children now and then. They would actually come up and talk with them and ask them what they are looking at and what they are reading and what they are doing. We might be a better country for it.

Our criminal laws already prohibit the sale and distribution on computer networks of obscene material. We impose criminal liability for transmitting any threatening message over a computer network. And, in fact, under Senator Grassley's leadership, we increased the penalties for many of these. So I would put in the record my whole statement, Mr. Chairman. I would also ask that

we keep the record open. A Cato Institute report is going to be completed by Wednesday. I would like to put in the record the Cato report about the constitutionality of our bill, as well as a statement by the People for the American Way.

Senator GRASSLEY. I was thinking about keeping the record open for 2 days for submissions. Is that OK?

Senator LEAHY. I think Cato said they are going to take until some time Wednesday, if we could make sure that they are specifically allowed to get theirs in, too.

Senator GRASSLEY. Thank you. We will do that.

[The prepared statement of Senator Leahy, the Cato Institute report, and a statement of People for the American Way follow:]

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

This is the very first congressional hearing held on the issue of regulating indecent and obscene material on the Internet and the problem of children's access to objectionable online material. That is correct, the first.

In spite of the action taken by the Senate Commerce Committee when it added the Communications Decency Act to its telecommunications bills last year and this, they held no investigative or legislative hearings into this important and complex matter. Indeed, when the Senate passed a restrictive version of the Exon-Coats Communications Decency Act on June 14, over my objection and those of Senator Feingold, it did so without the benefit of hearings or anything approaching a thorough examination of the matter. I am old-fashioned enough to remember when we used to hold hearings first and pass legislation after—after we got the facts, had analyzed the problem and had worked with the Administration and the public to craft a legislative solution to the public's legitimate concerns.

With all the magazine articles, talk show babble, and furor that has surrounded this issue, I am glad the Judiciary Committee is holding this hearing in order to begin to set the record straight. I want to commend Chairman Hatch and Senator Grassley for convening this hearing and look forward to the testimony of our witnesses this afternoon. These are issues that greatly concern me: the future of the Internet; the best ways for parents to control their children's access to the Internet and to protect against inappropriate and offensive materials; the appropriate role of law enforcement.

I had asked the Attorney General of the United States as well as a coalition of private and public interest groups known as the Interactive Working Group to look at these issues and provide recommendations on addressing the problem of children's access to objectionable online material in a constitutional and effective manner. I look forward to receiving the report of the Department of Justice as promptly as their study can be concluded.

Today the Interactive Working Group is releasing its report describing some of the technology available today to help parents supervise their children's activities on the Internet and protect them from objectionable online material. Some of this technology was demonstrated last week in a meeting hosted by Representative Cox, who will testify here today.

We are finding that software entrepreneurs and the vibrant forces of the free market are providing tools that can empower parents to restrict their children's access to offensive material. We can address the problem of online pornography by empowering parents, and not the government, to screen children's computer activities. This is the best way to police the Internet without unduly restricting free speech or squelching the growth of this fantastic new communications medium.

It is parents, not the government, who should decide what restrictions to place on their children's access to that which they consider objectionable: whether it is beer advertising, or fantastic card games that some parents believe promotes interest in the occult. Available blocking technology can make pornographic Usenet news groups or World Wide Web sites off-limits to children. Other commercially available products limit children's access to chat rooms, where they might be solicited, and limit children's ability to receive pornographic pictures through electronic mail. Yet other products allow parents to monitor their children's usage of the Internet. Interested organizations, like the Christian Coalition or Mothers against Drunk Driving, could provide parents that use blocking technology with lists of sites these groups consider inappropriate for children.

On the other hand, government regulation will stifle this new industry. The Internet has been growing at an exponential rate and new uses for it are devised daily. Overly restrictive bans against indecency on the Internet will prove not only unconstitutional but will also hamper the growth of this new communications medium.

The Internet does not function like a broadcast or a newspaper where a station manager or editor chooses which images or stories to send out in public. The Internet is like a combination of a great library and town square, where people can make available vast amounts of information or take part in free and open discussions on any topic.

It has provided great opportunities for our disabled citizens and has enabled our children the ability to discuss issues with some of society's greatest minds. With this technology, I conduct electronic town meetings with Vermonters, post information about legislative activities, and hear back from Vermonters about what they think.

To impose the government regulation of broadcasters to the Internet is inappropriate. Anyone with a computer and a modem can send something out on the Internet, but unlike a broadcaster, potential listeners must seek out this information and download it.

Any legislative approach must take into consideration online users' privacy and free speech interests. If we grant too much power to online providers to screen for indecent material, public discourse and online content in cyberspace will be controlled by the providers and not the users of this fantastic resource. On the other hand, we want our laws to encourage and not discourage online providers from creating a safe environment for children.

Even worse would be discouraging online providers from allowing children onto their services altogether. If online providers are liable for any exposure of indecent material to children, people under the age of eighteen will be shut out of this technology or relegated by the government to sanitized "kids only" services that contain only a tiny fraction of the entire Internet. That would be the equivalent of limiting today's students to the childhood section of the library or locking them out completely. This is not how this country should face the increasingly competitive global marketplace of the 21st century.

What are we doing if we discourage the Project Gutenberg from placing online the works of Charles Dickens, Geoffrey Chaucer or D.H. Lawrence for fear of prosecution because someone, somewhere on the Internet, might find the works indecent? Would the Internet still be the great electronic library and setting for open discussion it now promises?

Parents know their children better than any government official, and are in the best position to know the sort of online material to which their children may be exposed.

Finally, we must recognize our existing laws and what they provide by way of protection. Our criminal laws already prohibit the sale or distribution over computer networks of obscene material. We already impose criminal liability for transmitting any threatening message over computer networks. We already proscribe the solicitation of minors over computers for any sexual activity, and the illegal luring of minors into sexual activity through computer conversations. Indeed, only a few months ago under Senator Grassley's leadership we increased the penalties for many of these offenses in "The Sexual Crimes Against Children Prevention Act of 1995." We need to work with law enforcement to make sure they have the resources and training to track down computer criminals.

I look forward to working with all members of the Committee as we move forward on these important matters.

THE CATO INSTITUTE REPORT

NEW AGE COMSTOCKERY: PROPOSED CENSORSHIP OF CYBERSPACE

By Robert Corn-Revere¹

On June 14 the Senate voted 84-16 to approve the Communications Decency Act of 1995, proposed by Senator James Exon of Nebraska. The bill proposes to outlaw

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the use of computers and telephone lines to transmit "indecent" material, a category of speech that the Supreme Court has held to be protected by the First Amendment. The measure would impose jail terms and fines on anyone who uses a "telecommunications facility" to transmit any obscene information or image, or any indecent information or image to a person under 18. Also in June, Senator Charles Grassley of Iowa introduced S. 892, the Protection of Children From Computer Pornography Act of 1995. The Grassley bill would impose criminal penalties on any person who uses a computer facility to knowingly transmit indecent material to a person under 18. If either bill were to become law, it would usher in a new age of Comstockery in America.

The term "Comstockery," coined by George Bernard Shaw, refers to overzealous moralizing like that of Anthony Comstock, whose Society for the Suppression of Vice censored literature in America for more than sixty years. Under the so-called Comstock law, classic works by such authors as D.H. Lawrence, Theodore Dreiser, Edmund Wilson and James Joyce were routinely suppressed. Other targets of the Society's crusades included such literary giants as Tolstoy and Balzac. The more current law of indecency, which traces its heritage to Comstock, has been used to restrict some of the same literary works. The Exon and Grassley bills would extend this repressive regime to the Internet and online services, and thus threaten to undermine the promise of the emerging Digital Age.

BACKGROUND

In 1864 an alarmed Postmaster General reported that "great numbers" of dirty pictures and books were being mailed to Civil War troops. It seems that one of the most popular early uses of photography was the tintype version of the pinup.

As is often the case, invention became the mother of repression. Congress reacted quickly to the Postmaster's report, passing a law in 1865 making it a crime to send any "obscene book, pamphlet, picture, print, or other publication of vulgar and indecent character" through the U.S. mail.²

This law was strengthened several years later at the insistence of Anthony Comstock, a former dry goods clerk, who exerted broad influence as the Secretary of the New York Society for the Suppression of Vice. Under the popularly named "Comstock law," which prohibited use of the mails to send any "obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character," thousands of authors were jailed and literally tons of literature destroyed.

Fast forward to 1995: The popularization of the Internet, which can be used to transmit all kinds of information, including "indecent" digitized images and words, may spawn a new age of Comstockery.

Last February, retiring Senator James Exon of Nebraska introduced S. 314, the Communications Decency Act of 1995. The bill would impose jail terms and fines on anyone who uses a "telecommunications facility" to transmit any obscene information or image, or any indecent information or image to a person under 18. The Exon bill was incorporated as an amendment to S. 652, a comprehensive telecommunications reform proposal that was passed by the Senate in June. This was followed by S. 892, in which Senator Grassley proposed criminal penalties for operators of electronic bulletin boards and other entities that use computers to store and deliver indecent information.

Either bill would outlaw the use of computers and telephone lines to transmit "indecent" material, a category of speech that the Supreme Court has held to be protected by the First Amendment. The purpose of indecency regulation is to keep such adult materials from falling into the hands of kids. When he first introduced a similar bill last year, Senator Exon said he was concerned that the Information Superhighway was in danger of becoming an electronic "red light district," and that he wanted to bar access to unsuitable information by his granddaughter.

Exon was also troubled about the law's ability to keep pace with new technology. "Before too long," he told his Senate colleagues, "a host of new telecommunications devices will be used by citizens to communicate with each other. Telephones may one day be relegated to museums next to telegraphs. Conversation is being replaced with communication and electrical transmissions are being replaced with digital transmissions. * * * Anticipating this exciting future of communications, the Communications Decency amendment * * * will keep pace with the coming change."³ Or, as he put it in doublespeak: "The information superhighway is * * * a revolution that in years to come will transcend newspapers, radio, and television as an infor-

² Post Office Act, ch. 89, § 16, 13 Stat. 504, 507 (1865).

³ 140 Cong. Rec. S9746 (July 26, 1994).

mation source. Therefore, I think this is the time to put some restrictions or guidelines on it."⁴

Far from moving communications into the future, if either the Exon or Grassley bill is adopted, it would return the First Amendment to those less than thrilling days of yesteryear, when publishers routinely checked with the censors in advance to determine whether a particular manuscript was acceptable. The bills threaten to lobotomize the Internet by superimposing essentially the same legal standard that stifled the publication of literature in America for nearly 60 years under the so-called Comstock laws.

To understand the effect of the legislation, it is necessary to consider the difference between modern obscenity law, under which the First Amendment protects all but the most hard-core material, and obscenity law during Comstock's heyday, which criminalized any material that a jury believed might offend the sensibilities of the most vulnerable segments of society. In addition, it is important to examine the more recent doctrine of "indecentcy," which has been employed to limit exposure by children to offensive sexual materials on radio and television. Experience with these three lines of authority, taken together, provide a chilling vision of what the Exon or Grassley bills may bring about.

THE COMSTOCK LAW

In 1873, the year he was named Secretary of the New York Society for the Suppression of Vice, Anthony Comstock came to Washington to lobby for stronger obscenity laws. In doing so, he quite effectively employed a tactic that Jesse Helms and James Exon would emulate over a century later: Comstock brought along a great cloth bag filled with examples of "lowbrow" publications as well as information on contraception and abortion. He set up in the Vice President's office what came to be known as a "chamber of horrors" to display materials he believed should not be available to the public.⁵

Comstock's persistence paid off. Congress adopted the proposed law to Suppress Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use. In addition to obscene books, prints or other publications "of an indecent character," the law also prohibited the mailing of "any article or thing designed or intended for the prevention of conception or procuring of abortion."⁶ Moreover, Comstock was named a special unpaid agent of the Post Office Department and empowered to enforce the law. This enabled him to go to any post office and to inspect mail that he suspected might be obscene.

Like Senator Exon's Amendment, which was inspired by a desire to protect his granddaughter, the Comstock law—indeed, all obscenity law of the period—was predicated on a need to protect the most impressionable members of the population. The relevant legal standard was drawn from an English case, *Regina v. Hicklin*, which held that the test for obscenity turned on whether the material tended to corrupt the morals of a young or immature person.

The courts were concerned with "those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."⁷ Consequently, the intended audience of a book was unimportant if a young and inexperienced person might be exposed to the corrupting influence. Additionally, it was immaterial whether the book as a whole possessed literary merit. The courts focused instead on the passages they found to be most offensive to determine if a book was obscene. Indeed, some found that literary merit compounded the crime, by "enhancing a book's capacity to deprave and corrupt."⁸

The crusades against literature were motivated largely by the belief that certain novels would inflame the passions of young women whose virtue would soon be lost. But this was not the only concern. Comstock also crusaded against "dime novels," with their sensational tales of big city detectives and wild west gunslingers. These inexpensive books, filled with accounts of crime and violence were denounced as "the

⁴Peter H. Lewis, *Cybersex Stays Hot, Despite a Plan for Cooling it Off*, New York Times, March 26, 1995.

⁵Edward de Grazia, *Girls Lean Back Everywhere 4* (Random House: New York, 1992).

⁶Ch. 258, §2, 17 Stat. 598, 599 (1873). The law was further amended three years later to make its prohibitions unambiguous. Amendment to the Comstock Act, ch. 186, §1, 19 Stat. 90 (1876).

⁷*Regina v. Hicklin*, 3 Q.B. 360, 371 (1868).

⁸de Grazia, *supra* note 5 at 12.

inspiration for all of the antisocial behavior exhibited by the youth of the day." Comstock called such books "devil-traps for the young."⁹

Once given the authority, Comstock wasted no time in cracking down on what he called "vampire literature." In the first six months of the Comstock law, he claimed to have seized 194,000 obscene pictures and photographs, 14,200 stereopticon plates and 134,000 pounds of books, among other things.¹⁰ He zealously pursued this mission for another 42 years. Near the end of his life, Comstock wrote that he convicted "enough people to fill a passenger train of sixty-one coaches, with sixty of the coaches containing sixty people each and the last one almost full." He said that he had destroyed almost 160 tons of obscene literature and 3,984,063 obscene pictures.¹¹ Comstock also zealously pursued early feminists, such as Margaret Sanger, since his law outlawed the mailing of information on contraception and abortion.

After Comstock died, his work was carried on by John Sumner, who took his place as Secretary of the Society for the Suppression of Vice. But Sumner, like Comstock before him, did not have to rely on convictions as the sole measure of success. He could often persuade a publisher not to print a particular book, or, if already published, to recall all copies, turn them over for destruction and melt down the plates. By this method, Sumner pressured top New York publishers to withdraw from circulation and destroy all outstanding copies of *Women in Love*, by D.H. Lawrence, *The Genius*, by Theodore Dreiser, and *Memoirs of Hecate County*, by Edmund Wilson.¹² Other targets of the Comstock/Sumner crusades included such literary giants as Tolstoy, Balzac, and James Joyce. Comstock even attacked George Bernard Shaw's play, *Mrs. Warren's Profession*, because it dealt with the immoral subject of prostitution. Despite—or perhaps because of—the notoriety, the play enjoyed great success, and Shaw extracted further revenge by coining the term "Comstockery," as a reference to overzealous moralizing.¹³

No case better illustrated the excesses of Comstockery (or the problems with the current law of "indecentcy") than the campaign to censor *Ulysses* by James Joyce. The first obscenity prosecution of the classic work resulted from publication of installments from the book in a literary magazine named *The Little Review*. The publishers were arrested and prosecuted in 1920 because of the book's sexual themes. They were convicted and fined \$500. But the real loss was beyond the courtroom—no single American publisher would even consider printing the book for the next eleven years.¹⁴

This embargo ended in 1932, when a upstart publishing company, Random House, decided to make *Ulysses* a test case. Random House contracted with Joyce to publish *Ulysses* in America, and sued in federal court over the seizure by U.S. Customs officials of a French version of the book. The court held that the book was not obscene, and in doing so, rejected the prevailing legal test. In a decision affirmed on appeal, the court found that the book must be judged as a whole, and not by the effect that selected passages might have on vulnerable populations.

The court of appeals said it "cannot be gainsaid" that "numerous long passages in *Ulysses* contain matter [which] is obscene under any fair definition of the word." But the court found that the troublesome portions of the book "are introduced to give meaning to the whole, rather than to promote lust or portray filth for its own sake." It concluded: "We do not think that *Ulysses*, taken as a whole tends to promote lust, and its criticized passages do this no more than scores of standard books that are constantly bought and sold. Indeed, a book of physiology in the hands of adolescents may be more objectional on this ground than almost anything else."¹⁵

The case signaled the end of the *Hicklin* rule in America. As a result, the obscenity of a work of literature was determined not by the sensibilities of the most tender reader, but by those of the average reader. And the work was considered as a whole, not just by reference to the most lurid passages. Nevertheless, many publishers continued to shy away from certain books. For example, *Lady Chatterly's Lover*, written

⁹ Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary. L. Rev. 741, 757 (1992).

¹⁰ de Grazia, *supra* note 5 at 4.

¹¹ Blanchard, *supra* note 9 at 758; de Grazia, *supra* note 4 at 5; C.G. Trumbull, Anthony Comstock, *Fighter* 239 (1913).

¹² de Grazia, *supra* note 5 at 72-73, 710.

¹³ Blanchard, *supra* note 9 at 758.

¹⁴ de Grazia, *supra* note at 17.

¹⁵ *United States v. One Book Named Ulysses by James Joyce*, 72 F.2d 705, 707-08 (2d Cir. 1934).

in 1928, was not published in its unexpurgated form in America until 1959.¹⁶ Henry Miller's *Tropic of Cancer*, written in 1934, was not published in the United States until 1960.¹⁷ However, this restrictiveness began to fade as the courts began to consider the First Amendment implications of obscenity convictions.

MODERN OBSCENITY LAW

The Supreme Court has held consistently that the First Amendment does not apply to obscene speech. But before it confines otherwise protected expression to constitutional purgatory, the Court has stressed that the government cannot punish speech if it has even minimal value, and that rigorous due process protections must be applied. In 1957, in *Roth v. United States*, the Court emphasized that "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guarantees."¹⁸ Sixteen years later, in *Miller v. California*, the Court reformulated the test to state that obscenity "must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which * * * do not have serious literary, artistic, political, or scientific value."¹⁹

A major adjustment in the Supreme Court's approach to obscenity in the *Miller* case was its reliance on local community standards to determine which portrayals of sexual conduct "appeal to the prurient interest in sex" and consequently are "patently offensive." In the years between *Roth* and *Miller*, the Court had become the final arbiter of what material was obscene, and the Justices, quite frankly, were tired of it. The Court had found it necessary on thirty-one occasions to review the purportedly obscene material and render a judgment.

Justice Brennan complained that examination of the contested materials "is hardly a source of edification to the members of this Court." Apart from his personal reactions to the works, Brennan added that the procedure of having the Court examine the materials "has cast us in the role of an unreviewable board of censorship for the 50 states."²⁰ After 16 years of trying to apply the law, Justice Brennan, who wrote the *Roth* opinion, concluded that the government could not constitutionally prohibit obscenity.

A majority of the Court agreed with Justice Brennan's reasoning but not his conclusion. Reviewing the "somewhat tortured history of the Court's obscenity decisions," it found that "[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." As a result, there cannot be "fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.'" Chief Justice Burger emphasized that our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation, assuming the prerequisite consensus exists.²¹

The Court noted that the First Amendment does not require "that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City." But it also acknowledged the converse proposition—that community reactions to literature in, say, rural Georgia or Tennessee, should not dictate what is acceptable in urban centers.²² Indeed, Justice Stewart, famous for his statement that he could not intelligibly define obscenity but that "I know it when I see it," long maintained that a national standard could not be legally created or applied.²³ Based on this reasoning, the Court in *Miller* concluded that the question of "patent offensiveness" was a matter for juries to decide, applying local community standards.

From the Court's perspective, this solution had the twin merits of avoiding a national standard for obscenity while at the same time freeing the Justices from their uncomfortable role as critics of last resort. But it created the risk that the test for serious literary, artistic, political or social value would be set by the most reactionary community. Accordingly, the Court later clarified that the question of serious redeeming merit did not hinge on the vagaries of local literary tastes. Whether a work contains serious value must be judged by reference to the hypothetical reason-

¹⁶ de Grazia, *supra* note 5 at 94. See *Grove Press, Inc. v. Christenberry*, 276 F.2d 433 (2d Cir. 1960).

¹⁷ de Grazia, *supra* note 5 at 55, 370.

¹⁸ 354 U.S. 476, 484 (1957).

¹⁹ 413 U.S. 15, 24 (1973).

²⁰ *Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 92-93 (1973) (Brennan, J., dissenting).

²¹ *Miller*, 413 U.S. at 20, 30-33.

²² *Id.* at 32-33 & n.13.

²³ *Jacobellis v. Ohio*, 378 U.S. 184, 197, 200 (1964) (Stewart, J., concurring).

able person—not the reasonable resident of the community in question.²⁴ As a result, before a work may be condemned as obscene, the government must demonstrate that it lacks serious merit, and must do so using an objective test.

While the prevailing concern of modern obscenity law is the effect of the material on the average person rather than the most sensitive, the law does recognize some added protections for children. The Supreme Court has held that the government may designate some sexually oriented material as being harmful to minors and to, for example, prohibit the sale of such things as “girlie magazines” to those 16 and under.²⁵ But such restrictions must be carefully limited. The Supreme Court has held that it will not tolerate vague, open-ended restrictions on speech—not even for the benefit of minors—and that the government cannot “reduce the adult population * * * to reading only what is fit for children.”²⁶

THE PARADOX OF INDECENCY

Both the Exon and Grassley bills would prohibit not just obscenity online, but “indecent” as well. For the past twenty-five years, or so, the federal government has stepped up its efforts to define and enforce provisions of the U.S. Criminal Code that prohibit the transmission of indecent language by radio, television or telephone communications.²⁷ Unlike obscenity, the Supreme Court and Courts of Appeals have held that indecent speech is protected by the First Amendment. But, because indecency deals with sexual matters, courts also have held that the government may regulate it in certain circumstances.

The law regulating indecency is best known as a result of the George Carlin monologue, *Filthy Words*, which he described as the “words you couldn’t say on the public airwaves.” The seven words were those which Carlin said “will curve your spine, grow hair on your hands and maybe, even bring us, God help us, peace without honor.”²⁸ The Carlin routine was broadcast by Pacifica radio during a program about society’s attitude toward language. Before the show the station had issued a warning that the program contained “sensitive language which might be regarded as offensive to some.”

The FCC received a single complaint about the Pacifica program, which the Supreme Court characterized as coming from “a father who heard the broadcast while driving with his young son.” In fact, the complaint came from a Comstock wannabe—John K. Douglas, a member of the national planning board for Morality in Media, who did not disclose his fifteen-year-old’s age to the FCC. The broadcast aired at 2 p.m. on a school day, and there is considerable doubt whether the concerned father or his “young son” actually was in the audience. The complaint did not reach the Commission until six weeks after the fact.²⁹

The FCC found that the program violated the indecency rules, and the case made its way to the Supreme Court. Limiting its holding to the question of whether the FCC “has the authority to proscribe this particular broadcast,” the Court upheld the Commission’s censure of the Pacifica station.³⁰ It held that broadcasters historically have received less constitutional protection than the traditional press, and that “the broadcast media have established a uniquely pervasive presence in the lives of all Americans.”³¹ The medium is “uniquely accessible to children, even those too young to read.” In this context, the station’s prior warnings could not protect the public because the broadcast audience “is constantly tuning in and out.”³²

The Court also approved the FCC’s legal definition of indecency, which focused on “the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience.” The Court did not directly confront the question of literary merit, except as it relates to the overall context of a broadcast,

²⁴ *Pope v. Illinois*, 481 U.S. 497 (1987).

²⁵ *Ginsberg v. New York*, 390 U.S. 629 (1968).

²⁶ *Butler v. Michigan*, 352 U.S. 380, 383–84 (1957). See *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968).

²⁷ 18 U.S.C. § 1464; 47 U.S.C. § 223.

²⁸ *FCC v. Pacifica Found.*, 438 U.S. 726, 751 (1978) (Appendix to Opinion of the Court).

²⁹ Lucas A. Powe, Jr., *American Broadcasting and the First Amendment 186* (Berkeley: University of California Press, 1987).

³⁰ 438 U.S. at 742.

³¹ *Id.* at 748.

³² *Id.* at 748–49.

and it did not ascribe any significance to the fact that the Carlin monologue was part of a larger program that was a serious study of language.³³

Indeed, the decision appeared to be most confused on the question of redeeming social value as a defense to an indecency complaint. The Court cited, seemingly with approval, an FCC suggestion that "an offensive broadcast [that] had literary, artistic, political, or scientific value [that was] preceded by warnings * * * might not be indecent in the late evening, but would be so during the day, when children are in the audience."³⁴ It also referred to a 1960 FCC pronouncement indicating that the words or depictions of sexual activity in *Lady Chatterly's Lover* would raise indecency questions if broadcast on radio or television.³⁵ But at the same time, the Court emphasized "the narrowness of our holding," stressing that the case "does not involve * * * a telecast of an Elizabethan comedy."³⁶

Since the late 1980's the FCC has been engaged in continuous litigation to clarify the basic requirements of its indecency policy.³⁷ In 1992, Congress decreed that indecency would be banned from the airwaves between 6 a.m. and midnight.³⁸ The D.C. Circuit recently affirmed the FCC's broadcast indecency rules adopted pursuant to the statute, but narrowed the restricted period from 6 a.m. to 10 p.m. The court confirmed that such rules must balance the government's interest in protecting children with "the adult population's right to see and hear indecent material."³⁹ And it tailored its conclusions to the unique attributes of the broadcast medium.

Congress also applied indecency law to other electronic technologies, although the comparison to broadcasting has been far from exact. In 1988, Congress amended the Communications Act to combat the phenomenon of "dial-a-porn." The change imposed a blanket prohibition on indecent as well as obscene telephone messages. But upon review by the Supreme Court, all nine Justices agreed that sexual expression that is "indecent but not obscene is protected by the First Amendment."⁴⁰ The Court held that the government may regulate indecent speech to protect children, but "it must do so by narrowly drawn regulations * * * without unnecessarily interfering with First Amendment freedoms."⁴¹ The opinion described *Pacifica* as "an emphatically narrow holding," and distinguished the radio broadcast in that case from the telephone communications covered by the law. Unlike radio, the Court found that dial-it services require the audience to take affirmative steps to receive the indecent messages and that "callers will generally not be unwilling listeners." It concluded that telephone communications are substantially different from over-the-air broadcasts.⁴²

These efforts over the years underscore the central paradox of indecency law. Unlike obscenity, "indecent" speech is protected by the First Amendment, yet it is subject to a legal standard very similar to what the courts *rejected* for obscenity six decades ago. That is, indecency doctrine borrows from the discredited *Hicklin* rule, focusing solely on the effect of speech on children, not the average audience member. And there is no requirement for the government to evaluate works "as a whole." In deciding indecency complaints, the FCC focuses primarily on the salacious portions of programs, and provides only cursory review of the full context.

In practice, context is not all that important to the nebulous world of indecency law. Although serious literary, artistic, political or scientific value of a work is a complete defense to an obscenity prosecution, merit is simply a "factor" for the regulatory body to consider in the case of indecency. In an obscenity trial, expert witnesses can attest to the value of the material at issue. But when the FCC considers indecency complaints, it is for that agency alone to determine the extent to which "merit" is relevant. Its official position is that the context in which words or images

³³ *Id.* at 732.

³⁴ *Id.* at 732 n.5.

³⁵ *Id.* at 741 n.16.

³⁶ *Id.* at 750.

³⁷ *Action for Children's Television v. FCC*, 11 F.3d 170, 181 (D.C. Cir. 1993), *vacated en banc*, 15 F.3d 186 (D.C. Cir. 1994); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1509 (D.C. Cir. 1991); *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

³⁸ Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992); see 47 U.S.C.A. § 303 note (1993). For broadcasters who ended their broadcast day at or before midnight, the prohibition extended from 6 a.m. to 10 p.m.

³⁹ *Action for Children's Television v. FCC*, ___ F.3d ___, Slip op. at 21 (D.C. Cir., June 30, 1995).

⁴⁰ *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989).

⁴¹ *Id.* (citations omitted).

⁴² *Id.* at 127. Courts have since upheld FCC rules that limit children's access to dial-a-porn by requiring, *inter alia*, that customers request such service in writing before a common carrier may provide access. *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866 (9th Cir. 1991).

are presented must be examined to determine whether the expression is "patently offensive." But the FCC's usual practice in such cases is to duck the question.

This was most forcefully demonstrated by the Commission's refusal to declare that a reading from James Joyce's *Ulysses* would be permissible because of its literary merit. The request was made in May 1987, shortly after the FCC had announced a new "get tough" approach to indecency in which it cited three radio stations and one amateur radio operator for violating the law. One of those stations, KPFK-FM in Los Angeles, was owned by Pacifica Foundation, which had long been known for its provocative programming (such as the George Carlin monologue). Given its historic connection to the FCC's indecency enforcement efforts, Pacifica had reason to be concerned about its annual "Bloomsday" reading from *Ulysses* on WBAI-FM in New York.

So it sought guidance from the FCC staff, asking for a declaratory ruling to clear the long planned broadcast. Pacifica informed the Commission that it intended to transmit a program of "substantial literary and cultural value" at 11 p.m. on June 16, 1987. The request said that Pacifica would precede the broadcast with appropriate warnings, but that the program would contain "salty" language.⁴³ Pacifica did not immediately disclose that the quoted passages were from *Ulysses*, although it revealed that fact in subsequent meetings with FCC staff.⁴⁴

The request presented the FCC with a dilemma. If it permitted the broadcast, it might create a huge loophole in the indecency policy. But if it did not, it would suppress a classic of literature that courts had freed from censorship in a landmark 1934 case. In short, the Commission's choice was to declare itself to be either a eunuch or a laughingstock. Neither option being particularly attractive, the FCC forged a third alternative—it declined to issue a ruling.

A letter from the FCC's Mass Media Bureau informed Pacifica that "because of the first amendment considerations that are involved, the Commission must be especially cautious in exercising its authority to issue declaratory rulings with respect to program content prior to broadcast."⁴⁵ That being said, the letter quoted from the 1934 *Ulysses* case and stated—falsely—that nothing in the proposed Bloomsday reading was similar to broadcasts recently found by the FCC to be indecent. And after refusing to provide any further guidance, it said that the licensee must rely on its own judgment as to whether or not to transmit the program.

The Commission's deference to the good faith judgment of the broadcast licensee served its institutional purpose in permitting it to avoid making a decision on the Pacifica petition for a declaratory ruling. But the agency has otherwise shown little inclination to trust those who must make risky programming decisions. Just a few months after taking a pass on the *Ulysses* request, the FCC ruled that the question of indecency did not depend on the reasonableness of the broadcaster's judgment. That is, even if a broadcaster reasonably believed that a certain program had literary merit and could support that belief with expert opinion, the FCC remained the final arbiter of whether the program was indecent. Where the government's aesthetic judgments differed, the licensee's good faith belief was relevant only to the size of the punishment.⁴⁶

Broadcasters generally have shown great reluctance to find out if their literary inclinations match those of the bureaucrats. Despite a few notable exceptions, most steer a wide berth around the FCC's rules. But the prospect that broadcasters are censoring themselves finds few sympathetic ears among those in government, notwithstanding its professed deference to "first amendment considerations" in its nonresponse to Pacifica. In fact, the Commission has stated that "to the extent a broadcaster is 'chilled' from airing indecent programs when there is a reasonable risk that children may be in the audience, that is not an 'inappropriate chill.'" ⁴⁷ Of course, this begs the central question: what is indecent?

Apart from the circularity of the government's position and the disregard it exhibits for the constitutional obligations of public servants, it utterly ignores the problem of indecency law for programming in which literary merit is the dispositive issue. It also is the reason why you are unlikely to see many programs like *The Singing Detective* on American broadcast TV.

⁴³ *Petition for Declaratory Ruling of Pacifica Foundation*, FCC Ref. No. C5-574 (FCC, filed May 22, 1987).

⁴⁴ For a full discussion of this case written by counsel for Pacifica, see John Crigler and William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 *Cath. U. L. Rev.* 329 (1989).

⁴⁵ Letter from James C. McKinney, Chief, FCC Mass Media Bureau to Counsel for Pacifica (June 5, 1987).

⁴⁶ *Infinity Broadcasting Corp. of Pennsylvania, Reconsideration Order*, 3 FCC Rod. 930, 933 (1987).

⁴⁷ *Id.* at n.45.

The Singing Detective, a seven-hour Peabody Award winning mini-series produced by BBC, has been praised as one of the finest television programs in history. Critics were unanimous in calling the production a masterpiece. Steven Bochco, who created *Hill Street Blues* and *NYPD Blue* called it "seven of the best hours I have ever seen on a television set."⁴⁸ Marvin Kitman of Newsday wrote that *The Singing Detective* is "the most incredible TV program ever made." He called it "the kind of program that once in a generation or two comes along and permanently changes the boundaries of TV. It extends the parameters of what TV drama can do and reclaims TV as a creative medium."⁴⁹ Vincent Canby of the New York Times said it is "better than anything I've seen this year in the theatre (live or dead) [It] set(s) a new standard for all films."⁵⁰ John J. O'Connor, also of the Times, wrote that the program "opened up the boundaries of TV drama, making the special form as challenging and compelling as the very best of film and theatre."⁵¹ And Charles Champlin of the Los Angeles Times called it "the most potent and imaginative television I saw in all of 1988."⁵²

The show was aired by various public television stations between 1988 and 1990. On New Years Day 1990, KQED in San Francisco presented *The Singing Detective* in its entirety, starting at 11 a.m. and ending at 6 p.m. One viewer complained to the FCC, and he sent crude videotapes of the five minutes or so that he claimed were indecent. This triggered an investigation that lasted more than a year and led to discussions at the agency's highest levels. Staff members of all five Commissioners watched the tape, and then met to discuss the fate of KQED.

Dismissing the complaint should have been a simple matter. To the extent the FCC seriously considered merit as an important factor in making indecency determinations, *The Singing Detective* did not present a close case. The critical acclaim, the Peabody Award, and the serious content should easily have outweighed the few assertedly offensive moments in the seven-hour production. But the FCC did not consider the program as a whole. Indeed, the Commission did not even know what the show was about. Its review was riveted on images of brief nudity and a short scene in which a child witnesses a non-graphic sexual encounter.

Unlike the Pacifica request regarding *Ulysses*, the FCC could not point to a court decision that affirmed the program's literary value. Even with a judicial seal of approval, the Commission had declined to rule on the decency or indecency of *Ulysses*. So in the case of *The Singing Detective*, the agency was paralyzed. The matter languished for months and finally was forgotten. No order was ever issued by the FCC.

KQED spent this time in regulatory limbo as well. It hired Washington counsel, and probably spent thousands of dollars in defense of the program. The station had other matters pending at the Commission, and could not afford the black mark of an indecency fine. KQED ultimately was let off the hook, but the long investigation served as an object lesson for it or any other station with an interest in presenting groundbreaking programming. The moral of the story for station managers was, when in doubt leave it out.

As this example suggests, indecency law establishes the FCC as a national censorship board. Before the Supreme Court came to rely on local community standards for obscenity determinations, Justice Brennan complained that the Court had become a "board of censorship for the 50 states." When the Court made such judgments, Justice Brennan noted that "[o]ne cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so."⁵³ Yet that is precisely the role now assigned to the five FCC Commissioners with respect to indecency, even though such speech is protected by the First Amendment.

Empowering a single federal agency with such authority unquestionably raises constitutional danger signals. This is particularly true where, as is the case with the FCC, the agency's members are politically appointed and may be susceptible to political pressures. Such pressures abound. In announcing his most recent presidential bid, Senator Robert Dole (who co-sponsored the Grassley bill) attacked Hollywood for undermining American values. Former White House Director of Communications Patrick Buchanan (now a perennial presidential contender), urged President Reagan in 1987 to get more directly involved with the FCC and demand that it "begin pulling the licenses of broadcasters [who transmit] this garbage." Such a

⁴⁸ Stephen Farber, *They Watch What We Watch*, New York Times, May 7, 1989.

⁴⁹ Marvin Kitman, *The Best Unwatched Show Ever*, Newsday Jan. 21, 1988 at 15; Marvin Kitman, *Riding Potter's Express*, Newsday, Feb. 17, 1989.

⁵⁰ Vincent Canby, *Is the Year's Best Film on TV?* New York Times, July 10, 1988.

⁵¹ John J. O'Connor, *TV View*, New York Times, Dec. 25, 1988.

⁵² Charles Champlin, *Critic at Large*, LA Times, Feb. 18, 1989.

⁵³ *Paris Adult Theatre I v. Slayton*, 413 U.S. at 92-93 (Brennan, J., dissenting).

move, Buchanan argued, would reestablish Republican ties to the religious right.⁵⁴ In this type of political environment the FCC can be subjected to political blackmail. It has been suggested, for example, that former FCC Chairman Mark Fowler, known for his strong deregulatory philosophy, was denied reappointment because he failed to vigorously enforce the indecency rules.⁵⁵

Such pressures are by no means confined to those on the political right. In 1989 confirmation hearings for FCC Chairman Al Sikes and Commissioners Sherrie Marshall and Andrew Barrett, Democratic senators led the charge on indecency. In particular, Senators Daniel Inouye, Ernest Hollings, Jay Rockefeller and then-Senator Al Gore grilled the nominees for two hours, paying close attention to question of broadcast content. Senator Gore, whose wife Tipper had gained notoriety attacking lewd rock lyrics, was particularly concerned about Barrett's statement that indecent broadcasts exist because "there is a market for indecency out there * * * in America." Although Barrett's statement was unquestionably true, both Gore and Senator Rockefeller voted against the nominations. Senator Hollings, expressing his displeasure with the FCC's "safe harbor" approach to indecency regulation, stated: "Garbage is garbage, regardless of the time of day."⁵⁶

COMSTOCKERY IN CYBERSPACE

If adopted, the Exon or Grassley bills would apply such sentiments (and pressures) to the Internet and online services. The Exon bill would impose a fine of up to \$100,000 and a possible two year jail term—or both—on anyone who permits a "telecommunications facility" under his control to be used for the transmission of obscene or indecent communications. Grassley's proposal would subject a person who transmits "a communication that contains indecent material" or who "allows [such communications] to be transmitted from [a] remote computer facility" to five years in prison plus fines. Oddly, the prohibition on indecency would only bar sending salacious materials "to and person under 18 years of age." Young people presumably could transmit indecent materials with impunity to those over 18.

After an initial round of criticism, Exon added a number of defenses to prosecutions under the bill. The changes would insulate from conviction those entities who merely provide "navigational tools" to users, act as a passive conduit for communications or who take "reasonable steps" to provide users with a means to restrict access "to the communication specified in this section." What restrictive measures might be considered "reasonable" to block access would be prescribed by FCC regulations.

The Exon amendment has been criticized as being both too restrictive and too lax. Civil liberties activists have opposed it as censorship. At the other end of the spectrum, the anti-pornography activists have argued that the bill would weaken existing law. Meanwhile, the Justice Department issued a letter warning that the amendment's current provisions would "create several ways for distributors and packagers of obscenity and child pornography to avoid criminal liability." Senator Exon, undaunted by the complaints, has twice revised the bill and remains committed to its passage.⁵⁷ His second set of revisions imposed broad new restrictions on noncommercial communications.

Not everyone in Congress has jumped on board. Senator Patrick Leahy has urged his colleagues to avoid "[h]eavy-handed efforts by the government to regulate obscenity on interactive information services [that] will only stifle the free flow of information, discourage the robust development of new information services, and make users avoid using the system." He offered a substitute bill that would direct the Attorney General to study and to report to Congress on the means of controlling the flow of violent, sexually explicit, harassing, offensive or otherwise unwanted material on interactive telecommunication systems. Among other things, the bill would direct the Justice Department to assess whether current laws are sufficient to deal with perceived problems, examine whether technology gives parents the ability to control childrens' access to unsuitable materials, and recommend ways to encourage the development and deployment of such technology.⁵⁸

Senator Leahy's measured approach of having the government study the issue to determine first if a problem even exists, and how it might best be solved, is quite rational. But it lacks the demagogic appeal that drives virtually all anti-indecency crusades. Now that the House of Representatives has finished with its Contract

⁵⁴ Patrick Buchanan, *A Conservative Makes a Final Plea*, Newsweek, March 30, 1987 at 23, 26.

⁵⁵ Crigler and Byrnes, *supra* note 44.

⁵⁶ *Congress Asserts its Domination Over FCC*, Broadcasting, Aug. 7, 1989 at 27.

⁵⁷ Benjamin Wittes, *Internet Obscenity Bill Loses Support*, Legal Times, May 22, 1995 at 2.

⁵⁸ Statement of Senator Patrick Leahy, introducing S. 714, the Child Protection, User Empowerment, and Free Expression in Interactive Media Study Bill, April 7, 1995.

With America checklist, the religious right has stepped forward to claim its pound of flesh as payment for its contribution to the conservative landslide. The Christian Coalition has made censoring the Internet one of the tenets of its "Contract With the American Family." In this environment, most candidates will shrink from being tarred as "pro smut," and many will actively exploit this emotional issue. There is likely to be great pressure to stiffen Exon's proposal to control content, rather than just study the issue and the technology regardless of how much sense that makes.

Accordingly, Grassley's bill adopts a shoot first, ask questions later approach. The bill would authorize the Attorney General to study "the state of the technology that would permit parents to block or otherwise filter the transmission of indecent material to minor." But it would compel such an inquiry "[n]ot later than 2 years after the enactment" of criminal penalties.

If either of these bills is adopted, it will be extremely bad news for the First Amendment. Nothing in the history of indecency enforcement suggests that these proposals can be made compatible with a culture of free expression, no matter how narrowly they may be tailored. Indecency rules are based on the central assumptions of obscenity law as it existed under Anthony Comstock's reign, when great works of literature were suppressed routinely. Applying this body of law to cyberspace would be like unleashing a virus that could transform the essential character of the net.

But why is this so different from prior restrictions, such as the limits on dial-a-porn? If Congress may apply indecency rules to certain telephone transmissions, why should it not also apply the law to computer communications that are transmitted by telephone lines? After all, according to this line of reasoning, these communications media are licensed by the government; they bring communications into the home; and they are accessible to children. Advocates of this position maintain that computer communications may provide an even more compelling case for government control because of the wide array of resources that can be accessed over the Internet.

But this view fails to take into account the differing natures of the technologies involved and the information they provide, the difficulty of rational regulation and the constitutional risks of making the attempt. Compare broadcasting and telephone communications, for example. Radio and television stations transmit entertainment and informational programs that may touch on adult themes ranging from the satire of Howard Stern, to brief nudity on *NYPD Blue* to news reports on the photographs of Robert Mapplethorpe. With telephone communications, on the other hand, no one has complained about readings of *Lady Chatterly's Lover* by late night operators. The indecency issue with telephones has been pretty much confined to the heavy breathing of dial-a-porn. Phone sex may be a brisk business, but a narrow range of informational content is involved.

The proponents of legislation have blithely sought to apply indecency precedents for one technology as if they were applicable to others. In introducing S. 892, for example. Senator Grassley, quoting the *Pacifica* dictum describing radio, asserted that "computers [have] 'a uniquely pervasive presence in the lives of all Americans,'" are "uniquely accessible to children," and "can be regulated to protect children."⁵⁹ However, simply lifting phrases from a Supreme Court case does not make them applicable to the technology in question. Unlike radio and television, which are universally available to American homes, less than seven percent of U.S. households are on-line.⁶⁰

Judicial decisions regarding indecency regulation of broadcast versus cable television make clear that such rules cannot simply be transplanted between technologies. For example, the most recent D.C. Circuit opinion upholding a "safe harbor" approach to regulating broadcast indecency emphasized that its conclusion was predicated upon "the unique context of the broadcast medium." That is, the court stressed that "traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment;" that "broadcasting is uniquely accessible to children;" and that "prior warnings cannot completely protect the listener or viewer from unexpected program content."⁶¹ The court made clear that broadcasting cannot be compared to a situation in which a recipient "seeks and is willing to pay for the communication."⁶²

⁵⁹ Cong. Rec. S7922 (June 7, 1995).

⁶⁰ Elizabeth Corcoran, *On-Line Rivals Appeal to Microsoft*, Washington Post, July 20, 1995 at D11.

⁶¹ *Action for Children's Television v. FCC*, ___ F.3d ___, Slip op. at 11-12 (D.C. Cir., June 30, 1995) (en banc).

⁶² *Id.* at 12.

For this reason, courts have always treated cable television differently under the indecency rules. Decisions have consistently struck down indecency regulations directed at cable programming because many of the programming services are available by subscription and because parents have the option of using a "lock box" to preclude access to selected channels. Thus, the *Pacifica* precedent for regulating broadcast indecency does not support content control of cable television—an almost identical technology.⁶³ Indeed, in June the D.C. Circuit upheld a Cable Act provision that empowers cable television operators to refuse to accept indecent programming on leased access channels. In upholding the rule, however, the court emphasized that if the government had sought to regulate indecency on access channels directly, "the Commission and the United States would be hard put to defend the constitutionality of these provisions."⁶⁴

The differences that separate constitutional from unconstitutional regulation of indecency are particularly relevant to online services, which have far more in common with cable television than with broadcasting. The Supreme Court has emphasized that indecency rules must be sufficiently narrow to achieve their purpose without excessively limiting speech. With dial-a-porn, the audio equivalent of girlie magazines, the courts found—after 10 years of litigation over successive attempts to write rules—that it was sufficient to restrict access by minors to the service. In the case of cable television, indecency rules were struck down altogether. But with broadcasting the task has been far more complex. Not only have the FCC and the courts wrestled over setting a constitutionally-permissible safe harbor, they also have struggled with trying to apply the indecency standard to works of genuine merit. The FCC's experience with *Ulysses* and *The Singing Detective* hardly inspires confidence that indecency rules can be implemented so as not to restrict protected speech.

This problem will be magnified not only because of the vast array of information available online, but by the multiple functions made possible through interactivity. By mid-1995, there were more than 50 to 70,000 computer bulletin board ("BBS") systems operating in the United States, some free and others by subscription. Usenet, an international collection of BBS newsgroups accessible by Internet, covers almost any imaginable topic, from the Hubble Telescope to the wit and wisdom of Jerry Lewis.⁶⁵ This growth was accompanied by the emergence of online services such as America Online, Prodigy, CompuServe, Delphi, GEnie and Apple Computer's e-World. These services, now with approximately 7 million subscribers, can variously be characterized as providing a bookstore, magazine stand, news wire service, archive, message center, mail carrier, gathering place and publishing house. The available content and functionality of these services simply cannot be compared to either dial-a-porn or broadcast programming. This not only complicates the problem of evaluating "merit"—to put it mildly—it makes even reviewing the myriad forms of information nearly impossible.

The nature of online communication also makes such intrusive regulations far less necessary. Computers and modems offer users (read parents) a much greater degree of control over what may be accessed than ever imagined for a telephone or television. To begin with, computers require a basic skill—literacy—that is not a prerequisite for the other communications appliances. Additionally, software may be configured to screen out unwanted services. Online services such as Prodigy and America Online already provide software tools that allow parents to control their children's access. For example, to obtain access to Usenet newsgroups, Prodigy requires activation by the household account holder (who must have a credit card, and presumably is an adult). Siecom, Inc., an Internet access provider that serves elementary and secondary schools, restricts access to questionable newsgroups and provides the option of scanning email to screen objectionable material.⁶⁶ Another new software program, SurfWatch, allows parents and educators to block unwanted

⁶³ *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D.C. Utah 1985), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.* 480 U.S. 926 (1987); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 9-10 (D.D.C. 1993); *Community Television, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982). See generally Note, *Content Regulation of Cable Television: "Indecency" Statutes and the First Amendment*, 11 Rutgers Computer & Technology L.J. 141 (1985).

⁶⁴ *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995) (*en banc*).

⁶⁵ See generally Harley Hahn and Rick Stout, *The Internet Yellow Pages* (Berkeley: Osborne McGraw-Hill, 1994).

⁶⁶ Peter H. Lewis, *Cybersex Stays Hot, Despite a Plan for Cooling it Off* New York Times, March 28, 1995.

Internet material.⁶⁷ Microsoft and two Internet software companies, Progressive Networks and Netscape Communications, announced in June that they are working on technology to help parents control what their children can access on the Internet. Rob Glaser, chief executive of Progressive Networks, said he envisioned perhaps several dozen tunable filters developed by "very credible" organizations that parents would trust. He cited the National Education Association as an organization that parents might rely on for a stamp of approval; other parents might prefer the Christian Coalition, the Institute for Objectivist Studies, or the Children's Defense Fund.⁶⁸

It has been suggested that "online systems give us far more genuinely free speech and free press than ever before in human history."⁶⁹ But not if measures like the Exon or Grassley bills are adopted. The harsh penalties proposed, including possible jail terms, ensure that those placed at risk will err on the side of exclusion. At the very least, the law will force content providers to make access more difficult, which affects all users, not just the young. The defenses from prosecution are effective only if there is a working definition of indecency. It is of little utility for service providers to know that they are protected if they restricted access "to communications described in this section" if no one knows for certain what that means.

Similarly, the Grassley bill's focus on the "knowing" transmission of indecency offers no protection given the difficulty of "knowing" in advance what is indecent and what is not. Such defenses might be more effective in the world of dial-a-porn, where subject matter is limited. It is not helpful at all where the subject matter offered by providers is wide open but must be provided in a legal environment in which literary classics may be "indecent."

A recent decision by a New York court suggests that an on-line service may be held legally responsible for speech even though—as a practical matter—the provider could not be aware of the offending language. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the court held that Prodigy could be sued for defamation as a result of libelous statements posted on a bulletin board by an anonymous subscriber. The court was not persuaded by Prodigy's argument that the volume of messages—up to 60,000 messages per day—made true editorial control impossible. Rather, the court found that Prodigy's decision to regulate the content of its bulletin boards through the use of on-line monitors and filtering software "was in part influenced by its desire to attract a market it perceived to exist consisting of users seeking a 'family-oriented' computer service. This decision simply required that to the extent computer networks provide such services, they must also accept the concomitant legal consequences."⁷⁰

Under this precedent, any on-line service provider that attempts to provide screening tools to control information content is considered to be a "knowing" participant in providing that content. The service provider would be responsible for the thousands of postings and millions of email messages that pass through its system. Far from providing a defense, the Grassley bill's "knowing" requirement, and the Exon bill's immunity for providers that exert "no control" over information content will subject "family-oriented" services to the most stringent liability.

How will the Exon and Grassley bills affect a program such as Project Gutenberg, which makes electronic texts of books freely available on the World Wide Web? Even a cursory examination of the books provided by this remarkable service turns up authors, such as D.H. Lawrence, that are likely to lead to trouble, just as they did under Anthony Comstock. The only option under the law may be for services like Project Gutenberg to screen their materials and in some way limit access. Even if such a thing can be accomplished, it defeats the purpose of Project Gutenberg, which was created "to make information, books and other materials available to the general public in a form * * * people can easily read, use, quote, and search."⁷¹

Some discount the prospect that such an unquestionably meritorious venture as Project Gutenberg could be at risk. After all, they say, the days of the book burners are past. But they are wrong. Each year the American Library Association and American Booksellers Association compile a list of attempts to restrict access to books in libraries or bookstores in the United States. In East Hampton, New York, for example, the children's book *Where's Waldo?* was banned because part of a tiny

⁶⁷ "SurfWatch Blocks Internet Pornography, Breakthrough Product Ships Today," News Release, SurfWatch Software, Inc., Los Altos, Calif., May 15, 1995.

⁶⁸ Elizabeth Corcoran, "3 Firms Developing Anti-Smut Software," Washington Post, June 13, 1995, p.D1.

⁶⁹ Lance Rose, *Netlaw 4* (Berkeley: Osborne McGraw-Hill, 1995).

⁷⁰ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, ___ N.Y.S.2d ___, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

⁷¹ http://jg.cso.uiuc.edu/pg_home.html.

drawing shows a woman lying on the beach wearing a bikini bottom but no top. The ALA's 1994 Banned Books Resource Guide lists 800 titles that were challenged in 1993-94.⁷² Similarly, People for the American Way documented 463 challenges to books during the same school year.⁷³ The Exon and Grassley bills would simply move this battleground online.

In addition to this chilling scenario, the legislation contains some genuine loopeness. The ability of persons *under* 18 to send or make available indecent messages to those over 18 could lead to bizarre results. In May, the New York Times reported the story of a Bellevue, Washington high school honors student who was punished for putting a satirical home page lampooning his school on the World Wide Web. The page contained hypertext links to other Internet sites that offer sexually explicit material.⁷⁴ Under the proposed law, the student would have a valid defense from prosecution so long as he employed FCC-approved procedures to restrict access to his home page. He could even send some of the material by email to an adult, such as a favorite teacher. But if he sent the same message to a classmate, he could wind up in the slammer for two years.

Finally, the proposed law would impose a single national standard on digital transmissions, with the FCC as the arbiter of decency. Assuming this could even be accomplished given the Internet's global reach, it would replicate and expand the problems experienced by broadcasters. This might not be all bad, according to some observers, because the law also governs obscenity and a national standard could possibly prevent the most restrictive communities from creating a lowest-common-denominator standard.⁷⁵

The potential for such a problem has been vividly demonstrated by the conviction of a California couple whose restricted, adults-only bulletin board was accessed by a postal inspector in Tennessee. The postal inspector, using an assumed name, paid a subscription fee to join the bulletin board and downloaded digital images of sexual activity that did not violate the community standards of California. But a jury in Tennessee found *their* sensibilities were violated and voted to convict.⁷⁶ The case is on appeal, and unless it is reversed, Memphis Tennessee may define the community standard for all of cyberspace.

As important as it is to correct this precedent, the proposed legislation is an unlikely solution. Federal obscenity laws are enforced by local juries using local standards, just as the Supreme Court decreed in *Miller v. California* and its progeny. It is difficult to imagine Congress consciously divesting local communities of this prerogative. A more likely—and more dangerous—scenario, is that federal legislation restricting obscenity and indecency would create the worst of both worlds: local standards governing obscenity and national standards for indecency.

There is often much complacency surrounding the net, probably because of its anarchist origins and spirit. John Gilmore has said that the Internet treats censorship as system damage and routes around it. Perhaps that is so. But censorship nevertheless causes damage, and its weight is typically borne by the individuals who are prosecuted or wind up in endless FCC proceedings. There is a societal loss as well, as everyone else becomes just a bit more cautious about what they write, say or think. Esther Dyson wrote that "cyberspace still exists at the pleasure of the real world." Never has that been more true.

CONCLUSIONS

1. Both the Exon and Grassley bills would violate the First Amendment. Regulation of "indecent" speech is permissible only as a limited exception to general constitutional principles. None of the exceptions apply to on-line services or to the Internet.

A. Judicial decisions regarding the regulation of indecent speech on over-the-air broadcast stations do not support the regulation of on-line speech. On-line services do not have a "pervasive presence" in the lives of Americans as does broadcasting. Nor is computer communication "uniquely accessible to children" including those too young to read. Indeed, literacy is an entrance requirement for on-line communication. Similarly, parents exert far greater control over access to on-line communication, and available software gives parents an ability to screen out objectionable ma-

⁷²American Library Association Office of Intellectual Freedom, 1994 Banned Books Resource Guide (1994).

⁷³People for the American Way, *Attacks on the Freedom To Learn* (1994).

⁷⁴Melanie J. Mavrides, *Youth's Parody on the Internet Brings Punishment and a Free Speech Fight*, New York Times, May 28, 1995.

⁷⁵Lance Rose, *Netlaw* at 254-55.

⁷⁶*United States v. Thomas*, CR-94-20019-G (W.D. Tenn. Dec. 13, 1994) (conviction and forfeiture order), appeals docketed, No. 94-6648 and No. 94-6649 (6th Cir. Dec. 21, 1994).

terial to a greater extent than in any other medium. Additionally, "indecent" material does not appear without warning on-line, compared to what courts have suggested occurs with broadcasting.

B. Judicial decisions regarding the regulation of indecent speech on so-called dial-a-porn services do not provide support the regulation of on-line speech as proposed in the Grassley and Exon bills. The Supreme Court in this area has established that the government must employ the least restrictive means of achieving its objectives, and lower courts have held measures used to regulate broadcast indecency would not be constitutionally permissible to control telephone communications. By the same logic, the availability of less restrictive (and voluntary) alternatives to control on-line content make dial-a-porn type rules excessive if applied to computer-based communication. Moreover, the proposals to regulate on-line communications would impose a far greater burden on protected speech because of the broader range of informational content involved. In short, the need to regulate is far lower than in the case of dial-a-porn and the constitutional risk of suppressing speech is far greater.

2. Restrictions on "indecent" speech would suppress vast amounts of constitutionally protected material on on-line services, and the detrimental effects would be far greater than for any other electronic medium. The paradox of indecency law is that the communication to be regulated is constitutionally protected, yet the law offers none of the rigorous protections provided for the regulation of hard-core obscenity. The law governing indecency does not require that a work be evaluated "as a whole" and does not recognize serious literary, artistic, political or scientific merit as an absolute defense. Moreover, it does not consider the effect of such speech on an "ordinary person," but focuses instead on children. This standard is virtually identical to the obscenity standard employed under the Comstock laws—before First Amendment law was recognized—under which serious literature was routinely censored.

3. The chilling effect on speech would be immense because of the difficulty of defining "indecent" speech. FCC cases regarding indecent broadcasting leave included the review of newscasts, Peabody Award-winning dramatic series, political programming, and educational programming, among other types. Such programs are reviewed case by case, and the FCC has refused to provide advance rulings to provide guidance for content providers. Although the prospect of having a federal agency evaluate information content presents constitutional problems of a different order, the uncertainty created by the law creates another type of chilling effect. Faced with the threat of criminal liability under the Exon and Grassley bills, on-line service providers will err on the side of restricting access to any information that is even arguably indecent. As in the Comstock era, this would include classic works of literature and medical information.

4. The Exon bill's defense for entities that exert "no control" over information content would reduce the use of voluntary solutions by on-line services to protect subscribers. The use of software or other screening mechanisms would become the jurisdictional "hook" by which liability would be imposed. Accordingly, on-line providers will refuse to provide screening mechanisms.

5. The Grassley bill's prohibition only of "knowing" transmission of indecent material does nothing to limit the legislation's constitutional infirmities. In operation, it requires the on-line provider to "know" in advance what may or may not be indecent. On one hand, if the prohibition extends to any material that is arguably indecent, on-line services may be prosecuted for making any information generally available beyond what is "fit for children." On the other hand, if the prohibition only extends to material that previously has been found by a court to be indecent, the law will have no practical effect.

6. Not only is the censorial effect of indecency regulation greater in the case of on-line services than for other media, the need for such regulation is far less significant. Any concerned parent may limit his or her children's access to "indecent" communications by subscribing to an on-line service that provides screening services or by installing screening software on the computer.

7. Legislation directed at regulating on-line indecency is unconstitutional if either (a) the chilling effect is excessive, or (b) it does not employ the least restrictive alternatives. The Exon and Grassley bills fail both tests.

STATEMENT OF LESLIE HARRIS, DIRECTOR, PUBLIC POLICY, AND JILL LESSER, DIRECTOR, CIVIC MEDIA PROJECT, ON BEHALF OF PEOPLE FOR THE AMERICAN WAY ACTION FUND

INTRODUCTION

On behalf of People For the American Way Action Fund and its Civic Media Project, we respectfully submit this testimony. It is our belief that S. 892 (the "Grassley/Dole Bill") is an unconstitutional violation of the free speech rights of all Americans, as well as bad public policy at the dawn of a new information age. People For the American Way Action Fund is a 300,000-member constitutional liberties organization dedicated, in part, to the protection of the First Amendment value of free speech. The Civic Media Project was created more than a year ago, as People For the American Way realized the importance of protecting free expression and democratic values in the emerging interactive advanced media environment. Just one year later, these concerns are no longer theoretical: the threats to free expression abound. How Congress responds to those threats will affect the vitality of both free speech and interactive media for years to come. We thank Chairman Hatch, Senator Grassley and the other members of the Committee for the opportunity to submit testimony on this important issue.

Since early 1994, Vice President Gore and Speaker Gingrich, among others, have captured the public imagination with the promise of the "information superhighway," where every American could be a publisher and where cultural expression, civic participation, health care, entrepreneurship, and educational opportunities would flourish. The media coverage about the Internet was exciting and positive; barely a day went by without one of the nation's major newspapers or magazines publishing an article about the birth of the latest community network, the novel use of the Internet by schoolchildren, or the value of on-line health care to patients at rural health clinics.

Yet, just over a year later, the public perception of the "information highway" has shifted precipitously. In the months since the introduction of the Communications Decency Act in the Senate by Senators Exon (D-NE), Gorton (R-WA) and Coats (R-IN), and more recently S. 892, the Grassley/Dole Bill, the promises of the new medium have been forgotten in a rush to portray cyberspace as a dark and dangerous venue—bad for children and devoid of any redeeming social value. There has been little debate about the potentially devastating impact that censorship legislation may have on the growth of new technologies, or on free expression. Until just last week, there was little attention paid to the emerging technological options that can arm families with the tools to limit access to offensive content. Instead, the public has been barraged by explosive rhetoric and dirty pictures which has fostered widespread concern about the Internet's potential to harm children. The public is beginning to believe that the Internet is bad news.

But the Internet is not a red light district. It is access for rural and low income communities to unprecedented resources, libraries, educational programming and health care. It is the opportunity for enhanced civic participation and robust political dialogue. It is an exciting new venue for artistic expression and cultural exploration. To be sure, there is content on the Internet that many would find offensive, but before the indiscriminate hand of censorship chills the promise of this modern-day Gutenberg press, Congress must engage in a thorough examination of the meaning of the First Amendment in this new media age. Equally important, Congress must look at First Amendment-friendly technological solutions that are already emerging to empower families to control access to objectionable content.

While the Grassley/Dole bill has a laudable purpose—to protect children from inappropriate material—it would unconstitutionally restrict the free flow of constitutionally protected communications to adults. By imposing criminal penalties on on-line operators for the transmission of "indecent" communications, a significant amount of socially, artistically, politically and scientifically valuable content will be chilled as online providers fear being prosecuted under a statute with vague and unconstitutional terms. And, by making criminal liability dependent upon "knowledge", the bill would have the counterproductive effect of discouraging online providers from being good corporate citizens and taking voluntary steps to provide "children-safe" online areas. We urge the Committee to take a hard look at the plain meaning of S. 892 and to conclude that while its goal may be commendable, its means is unconstitutional, unworkable and unwise.

THE VAGUE APPLICATION OF THE "KNOWINGLY" STANDARD IN S. 892 RENDERS THE PROVISION UNWORKABLE

As a preliminary matter, it is fairly clear that the proposed legislation, in an attempt to prevent certain material from getting into the hands of children, would effectively ban constitutionally protected material for all citizens. One key issue of construction is whether the term "knowingly" applies to the age of the person receiving the material: does one have to "know" that the particular person receiving the transmission is under 18 years old? The plain words of the statute are quite unclear on this point. But the answer must be no. If the answer were yes, then the legislation would hold liable operators only if they knew that indecent material was being transmitted to a specific user that the provider knew was under 18. Almost none of the indecent material on the Internet is directly aimed at an audience of children and the circumstances where a system operator actually knew that a particular minor was accessing indecent material would rarely occur. This narrow interpretation of the bill would cover only an insignificant portion of indecent communications and would run counter to the legislation's avowed goal of "cleaning up" the Internet.¹ In conscripting online providers to censor indecent communication that might be accessible by a minor, the legislation would censor this material to everyone. Language that would clearly hold liable only those allowing transmission of indecent material to individuals they knew were under 18 without their parents' permission may raise distinct legal issues, but if that is the purpose of this bill, then it should say so in its language. This bill does not say so.

In addition, regardless of how the "knowingly" requirement is applied under S. 892, the bill would have the anomalous effect of holding providers of online services criminally liable for communications made and initiated by their subscribers, while not imposing any liability on the subscribers themselves. Furthermore, it would also encourage the online industry to adopt a "see no evil" stance with respect to material on the Internet. The less they know about what their subscribers are downloading, the less likely they are to run afoul of the law.

Less than one month ago, Senator Grassley spoke on the floor of the Senate about the prevalence of pornography on the "net" and submitted a copy of an article from Time magazine chronicling the results of a study about pornography in cyberspace.² In connection with that submission, Senator Grassley explained his desire to find a "constitutional manner to help parents who are under assault in this day and age" and a way to "stem this growing tide" of "vile pornography."³ But S. 892's imposition of a nebulous knowingly requirement will not permit Senator Grassley to realize either of these goals. Instead, the bill will encourage online providers to turn a blind eye to the pornography available through their systems and on the Internet in an effort to avoid liability, and will not punish of the makers of the so-called "vile pornography" at all.

S. 892 WOULD HAVE THE UNCONSTITUTIONAL EFFECT OF BANNING INDECENCY ONLINE

The proposed legislation is constitutionally infirm because its use of the term "indecent" renders it unconstitutionally vague. The Supreme Court has stated that a criminal prohibition is unconstitutionally vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). It is "a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Supreme Court has also stated that "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutional rights. * * * If, for example, the law interferes with the right of free speech * * * a more stringent vagueness test should apply." *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 496-99; see also *Video Software Dealers Ass'n v. Webster*, 986 F.2d 684, 689-90 (8th Cir. 1992) ("A stringent vagueness test applies to a law that interferes with the right of free speech."). Whether standing alone or narrowed by the FCC definition, the term "indecent" does not provide sufficient notice and would produce an unprecedented chill on constitutionally protected speech.

¹ In his statement in the Congressional Record on June 26, 1995, Senator Grassley said of his legislation "[The legislation] is meant to help protect children from sexual predators and exposure to graphic pornography," Congressional Record, June 26, 1995, S 9017.

² It is important to note that since Senator Grassley's submission, the study upon which the Time magazine article was based has been discredited by several scholars for its faulty methodology and abundance of inaccuracies about the amount of "pornography" on the Internet.

³ Congressional Record, June 26, 1995, S 9017.

The term "indecent" has not been defined by any federal court. Excluding the two statutory sections where the FCC has defined the term, see 18 U.S.C. § 1464, 47 U.S.C. § 223, "indecent" appears rarely in the federal code, for instance in such sections dealing with use of the mails, importation, or interstate transportation of certain materials (18 U.S.C. §§ 1461-63, 18 U.S.C. § 1465, 19 U.S.C. § 1305, 39 U.S.C. § 3006), federal employees aiding importation of certain materials (18 U.S.C. § 552), and packaging of tobacco products (26 U.S.C. § 5723). In none of these sections has a federal court developed an independent definition of indecency. Indeed, when faced with a vagueness challenge to statutory language concerning "obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance," the Supreme Court has taken the extraordinary step of construing these terms to be limited to "obscenity" as defined in *Miller v. California*, 413 U.S. 15 (1973), essentially reading the remaining terms right out of the statute. See *Hamling v. United States*, 418 U.S. 87, 113-14 (1974) (construing 18 U.S.C. § 1461); *United States v. 12 200-Ft Reels of Super 8MM Film*, 413 U.S. 123, 131 n.7 (1973) (indicating that the terms "obscene," "lewd," "lascivious," "filthy," "indecent," and "immoral" as used in 18 U.S.C. § 1462 and 19 U.S.C. § 1305 would also be construed to denote only material meeting the *Miller* standard). In none of these statutes has the Court addressed an independent definition of "indecent" outside of the regulatory context of broadcasting or dial-a-porn. The Court struggled for decades with the definition of "obscenity," which did not even involve constitutionally protected speech; consequently, it is unlikely that the term "indecent," which unquestionably covers expression protected by the First Amendment is sufficiently precise to withstand the scrutiny that the constitution requires.

While "indecent" has also been used in the statutes regulating broadcast and dial-a-porn, see 18 U.S.C. 1464, 47 U.S.C. § 223, the term in these sections has been defined by the FCC, not the courts; moreover, the FCC definition may itself be unconstitutionally vague. The Supreme Court has never addressed, much less resolved, a general vagueness challenge to the FCC definition of "indecent." In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court affirmed the FCC's finding that a particular monologue was "indecent as broadcast" and upheld the FCC's power to regulate indecent television and radio broadcasts pursuant to 18 U.S.C. § 1465. The Court carefully restricted its discussion of the FCC definition to whether the particular material in that case was "indecent as broadcast" and specifically noted that that issue was "narrowly confined by the arguments of the parties." *Pacifica*, 438 U.S. at 739. The only argument addressed by the Court relating to the definition of "indecent" was whether the FCC definition was constitutionally deficient because it did not require that "indecent" material appeal to prurient interests: "Pacifica's claim that the broadcast was not indecent within the meaning of the statute rests entirely on the absence of prurient appeal." *Id.* (emphasis supplied). The Court concluded that prurient appeal was not an essential component of indecency; since *Pacifica* had conceded that the material was patently offensive, the Court found no basis for disagreeing with the FCC's finding of indecency as broadcast. *Id.* at 741.⁴ In *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), the Court found that while government could ban obscene telephone communications, it could not completely ban constitutionally protected indecent communications; but again the Court did not address the FCC definition of indecency. The Court stated that the case "does not require us to decide what is obscene or what is indecent but rather to determine whether Congress is empowered to prohibit transmission of obscene telephone communications." *Id.* at 124.⁵ Thus, neither *Pacifica* nor *Sable* determined whether the FCC definition is void for vagueness.

And there is considerable difficulty with the FCC definition. Just this past Wednesday, Congress began the hearings concerning the raid at Waco. Testimony included a vivid and explicit description of a child's sexual encounter with David

⁴Although two circuits have relied on *Pacifica* in concluding that the FCC definition of "indecent" was not unconstitutionally vague, see *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) ("ACT I"), *Dial Information Services Corp. of New York v. Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991) (discussing "indecent" in the context of the dial-a-porn statute, 47 U.S.C. § 223), it is difficult to understand how this issue can be resolved by referring to a case which not only did not discuss the problem but carefully avoided even addressing it.

⁵The Ninth Circuit has argued that the Supreme Court's statement that it did not have to decide what was obscene and what was indecent necessarily implied that the FCC definition was not void for vagueness. See *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 874 (9th Cir. 1991). It is difficult to infer a legal principle from a case that did not address it either directly or indirectly. Instead, the Court's proclamation in *Sable* that it was not required to decide what was obscene or what was indecent probably means that the court did not consider the issue necessary to resolve the legal questions before it.

Koresh. Was this account, which certainly qualifies as a "description or depiction of sexual * * * activities or organs," also "patently offensive as measured by contemporary community standards"? It seems at least possible, if not likely, that it was. If so, does its newsworthiness save those who disseminate it from criminal sanctions? Both the federal courts and the FCC have failed to provide any clarity in this area. According to the D.C. Circuit, a work's serious merit does not necessarily imply that the material is not indecent. See *ACT I*, 852 F.2d at 1339-40. According to the FCC, the newsworthy nature of the material and its manner of presentation are relevant considerations in an indecency determination, but are not in themselves dispositive of the issue. *KSD-FM*, Notice of Apparent Liability, 6 F.C.C.R. 3689 (1990). This expression not only is constitutionally protected; but it also concerns an inquiry as to the conduct of our government and so lies at the very heart of the First Amendment. Is it "indecent" under the FCC definition? It seems impossible to say. Yet whether through direct prohibition or through a chill for fear of liability, the proposed bill would prevent people from making testimony of this government hearing available on line and prevent adults in "chat rooms" from describing it because of the chance that a minor might link up to it. Any reasonable operator, when faced with potential prosecution, would choose to suppress it.⁶ This can only be characterized as an infringement of the most basic of our First Amendment liberties.

Moreover, it is entirely unclear how providers could apply the "community standards" prong of the FCC definition. First, the Internet is not designed to serve people according to their geographical location; instead, it allows people of like minds to share expression by precisely disregarding their physical location. In that respect, one must wonder whether the phrase "contemporary community standards" would make any sense for the computer communications medium.⁷ It seems highly unlikely that providers could develop an accurate estimate of what each geographic community in the United States would consider "indecent." As a result, providers have an incentive to adopt the standards of the most restrictive community and thereby deprive others in less restrictive communities of access to constitutionally protected expression. Should the people of New York or San Francisco be subjected to the standards of people living in Memphis or Colorado Springs? Congress or the FCC could try to legislate application of a national standard, but the *Miller* court expressly declined to apply a national standard for obscenity in part out of concern that such a national standard could not be defined. See *Miller*, 413 U.S. at 30 ("our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists"), 32 ("Nothing in the First Amendment requires that a jury must consider *hypothetical and unascertainable* 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact") (emphasis supplied), 33 ("the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as the material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly sensitive one—or indeed a totally insensitive one"). This problem of "community standards" for the medium of computer communication only compounds the vagueness problems already discussed.

In essence, the inherent problems in defining the term "indecent" and tracking it through cyberspace will surely lead many system providers to shut down their gateways to the Internet altogether, including all World Wide Web and Gopher sites which are rich with important information, as well as all Bulletin Board Services and Usenet groups. For both commercial online providers and small nonprofit community networks, monitoring all communications for inappropriate content would be extremely burdensome, intrusive and prohibitively expensive. And while the commercial online community may be able to find a way to shoulder the burden, it is highly unlikely that community networks that provide access for free will be able to continue their gateways to the Internet.

⁶The above example about political speech is just one among many where the definition of indecency will undoubtedly differ among reasonable adults. In this day and age where there is significant disagreement about the "decency" of providing information on sex education, AIDS, birth control and abortion to minors, the online providers will have a challenging task indeed.

⁷Because the Grassley/Dole Bill does not deal with obscenity, we do not discuss the concept here in detail. We should note, however, that serious questions have been raised as to whether the "community standards" prong of the obscenity test can be applied to the Internet and other online services that serve customers nationwide.

THE LEGISLATION IS NOT NARROWLY TAILORED TO SERVE A COMPELLING
GOVERNMENTAL INTEREST

Although the language of the proposed legislation discusses only indecent materials made available to minors, it in fact imposes a ban on indecent expression among adults and conscripts online providers to enforce its provisions. This is not a regulation of obscenity which by definition has no redeeming social value; it is a complete prohibition of expression protected by the First Amendment, expression which may have considerable social and, as the Waco hearings demonstrate, political value. A complete ban on indecent expression has never been upheld by the Supreme Court.

Speech that is indecent but not obscene is protected by the First Amendment. See *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). Such speech may be regulated only if the regulation serves a "compelling" government interest and is narrowly tailored to achieve that purpose. *Id.*

The government has put forth two such interests in other contexts such as broadcast: enabling parents to control their children's exposure to indecent materials, and an independent government interest in preventing such exposure. But unlike broadcast, the chance of inadvertent exposure to indecent material through an online service is small. Accessing indecent material online usually requires a concerted effort to find it; one doesn't come across it merely by turning on the machine. Perhaps a few users attempt to send specific indecent materials to individuals they know are minors, but this legislation does not even address that scenario; if a few individual users are the real problem, then this bill is far from narrowly tailored to deal with it. In fact, as other witnesses testifying before this committee today make clear, narrowly tailored laws already exist, and should be vigorously enforced, against stalking of minors, distribution of obscenity and distribution of child pornography. These laws have been applied to the intentional distribution of material to specific minors via computer. No new laws are necessary to keep material out of the hands of children, especially where, as here, the law would apply to providers of computer services and not users.

Moreover, the opportunity for parental control is already far greater than with broadcast and is increasing every day. The truly concerned parent who wants to supply her or his children with computer technology without fear of exposing them to indecent communications need only get a computer without a modem, or not sign on to a service provider providing access to the Internet, or monitor the child when the child is online. In addition software companies and online service providers, responding to market demand in this area, have developed and are continuing to develop technological solutions that further enhance and fine-tune parental control over access to online material. As described more fully in the Testimony of William Burrington of America Online, Inc. and the Interactive Services Association, being presented today, the online services industry has published parental warning manuals and has begun including technology on their services to block out or filter content on private systems and on the Internet. Further, several independent software companies have developed affordable software—SurfWatch, NetNanny, Cybersitter, WEBTrack, and Netscape Proxy Server, among others—that require little computer literacy to help parents make their own decisions for their children. This is just some of the evidence available that alternatives to S. 892's draconian criminal solutions are readily available. The Supreme Court has made clear that where other generally successful alternatives exist, a complete ban on constitutionally protected expression cannot survive First Amendment scrutiny.

In *Sable*, the Supreme Court struck down a prohibition on indecent telephone communications even though a complete ban was undoubtedly the most effective way to ensure that children would not be able to access or be exposed to such communications. The Court stated that a complete ban was unconstitutional if other less restrictive means would prevent all but "a few of the most enterprising and disobedient young people" from accessing such messages. There is no evidence on record that the software presently available would not be generally successful in enabling parents to exercise substantial control in this area, while there is significant evidence that the technology works. Of course, there will always be individuals who will find a way around any device designed to deny them access; however, the Supreme Court in *Sable* made clear that the possibility that an enterprising minor may still be able to gain access to prohibited materials does not justify a complete ban on constitutionally protected matter for adults.

We are confident that this legislation is not an effective and narrow means of denying access to minors or furthering parental control, and will be enjoined in the courts. By the time the legal issues raised by this legislation are resolved, technology will have rendered much of this debate moot. Surely if the goal is to em-

power families *now* to navigate the brave new world of the Internet, market-provided technology is not just the most "narrowly tailored" solution, it is the sensible one.

THE LEGISLATION WOULD HAVE THE ABSURD EFFECT OF OVERRIDING PARENTAL WISHES

In its rush to regulate, the proposed bill also makes unwarranted assumptions about what parents feel it is appropriate for their children to have access to at various stages of their lives. Many parents certainly feel that as their children mature, they should be given more responsibility to select what kinds of materials they want to read or view. Yet this bill takes that authority away from parents and substitutes the system provider as the arbiter of what their children should view. Even if the parent feels that some "indecent" material is suitable for his or her teenager because of the material's social, political, or artistic value, it is the provider who will be forced to override the parent's choice because of the threat of liability. This result flies in the face of Supreme Court decisions that parents, not the government, have the right to raise their children as they see fit. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (striking state law requiring children to attend public schools as "interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (striking state law prohibiting the teaching of foreign languages to children as interfering with "the power of parents to control the education of their own").

CONCLUSION

While People For the American Way Action Fund shares the sponsors' concerns over the exposure of children to potentially harmful material, we believe that S. 892 as drafted would do little to accomplish its goal and much to irreparably harm a still nascent communications system that has the potential to unite, educate and inform the nation. We urge the committee to tread carefully and to oppose any legislation in this area that sacrifices free expression. We further urge that Congress legislate only where it can be demonstrated that existing criminal statutes are inadequate to protect our children from harm and then only in a carefully constructed, constitutional manner.

Senator GRASSLEY. Senator Thurmond?

**STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR
FROM THE STATE OF SOUTH CAROLINA**

Senator THURMOND. Thank you, Mr. Chairman. I have another engagement. I am going to have to leave in just a few minutes. I just want to commend the able chairman here for conducting this hearing. He made an outstanding statement. I wish every parent in this country could hear it.

I also want to commend the ranking member from Vermont for the excellent statement he made.

Our children are the future of this country. What they see and what they hear and what they do determine the kind of citizens they make. We must have the right environment for them, and we must guard in every way to see that they have the right associates.

I am convinced that we must take every step possible to prevent pornography from coming to their attention. There is no excuse in presenting pornography where children can get hold of it. The indecency, the outlandishness of pornography being presented where children can reach it should not be allowed under law.

Again, I commend the able chairman for the step he has taken in introducing this bill. I believe I am a cosponsor. If not, Mr. Chairman, I wish you to make me a cosponsor of this bill.

Senator GRASSLEY. We will make you a cosponsor if you are not already.

Senator THURMOND. Thank you very much.

Senator GRASSLEY. Senator Feingold?

**STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR
FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Thank you very much, Mr. Chairman.

The issue we are discussing today is also of great concern to me, and not simply because I am a member of this committee, but because I am a parent who is concerned about the welfare of my children as they use the Internet. This is just a completely new world from the time when I grew up. A computer was just something that was sort of a fantastic thing that we were told about the potential uses it might have some day. And so to some extent, without concerns on the part of people in the industry and government and parents, we are sending our children into sort of uncharted waters, and that is why I commend the chairman for his concern.

But I am also a parent who is enthusiastic about the positive opportunities new forms of communications technology can offer to my children.

Interactive computer networks have clearly changed the way people throughout the world communicate with one another, and my friend and colleague, Senator Leahy, is one of the most knowledgeable people in the Senate on this issue, and we need his expertise with regard to computers and the Internet. But all of us are going to have to come to grips with it as we move into the area of public policy and, in particular, Federal legislation.

While individuals carry on conversations in cyberspace, much like they do over traditional telephones, in many ways the similarities end there. The interactive nature of the Internet has opened up a whole new world to computer users.

On the Internet, one can act as a publisher and writer simultaneously. Students can access books and research materials without going to the library. Entrepreneurs can market and sell their products on the World Wide Web. And now people through the United States will be able to participate in Senate committee hearings through the Internet. The U.S. Senate, more than ever before, has the opportunity to have true grass-roots participation in the political process through the Internet. That today's hearing will be on-line emphasizes the potential of decentralized interactive communications networks.

However, with these new opportunities come new challenges, and the most important one is the one of protecting our children as they use the Internet.

As tragic as it may be, there are those in this country who will try to harm our children, either for profit or for even more perverse reasons. Unfortunately, those who prey off the vulnerability and innocence of children will use whatever means they can to commit their crimes, including communications technologies.

In trying to protect our children, we have to recognize the Internet for what it is. It is a new way of communicating. And what we have to do is to understand the technology's strengths and weaknesses.

But my concern, Mr. Chairman, is that in recent months this discussion has become so sensationalized that we may fail to react appropriately in areas where online dangers actually exist. I do not want to see the Congress respond to this problem in a way that may create new legal and constitutional dilemmas. I am afraid that

is exactly what happened last week when the U.S. Senate passed telecommunications legislation.

Members of the Senate reacted as any parent would when they were confronted with the big blue binder filled with pornography downloaded through the Internet. What Members were not told was where the graphics and text came from and how difficult it was to locate them. Senators reacted by voting for an amendment they thought penalized criminals and which purported to protect children.

In my opinion, that legislation duplicated exhibit criminal laws, prohibiting, as it already does, online obscenity and child pornography and also created prohibitions on speech that I think is protected by the first amendment.

So in a well-intentioned attempt to protect children, I am concerned that the Senate has gone down the road of trampling on one of the most fundamental rights we have in this country—to speak freely and without reservation, independent of prevailing views of what is offensive and unconstrained by a frequently changing political environment.

Mr. Chairman, I am concerned that the Senate will now try to pass additional legislation that will stifle the growth of interactive communications technology and that may well censor communications on the Internet, while not truly solving the problem of children getting material that they should not get.

Mr. Chairman, I think we need to look carefully at the following questions:

Where do the fundamental problems exist with abuse of the Internet—on news groups, on for-pay bulletin boards, within electronic mail, or elsewhere?

What is the nature of the problem—sexual predation, obscenity, pornography, indecency, profanity, or harassment, or some combination?

What laws—Federal, State, and local—exist currently to address those problems?

And where do those laws fall short of protecting our children?

How do interactive communications systems differ structurally from existing types of communications technologies, and how are they similar?

And what tools, finally, do parents need to protect their children and are those tools available now?

It is incumbent upon Congress to restore rationality to the debate by trying to answer these questions. I strongly urge my colleagues to exercise caution and restraint when considering and discussing legislative attempts to regulate free speech. We cannot use terms like “obscenity,” “pornography,” and “indecency” interchangeably. They are not the same. They are all matters of concern, but they have different meanings. And when you just toss them all into a bill—and I am not saying this bill does that—there are real consequences in our society for freedom of speech.

We must look for solutions that empower parents to exert greater control over the materials their children receive via the Internet. Free-market remedies, where they are possible, are usually—in fact, I would say almost always preferable to heavy-handed content

regulation and criminal penalties imposed by the Federal Government.

So, again, I commend the Chair for making sure this is handled in this manner, and I look forward to learning more about all of these issues from our witnesses, and I thank the witnesses for helping us out with this hearing.

Thank you, Mr. Chairman.

[The prepared statement of Senator Feingold follows:]

PREPARED STATEMENT OF SENATOR RUSSELL D. FEINGOLD

The issue we are discussing today is of great concern to me, not simply because I am a member of this Committee, but because I am a parent who is concerned about the welfare of my children as they use the Internet. I am also a parent who is enthusiastic about the positive changes and opportunities new forms of communications technology can offer to my children.

Interactive computer networks have clearly changed the way Americans, and indeed people throughout the world, communicate with one another. While individuals carry on conversations in cyberspace much like they do over traditional telephones, the use of the Internet goes far beyond that characteristic.

- On the Internet, one can act as a publisher and a writer simultaneously by posting their works on various bulletin boards, newsgroups, and on a World Wide Web page.
- One can search out just about any information they wish without leaving their home. Students can access books and other research materials simply by sitting at a personal computer properly outfitted for Internet access. There is a wide range of literature available through the Internet, and with efforts such as Project Gutenberg, which we'll learn more about today, there will soon be many more books available on-line.
- Individuals can participate in political, academic and scientific forums without being an expert in a particular field.
- Entrepreneurs can market and sell their products simply by establishing their own home page on the World Wide Web.
- And now, people throughout the United States will be able to participate in Senate Committee hearings through the Internet. Committees will not be limited to hearing the comments and opinions of those who are part of more organized coalitions and who can afford to make the trip to Washington D.C. The U.S. Senate, more than ever before, has the opportunity to have true grass roots participation in the political process through the Internet. That is an incredibly positive development for this country and emphasizes the potential of decentralized interactive communications networks.

In short, this new world of communications is virtually open to anyone with access to a computer with a modem and an Internet connection and who is also willing to take a little time to learn how to retrieve all the types of information out there.

In fact, there are a number of discussion groups on the Internet debating the very issue we are addressing today in this hearing. Those on-line debates are very heated, but they provide a positive outlet for the exchange of ideas.

While it is doubtful that, at least in the near term, interactive computer networks will completely replace more traditional forms of communications, it is clear that they have found at a minimum a lasting place within our society. The potential of this technology is virtually without bound.

However, with these new opportunities come new challenges—the most important of those protecting our children as they use the Internet to communicate with others. As tragic as it may be, there are those in this country who will try to harm our children, either for profit for even more perverse reasons. Unfortunately those individuals, who prey off the vulnerability and innocence of children will use whatever means they can to commit their crimes, including communications technologies.

In trying to protect our children, we must recognize the Internet for what it is, simply a new way of communicating. My concern in recent months, as I have participated in this debate, is that the discussion has become so sensationalized that we may fail to react appropriately in areas where on-line dangers actually exist. I don't want to see this Congress respond to existing problems by creating new legal and constitutional dilemmas.

That is what I believe happened when we passed telecommunications legislation last month. Members of the Senate reacted as any parent would when they were confronted with the "blue binder" filled with pornography downloaded from the Internet. What members weren't told was where the graphics and text came from—whether from public on-line chat groups or for-pay adult bulletin boards—and how difficult they were to access. Senators reacted as most of us would in that situation, they voted for an amendment they thought penalized pornographers and sexual predators and which purported to protect children.

In my opinion, that legislation duplicated existing prohibitions for on-line obscenity and created new restrictions on speech which is protected by the First Amendment.

In a well-intentioned attempt to protect children, we trampled on one of the most fundamental rights we have in this country—to speak freely and without reservation independent of prevailing views of what is offensive and unconstrained by a frequently changing political environment.

I am concerned that the Senate will take further legislative steps that will stifle the growth of interactive communications technology and ultimately censor communications on the Internet while not truly solving the problem.

I think we need to look very carefully at the following questions:

- Where do the fundamental problems exist with abuse of the Internet—on newsgroups, on for-pay bulletin boards, within electronic mail, or elsewhere?
- What is the nature of the problem—sexual predation, obscenity, pornography, indecency, profanity, or harassment?
- What laws—federal, state and local—exist currently to address those problems?
- And finally, where do those laws fall short of protecting our children?

It is incumbent upon Congress to restore some rationality to the debate by trying to answer these questions. In addition, those participating in this debate need to stop using terms with very different meanings interchangeably, such as obscenity, pornography and indecency. We must learn how interactive communications systems differ structurally from existing types of communications technologies as well as how they are similar. Supreme Court decisions on content regulation and the First Amendment have always weighed heavily on the nature of the medium in question.

Hopefully, we will have some of these questions answered in today's hearing. However, I want to caution my colleagues that one hearing alone cannot adequately address the complexities of this issue nor will it lead us to the proper solution without further study.

I strongly urge my colleagues to exercise caution and restraint when considering legislative attempts to regulate free speech. We must look for solutions that empower parents to exercise more control over the types of information their children receive over computer networks. Free-market remedies, where they are possible, are almost always preferable to heavy handed content regulation and criminal penalties imposed by the federal government.

I look forward to learning more about all of these issues from our witnesses, and I thank them from participating in this hearing.

Senator GRASSLEY. Senator DeWine?

Senator DEWINE. No opening statement, Mr. Chairman.

Senator GRASSLEY. I thank you, Senator DeWine.

Before I call the first panel, I hope I can assure Senator Leahy and Senator Feingold—and I hope the hearing will bring this out—that this is a narrow bill, obviously much more narrow than what the Senate has already voted on, and also a constitutional approach.

When there is some question, as has been raised, about the role of parents versus the Government versus the industry, the point I think that I tried to make is that parents should not have the sole responsibility, nor should government, but the industry has to finally take responsibility. In regard to technology, there is no proof that this technology will work 100 percent, the technology that you have been reading about over the last month.

I think you could legitimately ask what is going to stop computer-literate children from circumventing blocking devices. Technology is only part of the answer, and whatever innovations have resulted in the last few weeks from these legislative efforts are positive and reasonable, and they are things that we ought to be looking at.

I would also like to say that Senator Hatch had asked me to chair, when he was not sure if he could be here, and he will not be able to be here because of other Senate business. So he has asked me to include his statement in the record. He is a supporter and a cosponsor of the bill.

[The prepared statement of Senator Hatch follows:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

I commend Senator Grassley for his efforts. One of the greatest challenges facing Congress today is to ensure that our laws keep pace with the rush of technology that is changing virtually every aspect of the lives of all Americans. In the area of personal communications, the Information Superhighway is a reality, reaching into homes, schools, libraries and businesses in every community in America. And no segment of our society is (both literally and figuratively) more "plugged into" this communications revolution than our young people.

While the computer telecommunications network, the Internet, can be a powerful tool for good, bringing information and entertainment to millions, like other forms of communication there exists the potential for misuse. The easy access to an ever-expanding amount and variety of communications afforded by the Internet carries with it the danger that, absent appropriate safeguards, our children will continue to be able easily to access obscene and indecent materials, which are already far too present and available on the Internet to anyone, including minors.

The reality is that many young people can and do use the Internet with little direct parental supervision. That is why I have joined as a cosponsor of S. 892, the Protection of Children From Computer Pornography Act of 1995, which is the subject of today's hearing.

While the telecommunication networks, access providers, and electronic bulletin boards, which would be regulated with respect to the knowing or willful transmission of indecent material to children under S. 892, represent comparatively new and highly complex technologies, the social issue addressed by this bill is neither new nor complex. We, as a society, have both the legal right and the moral obligation to protect our children from exposure to the filth of graphic pornography.

This fundamental principle should apply to all forms of communication. A graphic depiction of sexual activity which is patently offensive according to contemporary community standards is indecent material. That same depiction of sexual activity is no less indecent by virtue of being electronically transmitted into a home or school or library by means of an expensive, state-of-the-art computer system than if it is contained in a pornography magazine purchased at a local newsstand for a few dollars and carried into the same home or school or library in a plain brown wrapper. Few in our society would argue with the proposition that a bookstore or newsstand operator who knowingly gave or sold a pornography magazine containing that material, which he knew to be indecent, to someone he knew to be a child, can and should be prosecuted under the law. S. 892 simply extends that rule of law to the operators of, in effect, electronic bookstores and newsstands.

This bill does not violate any First Amendment protections. Our courts have long held that the government has a legitimate and compelling interest in limiting the access of children to indecent material. S. 892 is carefully worded to limit its application to knowing, reckless or willful transmission of indecent material to children, while still permitting adults access to otherwise constitutionally protected material.

The bill is thus sufficiently precise and narrowly tailored to withstand judicial scrutiny, including on First Amendment grounds. It also provides adequate safeguards against prosecution for Internet access providers and electronic bulletin board operators who may inadvertently transmit indecent materials to children, without knowledge either of the indecent nature of that material, or that the recipient is a minor.

S. 892 addresses a significant and growing threat to the well-being of our children and the American family. I strongly support this legislation and urge its prompt passage by this Committee and by the full Senate.

Senator GRASSLEY. We will call the first witnesses now. Congressman Cox will not be able to come, so we are going to start immediately with our first panel—I suppose what you would call our second panel—and you can all come and sit while I am reading your introduction.

Donelle Gruff is 14 years old—at least that is what I am told her age is—from the Tampa, FL, area. She has I think what you will understand is a very difficult and harrowing story. I think that it is important for the committee to hear and consider her story. For moral support, seated next to Donelle is her father, Michael Murray.

Patricia Shao is a parent from Bethesda, MD, whose young daughter and a friend were solicited for cybersex.

Our third witness is Dr. Susan Elliott. She is a physician and mother who terminated her connection to the Internet and online services after her teenage children were exposed to cyberporn.

As with all the witnesses this afternoon, I think you were told that you would have 3 minutes. I think I would like to give you not much more but 5 minutes, because that is our usual procedure before this committee. If you are not prepared to take up that much time, do not worry about it.

We would strongly urge everybody, though, to live by that limit, and we will have 5-minute turns for Members of the Senate who are here.

So I think I am going to take you the way that I introduced you so that would be my left to the right, Ms. Gruff first and then Ms. Shao and Dr. Elliott. Would you please start?

PANEL CONSISTING OF DONELLE GRUFF, VICTIM, ACCOMPANIED BY MICHAEL MURRAY, SAFETY HARBOR, FL; PATRICIA W. SHAO, PARENT, BETHESDA, MD; AND SUSAN TILLMAN ELLIOTT, M.D., PARENT, McLEAN, VA

STATEMENT OF DONELLE GRUFF

Ms. GRUFF. I was logged on a local bulletin board system called "The Zoo," and a guy named Bill logged on and came into the teleconference and told everyone he had a BBS that was free and instructed everyone to call it and gave us the number to call. I logged on to Bill's board "Beyond the Sound Barrier"—

Senator GRASSLEY. I am sorry. Will somebody on the staff help?

Senator LEAHY. Pull the microphone very close to you, Ms. Gruff.

Senator GRASSLEY. I would even ask you to start over, please. Let's see if we can get somebody to make sure that you have the right equipment here.

Senator LEAHY. We want to make sure everybody hears you.

Senator GRASSLEY. I do not mean to embarrass you, but you do have a story that everybody should hear. Thank you.

Ms. GRUFF. I was logged on a local bulletin board service [BBS] called "The Zoo," and a guy named Bill logged on and came into the teleconference and told everyone he had a BBS that was free and instructed everyone to call it and gave us the number to call. I logged on to Bill's board "Beyond the Sound Barrier," and at this time I was required to give him my name and address. After doing so, I logged on with my usual handle, "She Devil," and for the first

couple of days he seemed really nice. He welcomed me to his BBS and told me to look around at what the channel had to offer. The next day he asked me if I would be a co-syop and watch over the teleconference when more phone lines were installed. I said yes, and then after a couple of days he started asking me personal questions, such as do I shave besides my legs, what size bra do I wear, and if I would go out with him. When I would not answer, he kept asking me so I logged off and went to the other BBS, "The Zoo."

He followed me to that channel and logged on and kept telling me he was going to come over to my house. After telling him 20 times not to come over, he finally agreed, and I thought that was the end of it. That night at about 1:30 a.m., 3 days after I became a co-syop, he came over and I told him not to come back again. I said it was late and he was going to have to leave, and he did as I asked. The next day he came to my house and sat outside for 4 hours, and my mother was forced to call the police, and then he left. The next day he came back and sat outside my house again, and when I went to the front window to see what the dog was barking at, he saw me and left. That Saturday I went to a bowling alley to meet a few friends, and he followed me around all night but did not say anything to me.

A couple of days later, when I logged on his BBS, he "emulated" me and took me to some pornographic pictures. "Emulate" is a term that refers to using a computer at a remote location to act as though it were my computer. In so doing, the remote user can "appear" to others in the cyber world as though he is me. This is a procedure which, with certain software, can be done without my permission and without my knowledge.

When he did that, I had no way of getting out of them, and I turned my computer off. The next time I logged on his BBS, he attempted to download pornographic pictures to me, but he was having trouble doing it. He allowed me to download one to myself, and I did so I could give one to the detective. I have not called his BBS since then. This was a local BBS that was not on the Internet.

Senator GRASSLEY. Ms. Shao?

STATEMENT OF PATRICIA W. SHAO

Ms. SHAO. My name is Patricia Shao, and I live in Bethesda, MD. I am the mother of two children who have grown up with the wonders of the computer and the limitless opportunities it offers them.

I am here today to share an experience and to express my concerns as a parent with children growing up on the information superhighway.

Early this summer, my 13-year-old daughter went to her friend's house in Potomac to play on the computer. They were in the neighborhood; they were properly supervised, and I knew they were safe. It was shocking to discover later what they had experienced that afternoon.

The girls were in a teenage chat room on America Online and were propositioned for cybersex. Initially, they thought it was funny, giggling as you would expect 13-year-olds would. But as the requests became raunchier, they were frightened.

I, too, am frightened, and I am appalled at how I am not able to protect my children on the Internet. As I continue to research this topic and speak with other children and parents, I have discovered that almost 7 out of 10 have been victimized on the Internet.

I speak openly with my children, so my daughter was not afraid to come to me with this experience. My daughter's friend, however, insisted that I could not reveal what happened to her parents. She felt almost guilty, as if she were responsible for what happened to her.

Now, when does a victim become the guilty party in this? Only when the victim is confused and happens to be a child. Children as young as 10 years old have related stories to me of how they were propositioned and of nude pictures that were sent to them on the computer so they could recognize the sender in setting up a face-to-face meeting.

I understand that I have responsibilities as a parent to protect my children. I am in the communications field myself, and I am aware of the wonderful benefits of using the computer for communications, for research, for creativity, and for entertainment. What is disconcerting to me as a parent is the fact that I was unaware of the dangers of chatting online and of the amount of pornographic material available to anyone with a computer and a modem. I have learned that you can download hard-core pornography, that you can search the Internet to talk to anyone with the same interests as yours, be it common or perverse, and that all this can be accessed by children free of charge.

I am aware of software and other lock-out features that I can download into my computer. But what happens when my children are at a neighbor's house? And what happens if peer pressure builds and a normal sleep-over party of teenage boys becomes an opportunity to read and view pornographic material? That is pornographic material that they may not have access to otherwise. What happens in multicultural homes where parents that may not even be literate but have children who have been educated here and have access to this indecent and obscene material? Children today have grown up with the computer, and I can safely say that they are probably more computer-literate than the majority of their parents.

An education process has to start immediately to help our children and to help protect our children. I am working with Enough is Enough, which is a wonderful group based in Fairfax, VA, dedicated to protecting children against pornography. I have concerned parents and businesses in my community now involved in starting grass-roots organizations to educate both the children and their parents on this issue.

I believe in the freedom of speech. I also believe in responsibility—responsibility by the providers of the online service companies to protect the innocence of children. If hard-core pornographic materials are illegal in the mainstream distribution channels, then there should be laws against these child molesters looking for victims on the Internet, too. They may have looked on school playgrounds yesterday, but the playground for the children of the nineties is the information superhighway.

Senator GRASSLEY. Thank you.

Dr. Elliott?

STATEMENT OF DR. SUSAN TILLMAN ELLIOTT

Dr. ELLIOTT. I am a parent of three teenage children; a girl age 17, and boys age 14 and 12. Our brush with cyberporn was, happily, not devastating or dramatic, but it was disturbing. It was, I think, an experience shared by many families before the public became aware of pornography on the Internet.

First, I must say that my children are normal, intelligent, well-adjusted individuals. They get good grades, participate year-round in sports activities, and have never been involved with drugs or alcohol. Their sexual experiences have, I hope, been limited to looking at the swimsuit issue of Sports Illustrated and thwarted attempts at making out. In short, they were not predisposed to search for pornography on the Internet, nor are they computer hackers.

A respected teacher suggested that they might benefit from information sharing on the Internet. Our household had been inundated by promotional disks from America Online, and so we logged online. At first, the boys, along with many classmates, participated in the public chat rooms. I sat with them while they chatted, and I found it harmless, if somewhat silly. However, one cannot sit with teenagers 24 hours a day, and soon, without my knowledge, the boys had ventured into the more exciting realm of the "private" chat rooms.

Now, many of these rooms are private because they are technical or specialized, but some are private because they pertain to human sexuality. Being normal boys, my children were curious about these rooms. While chatting, they were offered pictures by other participants. They accepted a few of these, as did their classmates. With great ease, these children were able to e-mail hard-core pornography back and forth to each other. This might have gone on for some time if my husband had not noted that the memory of our computer was rapidly filling up. We opened up the trash file and found the graphics in question. They portrayed varying numbers of humans and animals involved in a horrifying gamut of sexual activities. The pictures were lewd and obscene by any standards.

We immediately confronted the children with questions about the pictures, and they confessed all. We shared our experiences with many of our friends and severed our relations with America Online, not with the Internet. Many long discussions about sexuality and appropriate expectations and behavior have ensued, and our family has benefited from these talks.

That, in a nutshell, was our experience with pornography on the Internet. Was any lasting damage done? My boys would say yes. They were asked to pay \$38 from their allowance for their online time. Color graphics are expensive. I, too, would say yes—not because my children have become victims or sexual predators, but because one of our their early sexual images will forever be something which is not beautiful or tender or even harmlessly titillating, but something which is coarse, vile, and ugly.

Thank you, sir.

Senator GRASSLEY. Thank you very much.

I will start with my 5 minutes in the first round. I would start with you, Donelle. Do you believe that other children are at risk from the person who stalked you?

Ms. GRUFF. Yes.

Senator GRASSLEY. You do.

Ms. GRUFF. He is still running his bulletin board.

Senator GRASSLEY. How did that make you feel, the fact that he could still be doing what he did to you to other girls?

Ms. GRUFF. It made me mad knowing that he tried it with 9-year-olds and 10-year-olds, too.

Senator GRASSLEY. Are you satisfied with the ability of local law enforcement to enforce the Florida law in this area?

Ms. GRUFF. Excuse me?

Senator GRASSLEY. The Florida law that would be able to stop your stalker from doing to you what he did, are you satisfied that the present Florida law would be adequate? Maybe you cannot answer that; OK.

Ms. Shao and Dr. Elliott, do you believe that Congress should act to protect children from exposure to pornography in cyberspace, or are you satisfied with the industry's efforts to do that alone will suffice?

Ms. SHAO. I personally do not know what the industry has done at this point. I understand that if you make complaints to America Online or the other carriers, they state that they are not responsible for messages that are sent on the Internet.

Senator GRASSLEY. It is that simple? They are not inclined to—they are not responsible, and it could be that we accept the fact that they are not responsible. But they do not have any desire to do anything either?

Ms. SHAO. There is no tracking system on the Internet at this time. The Caller ID I guess would be nice for that. But as Ms. Gruff has said, the technology allows you to emulate other computers and to really camouflage the sender, the sender's identity. So I think that somebody has to take responsibility, and if you make it a criminal offense, that may deter a number of them.

Senator GRASSLEY. Dr. Elliott, would you have a comment in regard to the question I asked Ms. Shao?

Dr. ELLIOTT. Yes; I would be comfortable if the Congress were to take the action that you are discussing. I am very aware of first amendment rights, and they are very important to me. But this is freedom which none of our 12-year-olds need, in my opinion, and it is far, far too easy for it to get into our homes.

What narrow things that Congress can do legally and technically I think would be much appreciated.

Senator GRASSLEY. Ms. Shao, in your testimony, you said you were aware of some of the technology that is being discussed. That would be a cost to parents. Do you think that parents ought to bear that cost for protection from this material?

Ms. SHAO. I think parents that are educated and can certainly afford to will bear that cost. But what my concern is would be the parents that are not able to, the parents that are not literate on the computer and the parents—because I come from a different culture, parents that may not even be able to turn on the computer that have children on the computer. Within my community, I know

of many families that are in that situation, and we need to protect children like that.

Senator GRASSLEY. Dr. Elliott, in your written testimony, you indicated that you and your friends with children have terminated your connections to Internet and online computer services. Would my bill help give you and other worried parents the comfort level that you need in order to reconnect to Internet and online computer services?

Dr. ELLIOTT. Yes, it would. I have to admit that we terminated our relations with America Online. We are currently on the Capital Internet service, and my children work on the computer and, in fact, participate in a sort of harmless little game called "Avalon." So we are on the Internet at this point.

I think that some of the services make the pornography easier to access than others. But, yes, your bill would give me that comfort level which I need.

Senator GRASSLEY. Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

I have listened to a number of these statements and I have heard others very similar to what you said. It is one of the reasons I do believe that Congress has to provide law enforcement better statutes. For example, Senators Grassley, Kyl, and I have introduced the National Information Infrastructure Protection Act, which I think will help. Ms. Gruff, in hearing your testimony, it is not dissimilar, I think, from stories I heard in the days when I was a prosecutor and pedophiles used different techniques. Now, pedophiles will strike up a friendly, helpful pose in a discussion group or chat rooms available online, I guess wanting to have a private electronic-mail conversation with children. Then the pedophile starts sending suggestive letters and suggests a meeting.

I would note that these actions, sending obscenity, sending child pornography, soliciting children or luring children, that is illegal today. It does not matter whether the pedophile takes his action in person, by telephone, by mail, or over a computer. And I am concerned, Mr. Murray, that when your step-daughter was approached this way, the law enforcement people felt they could not take action, because they should have taken action. Quite frankly, they should have taken action. There is no question about it, and they have the laws today that would allow it.

In fact, if I might put in the record, Mr. Chairman, a letter from the Department of Justice where I asked them to detail some of the cases like this they have prosecuted.

Senator GRASSLEY. Yes, it will be included in the record.

[The Department of Justice letter follows:]

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, July 13, 1995.

Hon. JANET RENO,
Attorney General of the United States,
U.S. Department of Justice, Washington, DC.

DEAR JANET: Pending your response to my letter, dated June 11, 1995, I would appreciate hearing from you about the Department of Justice's efforts in prosecuting various crimes involving computers and children, including online obscenity, child pornography, luring and solicitation. Your 1994 Annual Report described a case

tried by the Department involving the importation of child pornography by computer that resulted in a conviction and sentence of 72 months for the defendant.

As Congress considers various proposals to regulate speech over computer networks in an effort to protect children from exposure to harmful materials, a review of current Federal authority in this area would be helpful. Could you provide me with additional examples of cases that Federal prosecutors have brought to protect children from crimes involving computers, including under the following criminal laws: 18 U.S.C. §§ 875, 1465, 1466, 2251, 2252, and 2423?

I look forward to hearing from you on this matter, and to reviewing the report I requested in my June 11 letter.

Sincerely,

(Signed) Pat

(Typed) PATRICK J. LEAHY,
United States Senator.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, July 24, 1995.

Hon. PATRICK J. LEAHY,
*Unites States Senate,
Washington, DC.*

DEAR SENATOR LEAHY: This is in response to your letters of June 19, 1995 and July 13, 1995. I am happy to provide the information you have requested as we continue to work together on the issue of child pornography and obscenity on the Internet.

With respect to your June 19 letter, as the Department has previously responded to you, we support a comprehensive review of the current statutory framework and problem of computer facilitated child sexual abuse. However, while the Department can fairly easily review and analyze the law and recent cases, our ability to obtain information concerning new developments in technology or conducting in-depth non-criminal investigations is extremely limited as it would depend on voluntary compliance from industry and the public at large. However, the Department will attempt to provide as much information as possible to Congress so in order to assist Members in making decisions on this important issue.

As you know, the Criminal Division of the Justice Department has already undertaken a number of successful prosecutions of individuals who have used computer technology to facilitate their sexual exploitation of children. The Department's efforts in this area have been carried out by career prosecutors with an expertise in child sexual abuse investigation and prosecution. Moreover, the Division has undertaken a review of the current statutory framework, and we have developed a legislative proposal addressing a number of issues related to child sexual abuse and exploitation. We have discussed our proposal with your staff and we hope to work with you to see that it becomes law.

The Department has also maintained contact with various state and federal law enforcement agencies and is familiar with the more notable cases which have been prosecuted as well as problems which have arisen. Therefore, I believe that the Department is in a position to provide information on the questions you raise. I would also be happy to make Department officials available to you and your colleagues to provide background information on this important and timely issue.

In your July 13 letter you requested information concerning the Department's specific efforts in prosecuting various crimes involving computers and children, including on-line obscenity, child pornography, luring and solicitation. I am pleased to share with you the attached brief summary of some of our recent successes in this area.

I trust that this information will be useful to you. Please do not hesitate to contact me if I may be of further assistance on this or any other matter.

Sincerely,

(Signed) Andrew Fois

(Typed) ANDREW FOIS,
Assistant Attorney General.

BRIEF HISTORY OF DEPARTMENTAL EFFORTS TO COMBAT COMPUTER FACILITATED
CHILD SEXUAL EXPLOITATION AND ABUSE

The Department of Justice prosecuted the first child pornography cases involving computers in 1991. This activity included the distribution of child pornography and obscene material as well as the use of computers to maintain and establish contact between pedophiles. These prosecutions produced a substantial amount of intelligence and served as the impetus for further investigations.

In late 1992, the United States Customs Service and the Department's Child Exploitation and Obscenity Section initiated the planning for the first national investigative program targeting the importation of child pornography from Europe. Named "Operation Longarm", the project arose from the investigation of an individual who was importing child pornography from Denmark. The primary statutory violation has been illegal receipt of child pornography pursuant to Title 18 U.S.C. § 2252.

The Department received substantial assistance from the Amsterdam Police, who arrested the operator of the primary child pornography BBS (BAMSE) and seized his computer system. On March 4, 1993, on the basis of that seizure and the data contained on the BAMSE computer, approximately 40 searches were executed throughout the United States.

To date there have been 16 convictions. Many of the outstanding prosecutions have, until recently, been delayed as the Ninth Circuit Court of Appeals had invalidated the child pornography statute in the Circuit. With the recent reinstatement of the statute by the Supreme Court, the remainder of the cases are now expected to proceed. Of the 18 Longarm cases prosecuted to date, one has been successfully tried, one is currently on trial in Seattle, 15 were resolved by plea to felony charges, and one defendant was given pre-trial diversion. Sentences for the others have ranged from probation to home confinement or incarceration.

The most severe sentence to date was imposed in the case of *United States v. Kimbrough*, prosecuted by the Child Exploitation and Obscenity Section and the United States Attorney's Office for the Northern District of Texas, in Lubbock, Texas, which resulted in a 72 month prison sentence. During the search in this case, the Customs Service discovered that the defendant, who had downloaded child pornography repeatedly, was also in the process of setting up his own pornography BBS to redistribute the child pornography he imported. Additionally, he had imported child pornography depicting bondage and sadism of young girls as well as pornography involving girls as young as eight years old.

During the course of the strenuously litigated case several novel issues were raised. These issues included: (1) whether the children depicted were actual children or computer generated; (2) whether the defendant could be proven to have known the nature and character of the material as child pornography on the basis of the BBS description; and (3) whether the seizure of computer equipment was constitutional since the Government did not identify the specific computer equipment containing the child pornography before removing the equipment to their offices. These issues were raised at the District Court level as well as on appeal to the Fifth Circuit where a decision is currently pending.

Investigations of computer facilitated child pornography have also been pursued by the United States Postal Inspection Service and Federal Bureau of Investigation. For example, on February 24, 1995, Donald Harvey pleaded guilty, in the District of New Hampshire, to two counts of knowingly distributing and possessing computer image files which contained visual depictions of minors engaged in sexually explicit conduct. The investigation, which was supervised by the Child Exploitation and Obscenity Section and carried out by the Federal Bureau of Investigation, revealed that Harvey communicated with minors utilizing an on-line service and sent them computer image files of pornography and child pornography. Harvey also utilized computer e-mails to solicit sexual activity with minors. In June 1994, Harvey flew to Florida to meet a person he believed to be a 14-year-old boy for sexual activity. The person he believed to be a child was actually an undercover agent who arrested him upon arrival. Harvey is scheduled to be sentenced on July 24, 1995.

The Justice Department has been able to use other statutes to prosecute and investigate individuals who use computers to sexually exploit children. The Mann Act, 18 U.S.C. § 2421 *et seq.*, prohibits the movement in interstate or foreign commerce of a person for the purpose of engaging in illegal sexual conduct with children or adults. Thus, a person who uses a computer to set up a meeting with a child for the purpose of engaging in illegal sexual conduct and thereafter travels in interstate or foreign commerce or causes the minor or adult to so travel would be guilty of a violation.

Title 18 U.S.C. § 1462, which prohibits the use of a common carrier to import or transport obscene material has and is currently being used to prosecute individuals involved in child pornography. An example of such a case was *United States v. Baird*, which was indicted in January 1994 in Los Angeles. Baird pleaded guilty to knowingly importing approximately 22 photographs depicting obscene matter, including but not limited to, portrayals of child pornography. Baird was sentenced to 5 years probation and 2,500 hours of community service and was ordered to forfeit the computer equipment used to accomplish the importation. Because child pornography is almost always obscene, possessing no serious value, appealing to a prurient interest, and depicted in a patently offensive manner, this statute is generally applicable to all child pornography cases. Generally, however, this statute not used where the child pornography statute is available since the Government's burden of proof is substantially and unnecessarily higher.

Prosecutions under 18 U.S.C. §§ 875, 1465 and 1466 have not to our knowledge represented efficient or promising options for child sexual exploitation cases. These statutes are fairly limited in scope and arguably apply only to narrow factual situations. To date, no successful prosecution has been brought under these laws for child pornography or child sexual abuse crimes.

As you can see, the Department has been effectively using the current statutory framework to pursue individuals seeking to use computers to sexually exploit children. Loopholes in the statutory framework are generally limited to situations where the computer actually changes the method of exploitation as opposed to where the computer merely facilitates a traditional criminal activity. These areas are narrow and will be addressed in the Administration's legislative proposal.

Senator LEAHY. It made me think of an example of that when you were talking about Florida. A few weeks ago, a New Hampshire man was arrested in Florida. He arrived to have sex with a 14-year-old boy to whom he had sent obscene pictures and he had propositioned through an online service. What he found out when he got there, was that the 14-year-old boy did not exist. Instead, it was a Florida law enforcement agent using an online persona of a teenager, and they caught this person. They used laws that are on the books and caught him.

I would suggest that, if they are listening at all, the law enforcement people in your jurisdiction ought to go back and look at this case again. I would think that they have a case. If some of these people think that they may be talking not to a child but to a police officer, maybe some of these sick individuals will hold off.

Ms. Shao and Dr. Elliott, I found your testimony very compelling and very moving and very good, a lot better than a lot of the professional testifiers who come here. Nothing against them, but there are a lot. America Online announced last week it is going to make Surf Watch blocking technology available as part of its service.

I am not asking whether you are going to go back online or not, but if you did, is that something you would be interested in, that kind of blocking technology?

Dr. ELLIOTT. My only problem is I will have to get my 12-year-old to explain it to me.

Senator LEAHY. I usually bring my 9-year-old neighbor over to explain it. And the added advantage, they will program my VCR for me while they are there. [Laughter.]

But that is true, and I understand what you are saying. But you also have this issue with every kind of new thing, an ATM machine or anything else. It takes some getting used to. But would it be safe to say if you were to go back online that you would want some kind of a service that would actually be able to block or to tell you where children have been?

Dr. ELLIOTT. I would feel comfortable with such a service in my own house, but as I pointed out, I believe my children can e-mail this stuff back and forth. I do not know the technology there. But even if my house is safe with that blocking material, I do not know if all of my friends or the neighbors or the neighbors of the neighbors are protected in a similar fashion, and I cannot control what a 16-year-old boy does hour to hour.

Senator LEAHY. Any more than if one of them went out and bought a very pornographic magazine and brought it home and said, hey, everybody come on over to my house after school, I got something I want to show you.

Dr. ELLIOTT. I can find that under the bed, though.

Senator LEAHY. Under your neighbor's bed?

Dr. ELLIOTT. You know, well—

Senator LEAHY. But you see what I am saying.

Dr. ELLIOTT. I see.

Senator LEAHY. I am trying to figure out how best we balance some of these things. For example, I talked about the Gutenberg project of putting all these books online, something done free by volunteers. They might put on "Tale of Two Cities," something that I read in the 3rd grade and loved. They also might put on "Lady Chatterley's Lover." Do we tell them they can never put on "Lady Chatterley's Lover" because a 10-year-old might get it?

You see what I am getting at. Are there ways that we can balance this, use the very tough laws against child pornographers, laws that are on the books, and go after them now, but give parents some ability to control what goes on in their computers?

Dr. ELLIOTT. I hope there are. I feel that all the laws are there. I feel that education of all parents is a vital part of this. But I do hope that the Congress can do something to make our job easier, somewhat easier, as a parent and not let this stuff in everywhere willy-nilly.

Senator LEAHY. Thank you. My time is up. Mr. Chairman, I may have some other questions.

Senator GRASSLEY. Before I call on Senator DeWine—and this is just a point of view for you to consider because, as you know, I am not a lawyer and I am not going to say that I know exactly where things fall within the Constitution. But I think the point that you made in regard to other laws presently on the books that can be used and should have been used—and you just pointed out one that was used in the case of Florida—as I understand it, Ms. Gruff's material would not have been unlawful because it was not obscene and it was not child pornography, two unprotected classes.

Senator LEAHY. Well, child solicitation is. Solicitation of a minor is illegal in Florida and virtually every other State in the Union.

Senator GRASSLEY. This bill would apply to computer technology and transmission, the classification of indecent material, as described and upheld in 48 of our 50 State laws and upheld by the Supreme Court, maybe in the *Sable* case and in other cases as well.

Senator DEWINE—

Senator LEAHY. Mr. Chairman, if I might just respond to that?

Senator GRASSLEY. Please do respond.

Senator LEAHY. There are two things. One, there is some material that is illegal to provide to minors, but not to adults, and there

is that concern. Second, there is the question of to what extent does a bureaucrat make the decision as to what might be seen online or to what extent do parents. Third, none of the bills proposed in the Congress to control indecency on the Internet would stop pedophiles from stalking our children or doing an online stalking, which is something that I think that we have to approach and go after, because that is against the law in virtually every State, including the type of activity that Ms. Gruff testified to.

Senator GRASSLEY. Senator DeWine?

Senator DEWINE. Thank you, Mr. Chairman, very much.

Donelle, let me ask you a few questions if that is all right. Maybe you can help me understand this a little better.

My children, if they were here, would tell you that I am computer-illiterate, so you are going to have to kind of walk me through this. But I think my questions do have some relevance because I would like to see really how this operates.

You say you logged on to the bulletin board service called "The Zoo." What is entailed in doing that? How long does that take to do that? If you walked up to it, how long does that take you to do that? Is that very long at all?

Ms. GRUFF. It takes about 30 seconds to log on.

Senator DEWINE. Thirty seconds. And then how did you determine to log on to "The Zoo"?

Ms. GRUFF. It is just like picking up a phone and dialing it.

Senator DEWINE. You say, "I logged on to the bulletin board service called 'The Zoo.'" Why "The Zoo"? Aren't there other bulletin board services available?

Ms. GRUFF. That is the one that I called the most at the time.

Senator DEWINE. Then you say, "Bill logged on." How does that work? He just comes right on the screen then?

Ms. GRUFF. Yes.

Senator DEWINE. And had Bill been on there before this particular time, or was this the first time?

Ms. GRUFF. Excuse me?

Senator DEWINE. Had you seen the name "Bill" log on there before?

Ms. GRUFF. No.

Senator DEWINE. You said that he told everyone he had a BBS that was free and instructed everyone to call it and gave you the number to call it. You then said, "I logged on to Bill's BBS, 'Beyond the Sound Barrier,' and at this time I was required to give him my name and address." What do you mean you were required to do that?

Ms. GRUFF. Whenever you log on to a bulletin board system for the first time, you have to give them your real full name, your address, your telephone number, and your birth date.

Senator DEWINE. And that is standard procedure?

Ms. GRUFF. Yes, for all.

Senator DEWINE. For all?

Ms. GRUFF. Yes.

Senator DEWINE. After he ended up showing up at your house, what did you do then?

Ms. GRUFF. My parents were sleeping, and I told them the next morning.

Senator DEWINE. And were the police called at some point?

Ms. GRUFF. Yes, the police were called right away, and a detective came out and had me keep logging on to his board and "capture" is where you can make a file and it will have everything that he has written to you and you have written to them.

Senator DEWINE. And so the detective got that information?

Ms. GRUFF. Yes.

Senator DEWINE. Then I believe you said that you "were emulated." Please explain "emulating." Tell me what that means.

Ms. GRUFF. Emulate is where—it is usually a sys op, the person in charge of the board, can—I do not really know how to explain it. It is where they can take you places. They can type for you, and you cannot really do anything about it.

Senator DEWINE. So other people will think that is you?

Ms. GRUFF. Yes.

Senator DEWINE. And you cannot really control that, then, at that point?

Ms. GRUFF. No.

Senator DEWINE. And then you said you turned your computer off, so you just exited, got out?

Ms. GRUFF. Yes.

Senator DEWINE. You say, "The next time I logged on, he attempted to download pornographic pictures to me, but he was having trouble doing it. He allowed me to download one to myself, and I did it so I could give one to the detective." You were able to get that out of the system and then give it to the detective?

Ms. GRUFF. Yes, you can copy on to a disk.

Senator DEWINE. What did the detectives tell you in regard to what they could do with him, with Bill? Did they say they could not prosecute him?

Ms. GRUFF. They did not tell me anything. I do not know what is going on.

Senator DEWINE. Did they talk to your step-dad?

Ms. GRUFF. Yes.

Senator DEWINE. Could you, sir, tell us what they told you?

Mr. MURRAY. I am sorry. I did not hear you.

Senator DEWINE. Could you tell us what the police officers told you at that point?

Mr. MURRAY. The sheriff's department wanted us to gather information and present it to them so that it could build a case. We presented the information. Several other people presented the information. At this point in time, to the best of my knowledge, absolutely nothing has happened.

Senator DEWINE. How long ago was that?

Mr. MURRAY. This happened in March.

Senator DEWINE. In March. Have you had any explanation from them as to what they are doing or what they can do?

Mr. MURRAY. Apparently he has not violated any laws.

Senator DEWINE. Did they tell you that, though?

Mr. MURRAY. Not specifically.

Senator DEWINE. I do not want to put words in your mouth. I try to understand. You are surmising that by the fact—

Mr. MURRAY. The fact that he is still operating.

Senator DEWINE. I am sorry?

Mr. MURRAY. The fact that he is still operating says to me that obviously he must not be violating any laws.

Senator DEWINE. I see my time is up. Thank you, Mr. Chairman.

Senator GRASSLEY. If Mr. Feingold was here, it is his turn. Otherwise, I will go to Senator Simon.

STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. I thank you, and I am sorry I was not here for your testimony, Ms. Gruff, but I read your statement and read the other two statements.

I have to say there is no one in this room, with the possible exception of Senator DeWine now, who is less competent in this area of computers than I am. I still write my books on a manual typewriter.

I do not begin to understand all of this other than that I know somehow we have to protect people better than we are now protecting them. I voted 3 or 4 weeks ago, Senator Leahy, for your amendment for a study, a 5-month study. I think we ought to—and I am just talking out loud to witnesses who have obviously gone through something that I think millions of Americans must be going through. And you just accidentally, for example, Dr. Elliott, found out what was going on in your own home. I think there are huge numbers of people who do not know what is going on in their home.

I also think we have to do this so we are adequately covering things. My staff gave me this memo:

The following list of news groups, many of which are pornographic, will not be affected by S. 892. Unlike blocking or filtering software that would enable parents to block access to such pornographic news groups, S. 892 does not affect news groups because they are not operated by any specific person and they are not provided by any online company.

And there is a list then of 137 such groups, and if you just look at the names—I am obviously not going to repeat them and give any publicity to them, but you know by the names what kind of business they are in.

So, Mr. Chairman, I appreciate your having this hearing. You are, among other things, helping to educate me in what is going on. I want us to do something, but I also want us to do the right thing. And I know you do, too, Senator Grassley. And I hope we do this carefully so that we do not have any first amendment problems but we can protect America's homes better than we are now protecting America's homes.

I want to thank you. I have no questions for the witnesses, but I appreciate your standing up and telling us your story.

Senator GRASSLEY. Well, I think your statement is right, and it would back up what I would say, that there is a role for technology and government in this, and what I am doing in my legislation does not preclude anything about technology. Your listing of many organizations I think shows where technology would come in. In the meantime, I think there is, as we see here, a very definite need for the involvement of government and not putting the total responsibility on parents at this point.

Senator SIMON. Yes; I think this is one of the—I hear the same thing in this area of violence on television, well, let's just let parents take care of it. But it is just not that easy.

Senator GRASSLEY. And I think Mr. Murray underscored the problem of the current laws not working. Particularly, this case deals with interstate commerce, and we have a responsibility to act.

Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman.

I, too, want to thank the panel very much. This is something I can relate to as a parent, and I particularly relate to Dr. Elliott's response simply because we have the possibility here of technology, private technology as an alternative, which I would hope would work for parents. You know, you might need your kid to teach you how to work it, and I think maybe we can get around that. But that is a fair comment. So if a young individual is very skilled, they can tell you that they have got it working, and you might not ever know the difference in this new world of computers. So I think that is a fair point.

But the thing that I would like to spend my brief time on is what it is you would like to see, in effect, removed from the Internet. At least one of you has given an example of material that is so extreme that I think almost anyone would agree that it is obscene. In fact, I would suggest that the material that was described is obscene under current law and that the law completely covers it at this point.

But other examples have been given. What about a Playboy Magazine on the Internet? What about profanity? What about "Catcher in the Rye"? What about a discussion of how one can avoid getting AIDS and the specificity that might involve cyberspace conversations on that issue?

Do you want all of that material removed? If not, how do we, sitting here in Washington, decide what is or is not appropriate? I realize these are hard questions, but that is literally what, to some extent, we are being asked to do here: to define what is indecent, not just what is obscene but what is indecent. And that seems to be a tougher thing.

Any reaction, Dr. Elliott?

Dr. ELLIOTT. I have no problem with the concept of obscenity as it stands. I understand that my children cannot go to a magazine store and go to the back room—or the video store. And I have no problem with what they could get in normal sorts of stores and see on normal sorts of television before 10 o'clock at night. I just wish the computer industry had those same standards.

But I also understand that the computer industry is much more difficult to regulate than those things because essentially everybody is a broadcasting station, as I understand it in my very basic way. So that is why I think that technological methods might be necessary to actually just regulate that. Just to enforce the standards that we already have I think require technology to be put in place that we do not have.

Senator FEINGOLD. Ms. Shao?

Ms. SHAO. I think technology may not be adequate to screen that material. As you say, if there is a frank discussion about AIDS,

maybe there is language that is introduced within that conversation that could not be indecent under other circumstances. So I think that what needs to be put in place is a very, very narrow definition and penalties for transmitting hard-core pornography and for pedophiles looking for victims on the Internet.

Senator FEINGOLD. Is it possible that the current definition of the Supreme Court of obscenity is sufficient, as far as you know? In other words, when you start talking about hard-core pornography—this is a difficult question in terms of the law—it is possible you are only referring to what is already illegal as an obscenity with regard to the first amendment law anyway. Is it possible that the law is sufficient in that regard?

In other words, do you know of anything that you know for sure right now that you want banned which is not illegal under the obscenity standard?

Ms. SHAO. What I know for sure is not illegal is being distributed underground from what I understand, and it would be very difficult for minors to get access to that material.

Senator FEINGOLD. So it may be a question of enforcement rather than needing a new law. The law might be sufficient, but because of the complexity of this matter law enforcement resources may not be adequate, even though the law covers the materials being discussed here today.

Ms. SHAO. Well, the law then should be further defined to cover the Internet, then. If law enforcement, as in this particular case with Ms. Gruff, finds that they cannot find it on the books at this point to prosecute this man, then there is something wrong with that law. It needs to be defined further in regards to the Internet and in regards to protecting the minors.

Senator FEINGOLD. I do think we should take a case like this and make sure the law is adequate in that regard. I think that is a very fair point.

I do thank you, and I would just say, Mr. Chairman, that the intentions here are very, very positive to everybody. But the challenge here is to make sure—and it is so easy to slip into the other examples; you know, foul language, Playboy, these are some of the examples that are given.

I guess what I want to know—and you do not have to answer now—is it the intention to keep that stuff off the Internet, or is it more just sort of the hard-core and the obviously outrageous kind of harassment? That is the first thing we have to determine. Just how far do people want to go in terms of the content? Then it will be much easier to determine how we do it.

I thank the Chair.

Senator GRASSLEY. Senator Leahy?

Senator LEAHY. If I could just follow up a little bit. Ms. Shao, you are working with Enough is Enough, are you not, to educate children and parents about pornography?

Ms. SHAO. Yes, I am.

Senator LEAHY. I understand that one company, WEB-Track, has some blocking technology that they will make available for free from kindergarten up through I guess the higher grades. Are you letting schools know about the free availability of this kind of blocking technology?

Ms. SHAO. Yes; we do plan to. But the reason I am here today is because of the fact that I myself was not aware of the problem on the Internet until this occurred to my own daughter. And I am in the work world, and I am on the computer, and it was just—it was just so shocking. In addition to talking to other parents, who also were not aware of the problems, and then in talking to the children themselves, who, as victims, did not want to disclose the information to their parents, because of their level, I think, being a child, they almost thought that they brought this on to themselves.

Senator LEAHY. Ms. Shao, I am probably the only person sitting here at this table right now, I think, who has actually prosecuted people who were child molesters. Mr. DeWine and I are the only ones here who prosecuted people who were child molesters and sent those who tried to use children for pornography to prison. I have seen—and I will not even recount—some of the most horrible cases of pedophilia that you could imagine as a prosecutor. At the time I also had young children, and you are torn between making sure you enforce the law and just wanting to go out and take the law in your own hands.

I think about that because of what you just said about being amazed to see some of these things. In a different age, different technology, I was amazed to find some of the things that were being used then.

We found laws that were able to control it. As I said, there are laws today that for some reason are not being enforced.

Just as we tell our children whom they can associate with, we ought to be able to tell our children who they can associate with by picking up the telephone and talking. We are not going to do away with telephones because that may happen. We have tried to do something about that. The same with this, where it is actually easier to control it than it might be on the telephone.

You talk about the wonderful benefits of using the computer for research, communications, creativity, and entertainment, and I think every one of us, no matter how we approach this, would agree with that.

Would it be possible that there maybe some things as your children grow older that you may be willing to have them see or read that other parents might not be willing to have their children see or read? Is that a fair statement?

Ms. SHAO. Yes.

Senator LEAHY. Would it also be a fair statement to say that somewhere in here we have got to have some flexibility of parents to have some say in this and not turn it over entirely to a Federal bureaucracy? I am not trying to put words in your mouth, but I am just trying to get your feelings.

Ms. SHAO. I think that if you educate the parents and if you educate the children and you have restrictions on the system, then all parties can work within the boundaries. My children are not allowed access to R-rated or X-rated films. They are not allowed access to even soft-core pornography in book stores or even CD's and tapes that they cannot buy in stores anymore, amazingly.

So the restrictions are there. If the restrictions were on the Internet—and in addressing Senator Feingold's statement about

material, I certainly do not want to have the material restricted because there are adults that may want to have access to this information. But we just want the penalties in place so that it would deter activity on the Internet, I feel.

Senator LEAHY. Thank you, Ms. Shao.

Thank you, Mr. Chairman.

Senator GRASSLEY. I do not want to encourage a second round, but I do not want to cut anybody off, either.

Senator DeWine?

Senator DEWINE. I have no further questions, Mr. Chairman.

Senator GRASSLEY. I guess I just have one for summation. Senator Leahy mentioned that parents should have the responsibility of policing their computers, and I think we surely want to encourage that. Also, we all know that there are blocking devices available. But would all three of you on the panel agree that blocking devices would not be enough?

Ms. SHAO. Yes, I agree with that.

Senator GRASSLEY. Dr. Elliot?

Dr. ELLIOT. Yes, I believe I agree with that.

Senator GRASSLEY. Ms. Gruff?

Ms. GRUFF. Yes.

Senator GRASSLEY. OK; we have heard that current law should just be enforced, but in Ms. Gruff's situation and in the rest of our situations, nothing is stopping the problem; is that right?

Ms. SHAO. Yes.

Dr. ELLIOT. Yes.

Senator GRASSLEY. OK; I thank you all very much for your participation, and those of you who had to come a long way, particularly you, Ms. Gruff and Mr. Murray, thank you very much.

I will now call the next panel. Barry Crimmins is a journalist living and working in Ohio. He is a contributing editor to Moving Forward, which is a journal for adult survivors of sexual abuse. Mr. Crimmins has a fascinating story to tell us which I commend to my colleagues.

The next witness on this panel is Bill Burrington, who is assistant general counsel for America Online and chairman of the Interactive Services Association. Mr. Burrington will address what the industry is currently doing to grapple with the problems of pornography in cyberspace.

And the final witness is Stephen Balkam, who is director of the Recreational Software Advisory Council, which I think has done good work labelling violent video games to help parents control what their children are exposed to. He will discuss the possibility of using a similar rating system for cyberspace.

We will start with you, Mr. Crimmins.

PANEL CONSISTING OF BARRY F. CRIMMINS, INVESTIGATIVE JOURNALIST, LAKEWOOD, OH; WILLIAM W. BURRINGTON, ASSISTANT GENERAL COUNSEL AND DIRECTOR OF GOVERNMENT AFFAIRS, AMERICA ONLINE, INC., VIENNA, VA; AND STEPHEN BALKAM, RECREATIONAL SOFTWARE ADVISORY COUNCIL, CAMBRIDGE, MA

STATEMENT OF BARRY F. CRIMMINS

Mr. CRIMMINS. Mr. Chairman, members of the committee, thank you for this opportunity to use my first amendment right to speak out today about some very dangerous criminal activity that is proliferating unabated via computer throughout our Nation.

My name is Barry Crimmins. I am a writer and a children's rights and safety advocate residing in Lakewood, OH. I am also an adult survivor of childhood sexual abuse. Since this is a public hearing, I hasten to add that my abuse was not perpetrated by any member of my family.

Last September, I purchased a new computer with a modem in order to communicate online. I joined the service America OnLine. Among the services available on AOL is something called the "People Connection." People Connection is a three-tiered structure. The first two tiers or areas are accessible to anyone using the service unless the parental control software is utilized.

These two tiers are the "public" or AOL-sponsored rooms, and the "member" rooms created by the users of the service. A "room" is a place where someone who has signed on can meet and interact live with others by exchanging typed messages that appear in a large window or screen that everyone else in the room can read and respond to. These rooms are listed on a scroll, and a user may browse the list, select a room to enter, and join a discussion or debate with other members.

The third tier consists of private rooms. These are not publicly listed and are often used to rendezvous with other members without providing the rest of AOL's members access to their meeting.

I did not discover the member rooms until I was informed that there was a regular meeting of abuse survivors in this area. Before I could find the abuse survivors' room on the member scroll, I came upon numerous atrocious rooms. Many were obviously created by and for pedophiles. There were rooms promoting rape, incest, the exchange of child pornography, hate crimes, and every possible, and in some cases impossible, sexual activity. If one could imagine it, it was there. The first time I found the abuse survivors' room, it was located between a room called "DadsNDaughters" and another entitled "lilboypix."

I discovered that people enter these rooms and mainly communicate by "instant or private message" with other people who are in the room. It is in these private messages that most of the trading of graphic image files or "GIF's"—computerized transmittable photographs—is negotiated. It is, however, not unusual for people to just send unsolicited GIF's to everyone in the room on the "good faith" that they will have similar files returned to them. When AOL closes one of the particularly egregious rooms, they often suggest that the participants recreate the room as a "private room."

This, for all intents and purposes, says, "You may continue to conduct your illegal activity on our service—just do it in private."

My first response was to turn to AOL and demand that they take immediate action to prohibit such activities. After several weeks of communicating my outrage to them, it became clear that for whatever reason, AOL was not going to do anything to remedy the situation.

Since then, I have sought the assistance of various local, State, and Federal authorities. As I speak, much of the investigative work I have done is in the hands of said authorities. I hope this will result in the arrests of numerous traffickers in child pornography. I also hope that it establishes that AOL has had a great deal of prior knowledge as to how its service is being misused, and therefore, AOL facilitates and profiteers on these dastardly crimes. It is not hyperbolic to state that AOL is the key link in a network of child pornography traffickers that has grown exponentially over the last several months.

Child pornography is easily accessed on AOL. Working both under my own name and undercover, often with a profile that clearly stated I was 12 years old, I have been sent over 1,000 pornographic photographs of children via AOL. I have seen every possible type of sexual degradation of children of all backgrounds, from toddlers to teens. I have forwarded all of this material to AOL and the proper authorities.

AOL does not suggest that such files be forwarded to anyone but their Terms of Service Department, which may in and of itself be a crime. If AOL has not sent every, single file of child pornography that it has received to the authorities, then AOL has committed felonies, because if this is the case, AOL is a receiver of child pornography.

At one point, a particularly sick individual sent me, in my guise as a 12-year-old so much child pornography that it took 8½ hours to download it. AOL did not even e-mail me back to acknowledge receipt of it. I wrote and asked for a credit to my account for the time it took to gather this astonishing amount of crime evidence. AOL did not respond to this, either. Ten weeks later, this criminal was still online and actively exchanging child pornography in AOL's member rooms.

Much of the controversy surrounding the problems of online pedophiles centers on "parental controls." This issue completely disregards a serious reality—in many cases, the parents themselves are the perpetrators of these crimes. AOL constantly has rooms entitled, "Family Fun," "Nudist Families," "Incest is Best," "Have Hot Stepdaughter," and so on. In these rooms, child pornography is traded, and incest is discussed and celebrated. Many of the photos that are exchanged are purportedly of people's own children.

This committee is also concerned with children being able to access pornography online. Children accessing pornography is most serious when it is used by pedophiles to arouse their curiosity. Once they gain the child's attention, the child is more vulnerable. The worst possibility is that pedophiles will use the child's curiosity and vulnerability to gain physical access to them so that they might sexually and/or physically abuse these children. It is extremely probable that a number of missing children have dis-

appeared because of such contacts. In my investigation, many pedophiles, believing I was a 12-year-old, attempted to woo me in this fashion.

But of even more dire quantitative consequences is the easy access adults now have to child pornography. The development and growth of the Internet and online service providers has enabled exploiters of children to distribute child pornography to the masses. Computers and modems have created an anonymous "Pedophile Superstore."

The law of supply and demand is kicking in. The increased demand for child pornography directly translates into increased numbers of sexually abused children. You cannot have child pornography without abused children.

People who may have never acted on such impulses before are emboldened when they see that there are so many other individuals who have similar interests. What has recently taken place is nothing short of the de facto decriminalization of child pornography. This a full-scale emergency, and if the well-being and safety of any group other than children were threatened, we would never hear the end of it, nor should we.

Unfortunately, for exactly the same reason that children are the victims of these crimes, children are not being heard. They are weak, economically powerless, and generally not taken seriously.

What is needed right now is funding to create a task force of computer and legal experts to enforce zero tolerance for child pornography. As early as 1983, use of computer networking for pedophiles is being advocated in the notorious "North American Man Boy Love Association Journal." The pedophiles have a huge headstart. People need to see their neighbors who have committed these criminal acts taken away, jailed, and stigmatized as perverts. If this is done in a public, no-nonsense manner, it should seriously reverse the crisis that is destroying countless innocent children.

This crackdown must also include serious punitive measures against companies like AOL. The profit must be removed from "looking the other way." If AOL put a fraction of the effort into dealing with this problem that they put into spin-doctoring their culpability, things would improve rapidly. Kids cannot hire lobbyists and publicists with the profits derived from their exploitation to come up here and influence you. It galls me to think that I have paid AOL more than enough money to pay for the appearance of their counsel here today.

In the National Center for Missing and Exploited Children's excellent report, "Child Molesters: A Behavioral Analysis," the gravity of trafficking child pornography is addressed when the author aptly summarizes:

Any individual, however, who collects or distributes child pornography actually perpetuates the sexual abuse or exploitation of the child portrayed. It is no different than the circulation of sexually explicit pictures taken by a rapist of his victim during the rape. Such collectors of child pornography are in essence child molesters.

This report is a must-read for all interested in this problem and is an accurate checklist of the types of perpetrators I have encountered on AOL.

Senator GRASSLEY. Mr. Crimmins, how close are you to concluding?

Mr. CRIMMINS. I am getting there; I am very close.

Senator GRASSLEY. OK; I hope so—not because it is not interesting, but I want to be fair to all of our witnesses.

Mr. CRIMMINS. I understand. It is 7 months I am trying to boil down.

Senator GRASSLEY. Go ahead.

Mr. CRIMMINS. I have met many child pornography traffickers on AOL who were touting their first amendment right to possess and exchange whatever material they chose to. These people are deluding themselves if they think child pornography is protected speech. It is not. It is crime evidence.

Now, very simply, I will boil down the rest of what I have to say. The genesis of this problem comes in the member rooms on AOL that are created by the members. That is where you find it, and in my testimony, in the printed part, I have included dozens of these room listings that are so obvious that anyone who saw them trying to post this would stop it. So the only thing that stops this is software, so if you misspell it—if you spell it “childpooorn” with three O’s, it is right up and on the board, and they are in business, and they are trading child pornography, and those rooms fill up, and it is going on all the time.

I have explained this to AOL. I have sent them extensive questions, almost an interrogatory, for the past several months. Their response has been arrogant and dismissive, and it has annoyed me. I am here to tell the American people today that not only are their children in danger when they are on AOL; they are in danger because of America OnLine.

Thank you.

Senator GRASSLEY. Thank you, Mr. Crimmins.

[The prepared statement of Mr. Crimmins follows:]

PREPARED STATEMENT OF BARRY F. CRIMMINS

SUMMARY

There is a major crime wave taking place on America's computers. The proliferation of child pornography trafficking has created an anonymous “Pedophile Superstore.” As a result, the de facto decriminalization of child pornography is taking place. The demand for child pornography is also a demand for innocent children to be abused. Child pornography is not protected speech. It is crime evidence. The on-line service “America OnLine” (AOL) has become an integral link in a network of child pornography traffickers. It cannot claim that it is not aware of this. If AOL just put a percentage of the effort it makes to spin-doctor away its culpability for these problems into solving them, inexpensive and effective solutions could be found. AOL has been unresponsive and arrogant when approached in a good-faith effort to solve these problems. This testimony is the result of over six months of research. It documents something the American people need to know: not only are their children unsafe on America Online, their children are unsafe because of it.

CHILD PORNOGRAPHY ON THE INTERNET

Mr. Chairman, members of the Committee: Thank you for this opportunity to use my first amendment right to speak out today about some very dangerous criminal activity that is proliferating unabated via computer throughout our nation. My name is Barry Crimmins. I am a writer and a children's rights and safety activist residing in Lakewood, Ohio. I am also an adult survivor of childhood sexual abuse. Since this is a public hearing, I hasten to add that my abuse was not perpetrated by a member of my family.

Last September, I purchased a new computer with a modem in order to communicate "on-line." I joined the service America OnLine (AOL) because I wanted to be able to quickly access and computerize information that was of interest to me.

Among the services available on AOL is something called the "People Connection." People Connection is a three-tiered structure. The first two tiers or areas are accessible to anyone using the service unless the parental control software is utilized to limit a child's access. These tiers are the "public" or AOL-sponsored rooms and the "member" rooms created by the users of the service. A room is a place where someone who has signed-on can meet and interact live with others by exchanging typed messages that appear in a large window or screen that everyone else in the room can read and respond to. These rooms are listed on a scroll and a user may browse the list, select a room to enter, and join a discussion or debate with other members. The third tier consists of private rooms. These are not publicly listed and are often used to rendezvous with other members without providing the rest of AOL's members access to the private electronic gathering. For several months, I did not discover the member rooms until I was informed that there was a regular meeting of Abuse Survivors in this area.

Before I could find the Abuse Survivors' room on the member scroll, I came upon numerous atrocious rooms. Many were obviously created by, and for, pedophiles. There were rooms promoting rape, incest, the exchange of child pornography, hate crimes, and every possible, and in some cases impossible, sexual activity. If one could image it, it was there. The first time I found the Abuse Survivors' room, it was located between a room called "DadsNDAughttrs" and another entitled "lilboypix."

I discovered that people enter these rooms and mainly communicate by "Instant (or private) Message" with other people who are in the room (there is a constantly updated roster of who is in the room available at the push of a button). It is in these private messages that most of the trading of graphic image files or "GIF's" (Computerized transmittable photographs) is negotiated. It is, however, not unusual for people to just send unsolicited GIF's to everyone in the room on the "good faith" that they will have similar files returned to them. The rooms that I have investigated have been almost exclusively child pornography exchanges, but I have followed some of the traders of such material into adult porn rooms where they continued to solicit and exchange child pornography. When AOL closes one of the particularly egregious rooms, they often suggest that the participants re-create the room as a "private room." This, for all intents and purposes, says "you may continue to conduct your illegal activity on our service—just do it in private."

My first response was to turn to the "service" and demand that they take immediate action to prohibit such activities. After several weeks of communicating my outrage to them, it became clear that for whatever reason, AOL was not going to do anything to remedy the situation. Since then, I have sought the assistance of various local, state, and federal authorities. As I write this, much of the investigative work I have done is in the hands of said authorities. I hope this will result in the arrests of numerous traffickers in child pornography. I also hope that it establishes that AOL has had a great deal of prior knowledge as to how its service is being misused, and therefore, AOL facilitates and profiteers on these dastardly crimes. It is not hyperbolic to state that AOL is the key link in a network of child pornography traffickers that has grown exponentially over the last several months.

Child pornography is easily accessed on AOL. Working both under my own name and undercover (often with a profile that clearly stated I was 12 years old), I have been sent over a thousand pornographic photographs of children via AOL. I have seen every possible type of sexual degradation of children, from toddlers to teens. I have forwarded all of this material to both AOL and the proper authorities. AOL does not suggest that such files be forwarded to anyone but its Terms of Service department (which may, in and of itself, be a crime). If AOL has not sent every single file of child pornography it has received to the authorities, then AOL has committed felonies. Because if this is the case, AOL is a receiver of child pornography. At one point a particularly sick individual sent me (in my guise as a 12-year-old) so much child pornography that it took eight and a half hours to download it. AOL did not even e-mail me back to acknowledge receipt of it. I wrote and asked for a credit to my account for the time it took me to gather this astonishing amount of crime evidence. AOL did not respond to this either. Ten weeks later this criminal was still on-line and actively exchanging child pornography in AOL's member rooms.

Much of the controversy surrounding the problems of on-line pedophiles centers on "parental controls." This issue completely disregards a serious reality: in many cases the parents themselves are the perpetrators of these crimes. AOL constantly has rooms entitled "family fun," "Nudist families," "Incest is best," "Have hot step-daughter," and so on. In these rooms, child pornography is exchanged, and incest

is discussed and celebrated. Many of the photos that are exchanged are purportedly of people's own children. So, the myth that parents should be the sole entity that should protect children on-line, or anywhere else, is once again exploded.

This committee also is concerned with children being enabled to access pornography on-line. Children accessing pornography is most serious when it is used by pedophiles to arouse their curiosity. Once they gain the child's attention, he or she is much more vulnerable to exploitation by a pedophile. The worst possibility is that pedophiles will use the children's curiosity and vulnerability to gain physical access to them so that they might sexually and/or physically abuse these children. It is extremely probable that a number of missing children have disappeared because of such contacts. In my investigation, many pedophiles, believing that I was a 12-year-old, attempted to woo me in this fashion.

But, of even more dire (quantitative) consequence is the easy access adults now have to child pornography. The development and growth of the Internet and on-line service providers has enabled exploiters of children to distribute child pornography to the masses. Computers and modems have created an anonymous "Pedophile Superstore." The law of supply and demand is kicking in. The increased demand for child pornography directly translates into an increased number of sexually abused children. You cannot have child pornography without abused children. People, who may have never acted on such impulses before, are emboldened when they see that there are so many other individuals who have similar interests. What has recently taken place is nothing short of the de facto decriminalization of child pornography. As a result, countless innocents are being abused and having their lives destroyed. This is a full-scale emergency and if the well-being and safety of any group other than children were threatened, we would never hear the end of it. Nor, should we.

Unfortunately, for the exact same reason that children are the victims of these crimes, children are not being heard. They are weak, economically powerless, and generally not taken seriously.

What is needed right now is funding to create a task force of computer and legal experts to enforce Zero Tolerance for Child Pornography. As early as 1983, use of computer networking for pedophiles was being advocated in the *North American Man Boy Love Association Journal*. The pedophiles have a huge head start. People need to see their neighbors (who have participated in these criminal acts) taken away, jailed, and stigmatized as "perverts." If this is done in a public, no-nonsense manner, it should seriously reverse the crisis that is destroying countless innocent children.

This crackdown must also include serious punitive measures against companies like AOL. The profit must be removed from "looking the other way." If AOL put a fraction of the effort into dealing with this problem that they put into spin doctoring their culpability, things would improve rapidly. Kids cannot hire lobbyists and publicists with the profits derived from their exploitation to influence you. It galls me to think that I have paid AOL more than enough money to pay for the appearance of their attorney here today.

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I have met encounter many child pornography traffickers on AOL who were touting their first amendment right to possess and exchange whatever material they care to. These people are deluding themselves if they think child pornography is protected speech. It is not. It is crime evidence.

RESPONSE TO AOL'S CORPORATE ALIBIS

AOL has consistently claimed that most of these problems are occurring in private e-mails. And therefore they are helpless to do anything about it, without violating the rights of all members. The actual transfer of illegal materials takes place via e-mail, but the genesis of these transactions is easily traced to publicly accessible member rooms. Without these rooms, the perpetrators of these crimes would be unable to network with other faceless criminals. AOL maintains that it could never police the problem, but it would be simple and relatively inexpensive to have all member-created rooms cleared by properly trained staffers. Under AOL's present system, only easily fooled software stands between a pedophile and the creation of

an egregious room. A slight misspelling and the most brazen of rooms is on-line and in business.

AOL frequently claims that there are minimal problems on its service because all members are required to understand and conform to its Terms of Service (TOS). I doubt that these complicated rules are read or understood by members. Terms of Service contains strict guidelines for on-line conduct. For example, profanity, harassment, and the exchange of illegal files are all TOS violations. If AOL enforced these rules, their service would be a much safer and genuinely "family friendly" place. But since these rules are not enforced, AOL is an unsafe place for many people.

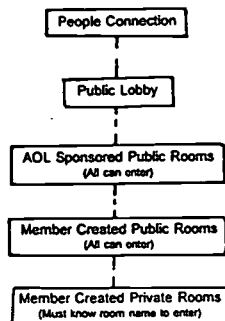
AOL maintains that only a small percentage of its members are involved in illegal activities. This is probably true. However, it would be interesting to determine what percentage of its income is derived from such persons. It takes a lot of time to up and download Graphic Image Files (GIF's). This results in very high AOL bills for the traders of such files. Time and again, AOL has told me that as soon as they close one room, another opens. Exactly. Under the current system there is always somewhere for child pornography traffickers and pedophiles to go. This problem would be easily solved with the use of live staff members to approve or disapprove of rooms. But this, of course, would mean there would no longer always be another egregious room opening. The expense of hiring a few more staffers would be a pittance to such a going concern (AOL added 500,000 customers between Christmas 1994 and early March of 1995). Additional staffing would be a minimal expense, unless AOL is including in its cost the loss of a "small percentage of customers" who just happen to have inordinately high monthly bills.

America Online is a publicly owned business. There are stockholders to whom the management is accountable. If I were one of those stockholders, I would seriously question the vision and judgment of those currently in power. They are conducting business in a very questionable fashion. They have a thriving and dynamic company with unlimited potential to be a valuable asset to the American people. Unfortunately, their current business practices do not indicate that the company's future is necessarily rosy. The customer is not always right at AOL, as a matter of fact, the customer is generally ignored or dismissed with an impenetrable bureaucracy and treated as if they are impertinent and a petty bother in the process. Time constraints preclude me from including much of the printed documentation of my correspondence with AOL in this oral testimony. But I have made copies of some of the more telling exchanges for distribution to the committee and the press. In particular I ask that you review the 17 questions in Attachment C. that I sent to AOL's media relations director Pam McGraw and the woefully inadequate response I received from her (Attachment D.). Also, I have included a list of several dozen of the rooms about which I have complained to AOL. Their very titles provide a brief, yet shocking, illumination of the depravity that is publicly exhibited on a daily basis on AOL's member room scroll. I would also be happy to make this material available to other on-line services, including the new Microsoft Net, as a template of what not to do.

In closing, I am here to tell the American people that not only are their children unsafe on AOL, their children are unsafe because of it.

ATTACHMENT A

America OnLine Room Chart



ATTACHMENT B

CORRESPONDENCE BETWEEN BARRY CRIMMINS AND AMERICA ONLINE

2-2-95

To: the Toadvisor,

Last week I forwarded child pornography to aol that was sent, unsolicited, to me through your service. After 7 days I received a response that told me that even though I was an offended party I had no right to be informed of the actions (if any) that were taken against the criminal who offended me. This is a completely unsatisfactory response.

That aside, the problem I have with private rooms is not that I'm harassed in them. I never frequent these rooms except to follow obvious pedophiles into them. My problem is that aol has a policy of suggesting that offensive member rooms become private rooms when the tos advisor shuts them down. I have seen this happen (and have a record of this) when the suggestion was made in a room full of people exchanging child pornography. As far as I'm concerned, this announcement was a formal facilitation of child pornographers by aol. I have written and asked for a clarification and all you suggest is I hit the ignore button. Well ignoring child pornography does not stop its spread, nor does it relieve aol of its responsibilities when its service is being used as a "safe harbor" for such criminals.

It took one week to receive a completely unsatisfactory response from aol about these matters. I have tried to give aol a fair chance to take appropriate action or to even say, "Now that you bring that up, perhaps we need a more specific policy about * * *". Instead all I received was a corporate suggestion to "ignore" pedophiles. Well I will not bury my head in the sand about this, nor will I be silent about my dissatisfaction with your service. Please let me know who I should address formal journalistic inquiries to at aol and kindly include a telephone number. Thank you.

Very truly yours,

(Typed) Barry F. Crimmins.

1-29-95

To TOS Staff, I am a journalist as well as a children's rights and safety advocate. I have filed dozens of complaints w/aol about pedophile chat rooms. Lately, to your credit, there has been an improved vigilance by tos staff on these matters. However, I have been sent child pornography without solicitation (when I was just checking out child pic exchange), I forwarded it to aol and never had it acknowledged.

Also I cannot complain severely enough about aol's practice of suggesting (when they shut down obvious pedophile rooms) that the occupants continue their endeavor in a private room. This results in the formal sanctioning by aol of "safe harbors" for pedophiles, child pornographers etc.

I hope that the piece I'm writing has a happy ending. I hope it is the story of how aol used some of its massive profits to assure itself and the world that the safety and innocence of children are your service's utmost priority. If this is the case please contact me as I think I can be of assistance.

Very truly yours,

(Typed) Barry Crimmins.

Date: Thu, Feb 2, 1995 3:50 PM EST
 From: TOSAdvisor
 Subj: Re: Terms Of Service
 To: [Barry Crimmins]

Dear Member:

Thanks for reporting the adult graphics file you received. We'll look into it and take the appropriate action.

America Online takes the transfer of this material very seriously, and will cooperate with investigations by local, state or federal law enforcement agencies in order to curb this activity.

For confidentiality reasons, we cannot disclose information on actions we've taken against other members, however, the resources available to us include written warnings and account termination.

If the situation merits, we may bring charges against the senders.

Actions within a private room do not fall under the jurisdiction of the Terms of Service. We strongly suggest that if you are being harassed by someone in a private room, you use the "ignore" button to block their dialogue from your screen.

Regards,

(Typed) Terms of Service Staff,
America Online, Inc.

Date: Wed, Feb 8, 1995 5:26 PM EST
From: PHYPOLITE
Subj: Re: pic
To: [Barry Crimmins]
Dear Mr. Crimmons:

Thanks very much for forwarding this information to me. While policy does not allow me to relay the exact status of another member's account to you, please know that I have taken appropriate action against the sender.

AOL has zero tolerance for any exploitation of children on our service, and I'm sure you are aware that we take very strong steps to respond to these activities, once they are brought to our attention.

I have also taken the liberty of forwarding your email to our Corporate Communications Department, so that they are allowed the opportunity to address your concerns as they relate to media.

Again, thank you for your interest in upholding AOL's community standards, and if you have any further questions or comments, please be sure to write again.

Best Regards,

(Typed) Pete Hypolite,
*Manager, Terms of Service,
America Online, Inc.*

Date: Fri, Feb 10, 1995 10:18 AM EST
From: PamMcGraw
Subj: Online experience
To: [Barry Crimmins]

Hi, I'm Pam McGraw, Director of Media Relations for AOL. The issue of child pornography was addressed in a January letter from Steve Case (keyword: letter). If you have any additional questions regarding child pornography on AOL, please contact me directly.

Regards,

(Typed) Pam McGraw.

Date: Sun, Feb 12, 1995 4:27 AM EST
From: [Barry Crimmins]
Subj: Perp rooms
To: PamMcGraw
cc: PHYPOLITE, Steve Case, Spiker M

(Note I couldn't even get system to accept this guide page—got "Your message could not be addressed. Try again later" I have for 40 minutes. Not one of these rooms has been removed in the interim.)

Dear AOL Officials, There seems to be no improvement with these type of rooms, no matter how many complaints and reassurances. The guide pagers are not getting the job done. I in no way am questioning AOL's intentions but as these two scrolls of chat rooms 4 hours apart indicate, there is a serious problem that has yet to be resolved.

The offending rooms at 4am 2-12-95 in the guide pager report that "could not be addressed": Incest, Child pornography, pedophilia, rape etc. Promoted in these rms (some were reported 4+hrs ago)—Vyung fmpics, Daddy, dadsn daughters, Hot4 auntie, Boy 4 Big Brother, Family fun, M4m Jr High only, personal teen pics, Ynggirl14mom, trading teen pics, Luv hairy boys m4m, Dad nds hot yngr f, under 15, Yngm iso daddy, iso yng girl, boys in undies pics, Rape fantasy, forcd fantasy forF, Daddys home lil girl.

Thank you for prompt attn. cc/ P.Hypolite, P McGraw, S.Case

Date: Sun, Feb 12, 1995 11:18 PM EST
 From: [Barry Crimmins]
 Subj: Aol pedophile policy
 To: PamMcGraw

Dear Pam,

Thank you for your letter. I have been on-line for dozens and dozens of hours researching on-line pedophiles. It is rare for there to be less than ten rooms that are serious problems. If I had to put a figure on it I would say the average number of offending chat rooms per scroll is at least 15. There have been times lately when there are only three or four of these rooms but there has never been 24 straight hours when the problem hasn't risen to previous levels.

Although it seems to me that some sincere efforts are being made by AOL, much more needs to be done. I am going to be writing and/or producing a story about this situation. I would prefer that it be the story of how AOL is truly setting standards not only as the best on-line service but the most conscientious. From the thoughtful notes I received from both you and Mr. Hypolite, I know that there are people in authority at AOL who are willing to make that happen.

I have many, many documents that verify what is going on in the chat rooms. I have been sent child pornography on six occasions. I also have a considerable amount of correspondence with AOL guides, advisors etc. that illustrate a rather naive approach to dealing with this problem. I would be glad to make portions of this material available to AOL in hopes that it would increase awareness about the problem of pedophiles on-line. I also have a number of suggestions that may be helpful as AOL revamps the procedure for closing these offensive rooms.

I would like to speak to you about these matters as soon as possible. I can be reached at (216) 221-8223. I will also try to call you at AOL. Thank you for your time.

Very truly yours,

(Typed) Barry F. Crimmins.

Hypolite and McGraw read the ?s 2-15-95 @ 1 pm est- response pending

This last email seems great until you receive it from three different guides in a 2 week period.

Date: Tue, Feb 14, 1995 10:54 PM EST
 From: Guide JAL
 Subj: Re: Guide Pager
 To: [Barry Crimmins]

Thank you for the Guide Pager notice!

Room names such as the one you are referring to are created by members. Room names are scanned on a regular basis, but rooms at one end of the list are frequently recreated by the time the other end of the Rooms list is reached. The TOS staff is currently in the process of revamping the procedure for closing such rooms so that this problem can be better handled. If you have any questions or comments regarding a specific room name, you can contact the Terms of Service staff via Keyword: TOS, or by selecting the Terms of Service option from PC Studio (either the PC Studio icon on chat screens, or Keyword: PC Studio).

Thank you for your understanding. :)

(Typed) Guide JAL.

ATTACHMENT C

QUESTIONS FROM BARRY CRIMMINS TO AMERICA ONLINE

Sent: 95-02-14

Dear Pam,

I in no way want to ambush anyone I speak to about this story (except of course pedophiles). So here are some of the questions I will be looking to have answered:

- (1) What is AOL's assessment of the problem of on-line pedophiles?
- (2) In a letter from a Tos guide, I was informed that AOL is "revamping its procedure" for closing offensive rooms. If true, what does this procedure entail?

- (3) Has AOL brought in any consultants who are experts on pedophiles? If so, who?
- (4) Has AOL ever considered segregating "adult chat rooms"? (For example nobody with a profile that says they are a minor is permitted)
- (5) Would AOL consider creating a different chat area for teens?
- (6) Does AOL realize that if abuse survivors want to search for a chat room to discuss their lives with other survivors, they are often subjected to scrolling through any number of rooms that celebrate sexual abuse?
- (7) Just recently AOL stopped suggesting that participants in offensive rooms, closed for TOS violations, consider just moving their gathering in a private room. Why and when was this policy changed? Why was it ever in place?
- (8) Is it possible for AOL to restrict access to certain areas to any account (not screen name but entire accounts) that has been used repeatedly to participate in obvious pedophile chat rooms?
- (9) Would AOL consider giving a cyber-hub (if that's what you call it) to a consortium of pro-child non-profit organizations?
- (10) Would AOL consider placing an Email address for the FBI on its service so that people, sent illegal files (child pornography in particular), could instantly transfer them to the federal authorities?
- (11) How is the AOL on-line staff selected and trained? Are these people all paid employees?
- (12) Why doesn't AOL have the equivalent of broadcasting's "kill switch"? In other words as soon as someone creates a room it would have to get through AOL's "goalie". If it is in obvious violation of TOS it is closed before it opens.
- (13) How does AOL feel about its service being misused to the point where it has become an integral part in a network of child pornographers?
- (14) In the past AOL has assured users that it could handle the burgeoning problem of on-line pedophiles "in-house". However the incidence of such criminal activity has grown dramatically in the past year. What changes in policy, implementation etc., has AOL adopted to transform current assurances into a workable and consistent program of enforcement of your services own TOS policies?
- (15) How many AOL staffers are currently assigned to policing member created rooms? How many worker hours per week does this entail?
- (16) What is AOL's take on the Baker BBS Rape fantasy case in Michigan?
- (17) Some legislators are already looking into on-line abuses. Does AOL expect the government to get involved in the regulation of on-line services?

I am certain that in the course of any interviews I conduct, several extemporaneous questions will also occur. I hope that this advance list will be considered as a show of good-faith on my part. I am also sending Mr. Hypolite a copy of this letter because I feel many of the questions are about matters that are under his jurisdiction. Thank you for your time.

Very truly yours,

(Typed) Barry F. Crimmins.

ATTACHMENT D

AMERICA ONLINE'S RESPONSE TO QUESTIONS POSED BY BARRY F. CRIMMINS

Sent: 95-02-21 09:46:20 EST

Dear Barry,

Thanks for your letter pertaining to the problem of pedophiles on line. I hope the following answers clearly indicate where America Online stands on this issue and what is being done to combat the trafficking of child pornography on the service. Throughout these answers we refer to TOS—Terms of Service—which are guidelines for using the AOL service. I trust you are aware of these and you can access TOS by using keyword: TOS.

- (1) AOL has been forthright about the issue both with its members and with law enforcement agencies (see Steve Case letter dated 1/695). Unfortunately, the gravity of such offenses can sometimes leave the mistaken impression that they are much more commonplace than is true. With more than 2 million subscribers—the largest online service in the U.S.—the number of pedophiles using America Online represents a tiny fraction of our member community.
- (2) America Online is considering a number of tools to make the jobs of TOS and AOL Guides easier. However, at this point in time, it would be premature to discuss the details.
- (3) Child pornography is illegal. When the transmission of child pornography through private communications is brought to AOL's attention, once it is deemed illegal, the proper authorities are notified.
- (4) America Online expects all members to follow its TOS guidelines. To segregate rooms based on behavior in those rooms would imply that AOL sanctions different rules and regulations for different rooms. AOL has one community and one set of rules for the members of that community.
- (5) There is an area on AOL for teenagers called "Teen Chat" in the People Connection.
- (6) While we are aware that there are chat rooms that offend the sensibilities of some of our members, unless the rooms violate TOS we cannot remove them from the service. If the rooms, as you suggest, "celebrate sexual abuse," TOS should be notified and the offending rooms will be removed.
- (7) Rooms terminated for TOS violations are removed from the service. TOS may suggest members create private rooms in instances where participants are scrolling or otherwise creating a nuisance and disturbing other members.
- (8) If a member violates TOS, he or she may be warned or, depending on the severity of the infraction, be removed from the service.
- (9) AOL has conducted a number of conversations with various non-profit organizations, some of them dealing with children's welfare.
- (10) Members who receive illegal information through the service can forward that information to TOS and, if it is deemed illegal, the proper authorities are notified.
- (11) Members of the TOS staff are internal, paid employees who are trained in TOS rules and procedures. AOL Guides are remote volunteers who use overhead accounts. They are also trained by TOS staff and are screened before becoming Guides.
- (12) Online is a real-time, interactive service. America Online is considering a number of tools to make the jobs of TOS and AOL Guides easier.
- (13) While we acknowledge such activities do take place, with more than 2 million members they are the exception rather than the rule.
- (14) While the number of such incidents may be going up in your eyes, so is the number of AOL members. We have added more than 500,000 members since December alone.
 Child pornography is illegal. When the transmission of child pornography through private communications is brought to AOL's attention, once it is deemed illegal, the proper authorities are notified.
 We've had a growing problem with member-created rooms whose title and discussion violate our Terms of Service. As more and more members abuse the privilege and establish rooms that suggest illegal activity, or detract from the enjoyment of others with offensive titles, we are faced with looking at a higher level of safeguards as it relates to member-created rooms. America Online is considering a number of tools to make the jobs of TOS and AOL Guides easier.
- (15) AOL staffs its service 24 hours a day and staffs according to growth.
- (16) AOL does not comment on specific cases.
- (17) Overall, the online services industry is making a concerted effort to police their own services.

I hope these answers have been of assistance.

Regards,

(Typed) Pam McGraw.

ATTACHMENT E

MEMBER ROOM TITLES FOUND ON AOL

Some of these rooms seem innocent, but I have checked, and believe me, they are all frequented by pedophiles and traffickers in child pornography:

EXAMPLES OF MEMBER ROOM TITLES FOUND IN AOL

| | | |
|------------------------|---------------------------|--------------------------------|
| Vyung fmpics | For cool 10 to 13 yr | Aunts and nephews |
| Daddy | teens 12 to 14 | parntsanddghtr |
| dadsn daughters | Hott teen fuc pics | need mommy to teach son |
| Hot4 auntie | Momdadsisbro | teenpcc trade plus |
| Boy 4 Big Brother | teen bottomless beach | teen incest stories |
| incest is best | Bif25isotngteentf | Daddy and son |
| Family fun | ynxpics | daadys lil girl |
| M4m Jr High only | dremz of little girls | yf pic bartering |
| personal teen pics | dadys personal pics | Dady plays with son |
| Ynggirl14mom | incest dau | Teen pics of girls |
| trading teen pics | Boypjg | Preggiiffsssteent |
| Luv hairy boys m4m | ynq fem oic trade | gm14 and 12 doin it |
| Dad nds hot ynqr f | Son4mom | parents who paddle |
| under 15 | Rape fantasies | Yocuuunngteen m inohio |
| Yngm iso daddy | teen masterbation | under16 snaps |
| iso yng girl | ym 4m everseendad | Family affairs |
| boys in undies pics | m4vryngmpics | Jr High xxxxxxxx |
| Rape fantasy | ISOyngfempics | Gay sons 4 gay dad bear |
| forcd fantasy forf | family is incest | ny16old 4 ny 11old sex |
| Daddys home lil girl | preteens in bikinis | Crpl punish at home |
| Raunchy ynf f pics | Dad took pics | dauger nds training |
| hairless little vulvas | Likes em under 12 | My sis caught mechild pccom |
| preschoolgyfs | brothers and sisters | pedochattandgiff |
| young teen pics | girl undershirt pics | Dads4 sons incest |
| preteen pic exchange | Have hot stepdaughter | for 6 gradersonly |
| teen snatch pics | girls underwear pics wntd | PREtTy TEENPIC TRADE |
| l do dgthr | pubescent foto | PREtTy TEEN GYYYFS |
| Rape | teenm who mastrb | PREtTy TEEN BOY ACTION |
| Teen F polamids | teen porno | PICS |
| y male pic trade | Jr high girls pix | very preteen gyfs |
| found pics of sis | Preteen action gyfs | Yxrxgpxdbrxaxdrex ¹ |

¹ Note: This is a new device—putting an x between every letter of the room title, this one says "yng pic trade".

There are dozens of room names more that I will make available upon request. In the last few months AOL's software must be catching some more stuff because most of the rooms are now spelled incorrectly or employ the x-device.

Senator GRASSLEY. Mr. Burrington?

STATEMENT OF WILLIAM W. BURRINGTON

Mr. BURRINGTON. Thank you. I am glad to be here—I think. [Laughter.]

Mr. Chairman and members of the committee, my name is Bill Burrington, and I am chairman of the Online Policy Committee of the Interactive Services Association, which is based here in Silver Spring, and assistant general counsel and director of government affairs for America Online in Vienna, VA.

I appear before you today on behalf of the Interactive Services Association, or the ISA as I will refer to it, and its Online Policy Committee, whose members include all of the major online/Internet

service providers, such as America Online, CompuServe, MCI, Microsoft, Network, and Prodigy.

We understand that the purpose of these hearings is to discuss the responsibility of interactive online services, including those that provide access to the Internet, for the act of transmitting material to minors that is deemed to be indecent.

Our industry is concerned about children's access via online services to materials that their parents believe to be inappropriate. We also want to ensure that Congress creates an effective response that will not devastate the myriad benefits to our country, and frankly to the world, that will result from active participation in the global information infrastructure.

We want to work with Congress to protect children, empower parents to screen out unwanted material, and preserve constitutional guarantees of free speech, free press, and individual privacy.

Your bill, Mr. Chairman, would target for liability online service providers while ignoring content providers and subscribers who create, control, and upload indecent material onto our networks.

What is more, the online providers would be liable under this bill for indecent communication regardless of any measures they may take to limit access or to screen content providers on their system.

Statutory defenses for providers who make good faith efforts to screen and block indecent materials to minors would provide an industry incentive to develop effective blocking and screening devices. The lack of such defenses in this bill would serve as a disincentive for investing in such efforts.

Even without any legislation, the market is already acting to address the concerns of parents, educators, and others who are interested in controlling the flow of information accessible via computer. Just last week, companies such as ours, America Online, Webster Network Strategies, SurfWatch Software, and Netscape announced new products and services that allow users to screen from their online systems content they find offensive.

Mr. Chairman, I would like to reference the editorial in today's Wall Street Journal which discusses these technology tools and some of the other approaches that Senator Leahy and Senator Feingold mentioned today, and I would like to ask that this editorial be submitted as part of the record.

Senator GRASSLEY. It will be included. I should remind anybody, including the first panel, that any written statements that go beyond your verbal statements will be included in the record.

Mr. BURRENTHON. Thank you, Mr. Chairman.

[The Wall Street Journal editorial was not available at press-time.]

Mr. BURRENTHON. In our written testimony submitted to the committee, we expand upon three key points, and I will summarize those very briefly.

First, constitutional guarantees of free speech and press should be cautiously guarded. We urge Congress to consider the least restrictive alternatives in achieving the goal of protecting minors from indecent materials.

Second, the online service provider industry should be encouraged to provide voluntary editorial control over its services and to continue its research and development of parental empowerment

technology tools. This industry should not be cast in the role of national censor, or national "net-cop," determining which information may be fit for children, but nonetheless subject to criminal liability if it guesses incorrectly in any given instance.

And finally, the ISA agrees with the Department of Justice and the American Family Association that existing criminal laws suffice to punish the use of computer networks for obscenity and child pornography. We believe that current law negates the need for new legislation, either federally or at the State level.

Technological relief is currently available, and more is underway. For example, at America Online, our parental control technology was put in place 2 years ago, way before this became a sexy issue, so to speak. Prosecutors appear to have the prosecutorial tools they need as well. And to my knowledge, the Justice Department has not asked for new criminal laws to combat smut on the Internet.

The online service provider industry has developed a broad array of technological screening devices, with the promise of more to come. It is sad and ironic that S. 892 intends to reward industry for its efforts with criminal liability. The current industry initiatives include the following.

First, providers can control the audience, the kinds of people who subscribe. We require a credit card or a checking account and require that master account holders be at least 18 years of age or older.

Second, providers can help the subscribers control the audience.

Third, providers can exercise control over the topics of the chat lines and conferences that they sponsor and, consistent with Federal law, can monitor many of these activities, which we do.

Fourth, while online operators cannot legally monitor e-mail, they act on complaints brought to their attention, as we did here by Mr. Crimmins, by subscribers who receive offensive material by e-mail.

And finally, particularly with regard to the Internet, many providers are incorporating powerful new blocking and filtering technology to empower parents to make choices consistent with their own particular values about the material that their children can access.

Let me respond briefly to comments by Mr. Crimmins, and I would, Mr. Chairman, like the opportunity to respond a little bit more in detail during the question and answer session. I think there were some statements made that are accurate and some that are bit misleading, and we appreciate Mr. Crimmins' involvement in this issue and we want to make sure we have an accurate record.

First of all, we take what Mr. Crimmins said and says very seriously. We also have zero tolerance for child pornography obscenity on our service, and I think that has been slightly mischaracterized here today.

We are grateful to subscribers like Mr. Crimmins who help make our system better. Our systems are not perfect, and subscribers like Mr. Crimmins help to test the limits of our policies. We try to respond as promptly as we can. A lot of what we have seen and heard today I think could be characterized as growing pains. We are all having growing pains. All of us in this room are trying to

understand this technology. We had 300,000 subscribers 2 years ago; we have 3 million as of today, and there seems to be no end in sight to the development of this industry.

Law enforcement has some growing pains here, too. I think they are trying to apply existing criminal laws to a new technology and trying to understand it. I think we are all basically trying to understand this. Parents are trying to understand it. Children are trying to understand it. So I am glad that we are here today, and I applaud you, frankly, for having the first hearing on this important issue.

Parental control, we believe is the ultimate answer, and Mr. Crimmins acknowledges that this is in place at AOL. Mr. Crimmins rejects parental control on the basis that some parents transmit images of their own children, but we think this misses the point. Parental control protects the vast majority of families where parents want to control what their children do. The ability to empower parents with meaningful control is in no way negated by the criminal behavior of a few.

Also, AOL does request that subscribers forward offense and inappropriate material to it and that such information that is in violation of law is forwarded to law enforcement. This was confirmed to Mr. Crimmins on several occasions, and I can categorically confirm that such is the practice at AOL today. We work closely with law enforcement. We have very active so-called "electronic neighborhood watch" programs out there, where people are continuously sending to us information that they deem to be illegal, or child pornography, and we act upon that.

The crux of Mr. Crimmins' complaint is that AOL should have live monitors on chat rooms and that we should read private electronic mail. We do monitor chat rooms and the rooms themselves, and we do remove from chat room listings any room that is not in compliance with our terms of service. We also have live monitors monitoring rooms as well.

It is our view that we cannot without legal process monitor and disclose private e-mail. We do request that offensive e-mail be forwarded to us. When it is, we can act upon it because permits a party to a communication to consent to its disclosure. If neither party to the communication consents to the e-mail, it is our view that the Electronic Communications Private Act prohibits us as a service provider from monitoring and disclosing e-mail to law enforcement or to anyone without appropriate legal process.

Let me say that we no longer suggest to chat rooms that we terminate that they talk off-line on e-mail.

So a lot of what we are talking about here has developed very rapidly. Much of the activity that Mr. Crimmins has been involved in on America Online occurred early this year, in January/February, and we have reviewed the correspondence from him during that time, and here we are nearly in August. We added 500,000 subscribers during that period, and things have changed dramatically both in our industry and for our company, and frankly, a lot of the practices that Mr. Crimmins has referred to simply do not occur today. I was online this weekend, doing a lot of what Mr. Crimmins alleges here, and I simply did not run into a lot of the material that he was talking about.

Finally, let me conclude. We take this issue very, very seriously. We would like to help this medium grow, globally as well as nationally. In a recent report that essentially analyzed the Rimm study in Time Magazine that has been criticized, other academics at another institution made the claim that less than one-half of 1 percent of the material on this vast sea of information known as the Internet contains the sort of sexually explicit and offensive material we are talking about today.

So I think we need to look at the scope of the problem; let us do what we need to do with that less than one-half of 1 percent. Let us accept the fact that current criminal laws do exist, but they need to be enforced. And let us work together to develop the technological tools and educate parents to make those tools simply to implement, so we can get at this problem and so that both parents and kids can enjoy the benefits of the online world.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Burrington follows:]

PREPARED STATEMENT OF WILLIAM W. BURRINGTON

Mr. Chairman and members of the Committee, I am William W. Burrington, Chairman of the Online Policy Committee of the Interactive Services Association and Assistant General Counsel and Director of Government Affairs for America Online, Inc. in Vienna, Virginia. I appear before you today on behalf of the Interactive Services Association ("ISA") and its Online Policy Committee.¹

As the oldest non-profit North American association serving businesses that deliver telecommunications-based interactive services to consumers, the ISA has been responsive to concerns about the social and political impact of this new interactive medium that millions of Americans use every day. ISA's 300-plus members (see Appendix A) represent the full spectrum of industries now active in delivering personal interactive services. ISA's membership includes companies from the advertising, broadcasting, cable, computer, financial services, marketing, publishing, telephone, and travel industries.

We understand that the purpose of these hearings is to discuss the responsibility of interactive online services, including those that provide access to the Internet, for the act of transmitting material to minors that is deemed to be indecent. Our industry is concerned about children's access via online services to materials that their parents believe to be inappropriate. We also want to ensure that Congress creates an effective response that will not devastate the myriad benefits to our country that will result from active participation in the National Information Infrastructure. We want to work with Congress to protect children, empower parents to screen out unwanted material, and preserve constitutional guarantees of free speech, free press, and individual privacy.

In its zeal to "clean up" the content of a small portion of electronic communications, S. 892 would target for liability online service providers while ignoring content providers and subscribers who create, control, and upload indecent material onto networks. For example, although access by minors to Playboy magazine may be restricted in some states, it is not restricted under federal law. This legislation, however, creates the anomalous result of punishing online service providers for permitting the electronic distribution of Playboy to minors although federal law does not punish the publisher. This is not to say that the publisher should be punished; we simply cannot agree that the constitution would permit computer distribution to be criminalized when the publishing of the same material is not.

What's more, the online providers would be liable under S. 892 for indecent communication regardless of any measures they may take to limit access or to screen content providers on their system. Statutory defenses for providers who make good faith efforts to screen and block indecent materials to minors would provide an industry incentive to develop effective blocking and screening devices. The lack of such defenses in S. 892 would serve as a disincentive for investing in such efforts.

¹ISA's Online Operators Policy Committee is comprised of: America Online, Inc.; Apple e-World; CompuServe; Delphi Internet Services Corp.; GENie; Interchange Network Company; MCI; Microsoft Network; Prodigy Services Company; and Ziff Davis Interactive.

ISA is also concerned about the criminalization of indecent speech, given that this speech is protected by the Constitution and can be restricted only in a few narrowly defined situations. The Supreme Court's *Sable* decision mandates that regulations on indecent speech must be narrowly drawn to protect minors without unnecessary interference with the First Amendment. The regulation proposed by S. 892 is not the least restrictive alternative. It prohibits any "communication that contains indecent material" as well as indecent material itself directed at minors. This type of regulation is not likely to pass constitutional muster.

Rather than criminalizing the mere transmission of certain materials, Congress should support and encourage the entrepreneurial spirit of the interactive services industry to build parental empowerment tools and encourage the industry to make such solutions widely available to consumers. Even without any legislation, the market is already acting to address the concerns of parents, educators, and others who are interested in controlling the flow of information accessible via computer. Just last week, companies such as America Online Inc., Webster Network Strategies, SurfWatch Software, and Netscape announced new products and services that allow users to screen from their online systems content they find offensive.

In my testimony today, I would like to address several issues:

- (1) Constitutional guarantees of free speech and press should be cautiously guarded. We urge Congress to consider the least restrictive alternatives in achieving the goal of protecting minors from indecent materials;
- (2) The online service provider industry should be encouraged to provide *voluntary* editorial control over its services and to continue its research and development of parental empowerment technology tools. This industry should not be cast in the role of national censor, determining which information may be fit for children, but nonetheless subject to criminal liability if it guesses incorrectly in any given instance; and
- (3) The ISA agrees with the Department of Justice and the American Family Association that existing laws suffice to punish the use of computer networks for obscenity and child pornography. We believe that current law negates the need for new legislation, either federally or at the state level.

Before I address these points, I would like to provide an overview of the online service industry.

INDUSTRY OVERVIEW

Online service providers offer interactive services to millions of subscribers across the United States. In fact, there are presently over 8 million subscribers to computer-based online services. "Interactive services" are easy-to-use, telecommunications-based services designed for information exchange, communications, transactions, and entertainment. These services can be accessed by a personal computer, telephone, screen telephone, or television. Online service providers may simply transmit the communications created by others, or they may additionally offer content such as "bulletin boards" or "home pages."

Interactive services are unlike any previous communications media. When an individual listens to the radio or watches television, the Supreme Court has recognized that the individual may be "surprised" by an indecent message; that is, by the time the viewer has seen the message, it is too late to avoid it or look away. This is the rationale behind some time, place, and manner restrictions on speech communication through such media. In the online medium, it is much less likely that a user will be surprised by indecent or obscene material. The online medium generally requires that a user take affirmative steps, such as using electronic mail or accessing a particular service through the click of an icon or typing in a particular address, prior to receiving communications. Although random online assault by indecent images or messages is possible, it is certainly not the norm.

I really can't talk about interactive services without mentioning the Internet. The Internet is a world-wide phenomenon available in over 90 countries, connecting some 5 million different computer systems, and accessed by an estimated 10-30 million people. These connected computer systems are operated by universities and other nonprofits, research institutions, governments, businesses, and individuals. There is no central governing body or policy governing worldwide user behavior. Further, some obscene and indecent material originates in countries other than the United States, and is therefore beyond the practical reach of American law.

The vast majority of all communication available over the Internet and other online services, however, is educational, informative, or entertaining. The ability to access and successfully use a variety of information will increase the productivity and

enjoyment of American life. For example, American students have vast educational opportunities literally at their fingertips via the Internet. The majority of educational databases currently originate in the United States. Should Internet access be cut off because of the threat of criminal liability, students across the globe will have access to information that is withheld from American students. Not only would this handicap our future by denying educational opportunities to students, but it would handicap America's international competitiveness as well by decreasing access to productivity-enhancing services.

Finally, interactive television services will bring video and other programming into households on demand. Currently, online services enable millions of people to communicate with each other and to access news, weather, sports, and financial information through the touch of a keyboard. These services enable personal communication across America as well as around the globe.

Interactive services empower their users. Since the beginning of consumer online services in the early 80's, one key fact has emerged and is often overlooked. Tools provided by interactive services can act as an extension of the person, compensating for differing abilities related to, for example, age or physical health. Electronic grocery shopping can be both a convenience to many, and a lifeline to a homebound individual who is seeking to stay independent. Communities, too, will experience increasing social and political empowerment through electronic communication, forums, information sharing, and collaborative planning. Perhaps more than any other medium that has been used by American citizens, interactive services support the fundamental principles of our democracy. And as services evolve to multimedia presentation, so, too, will applications tailored to those of us with hearing, speech, sight, mobility or other challenges. This empowerment of the public offers a unique opportunity for individuals, parents, and families to make conscious choices about the types of material they wish to receive via their computer terminals.

With this basic overview in mind, I will now address the first of the issues:

I. S. 892 IS NOT THE LEAST RESTRICTIVE ALTERNATIVE FOR LIMITING ACCESS TO CERTAIN SPEECH

Let me clarify that S. 892 applies to online service providers only to the extent that they are *transmitting* material. That is, for the purposes of this bill, it is not relevant whether the online provider was the source of the indecent communication to a minor or if it merely transmitted an indecent communication that originated elsewhere. S. 892 is simply unworkable because it is not narrowly focused on the bad actors; online service providers cannot police and be aware of the specific content of each communication, and yet they are penalized for transmitting certain communications. Conspicuously absent from S. 892 is any mention of the creator of the offending materials.

Online services are entitled to at least the same level of First Amendment protection accorded to other news disseminators, such as newspapers. See *Miami Herald Co. v. Tornillo*, 418 U.S. 241 (1974). In fact, online service providers are likely entitled to even greater protection because of the virtually infinite capacity of the medium to accommodate all speakers and points of view. It is precisely for this reason that legislators must use an abundance of caution prior to regulating and criminalizing online speech activities. As the Supreme Court cautioned in its landmark decision *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964), such a limitation on speech "dampens the vigor and limits the variety of public debate * * * [and] is inconsistent with the First Amendment."

As the U.S. Supreme Court has acknowledged, expression that is indecent but not obscene is protected by the First Amendment. Consequently, to regulate indecent expression in a constitutional manner, "[i]t is not enough to show that the Government's ends are compelling; *the means must be carefully tailored to achieve those ends.*" *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). S. 892 is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent communications on computer networks. Furthermore, it fails to encourage industry to develop further measures that will improve user control over online services.

S. 892 would depart from the federal criminal law's general rule that the originators of obscene material are liable for its distribution, not the entities who unwittingly carry out the distribution, such as a telephone network, a trucking company, or a courier service. See, e.g., 18 U.S.C. §§ 1462, 1465. Without a federal law that prohibits a person from using a computer to transmit an indecent communication to a minor, S. 892 proposes to impose criminal liability on access providers who permit others to use their computer network facilities to transmit indecent communications to minors. That is, the bill proposes to punish access providers for permitting

others to do something that federal law does not prohibit. It is, in the words of the Supreme Court in *Sable*, "another case of 'burn[ing] the house to roast the pig.'" The new S. 892 approach is not likely to survive constitutional scrutiny.

Moreover, the so-called dial-a-porn regulations that evolved after nearly a decade of constitutional attack contained "safe harbor" defenses for industry. See *Dial Information Services v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991). S. 892 provides no such defenses, again rendering it constitutionally vulnerable on the grounds that there are other approaches less restrictive but just as effective in achieving its goal of denying access by minors to indecent communications on computer networks.

Finally, in the context of private communications such as electronic mail, S. 892 places online providers in an impossible position: it holds them criminally responsible for indecent communications to minors while the Electronic Communications Privacy Act of 1986 ("ECPA") forbids them from monitoring electronic mail. See 18 U.S.C. §§ 2701, 2702. The bill would treat online providers differently than other communications carriers: even with regard to communications that rises to the level of criminal activity, neither the Postal Service, Federal Express, nor Bell Atlantic is expected to know the contents of hand-written mail or of telephone conversations between persons conspiring in a criminal enterprise, nor are they held liable for failing to prevent any harm that may result.

II. VOLUNTARY EDITORIAL CONTROL AND USER EMPOWERMENT TOOLS ARE THE MOST EFFECTIVE CONSTITUTIONAL APPROACH TO PREVENTING ACCESS BY CHILDREN TO INDECENT MATERIALS

As a matter of public policy, Congress should rely on the entrepreneurial spirit of the interactive services industry to build parental empowerment tools and encourage the industry to work together to ensure that such solutions are widely available. Technological relief is currently available and more is under way. Prosecutors appear to have the prosecutorial tools they need, too. The Justice Department certainly has not asked for new criminal laws to combat smut on the Internet.

While industry has demonstrated its willingness to serve an editorial function, a current obstacle to wide implementation of measures to block or filter out offensive materials is the threat of liability for any offending material that may fail to get screened. Two months ago in New York, for example, Prodigy was found to be a "publisher" of libelous statements made by a subscriber on one of its online bulletin boards "in large measure" because of measures that Prodigy took to be "a family oriented computer network." Prodigy was liable even though it was (and is) unable to control the content of user communications and was unaware of the particular offending statement. Congress should not now legislate another disincentive—criminal liability—rather, it should continue to let the market respond to the demand for editing functions and screening tools.

In addition, the online service provider industry has developed a broad array of technological screening devices, with the promise of more to come. It is sad and ironic that S. 892 intends to reward industry for its efforts with criminal liability. The current industry initiatives include the following:

First, providers can control the audience. At America Online, for example, we require a credit card or checking account to open an online account, which, like the dial-a-porn regulation's credit card requirement, presumes that the new subscriber is an adult.

Second, providers can help the subscribers control the audience. For example, at Prodigy, the registered head of each household, using a credit card for verification, must activate an Internet connection for each family member. America Online within two months will expand its existing parental control offerings with a new feature that will enable parents to block access to all but the "Kids Only" area of the service with content targeted and programmed specifically for kids. This will allow parents to have access to all America Online features, but limit their children's access to the Kids Only area.

Third, providers can exercise control over the topics of the chat lines and conferences that they sponsor and, consistent with federal law, monitor many of these activities. On these chat lines and conferences, online providers enforce rules that require that messages transmitted for posting be relevant to the subject of these activities.

Fourth, while online operators cannot legally monitor e-mail, they act on complaints brought to their attention by subscribers who receive offensive material by e-mail. All that a subscriber needs to do is forward the e-mail to the provider; at that point, the provider can take appropriate action based on the message. If, for example, the sender is a subscriber of CompuServe, CompuServe can act against the sender if he or she has breached the operating rules. If the e-mail message indicates

possible unlawful activity, the online provider will forward the material to law enforcement officials for investigation.

Fifth, particularly with regard to the Internet, many providers are incorporating powerful new blocking and filtering technology to empower parents to make choices—consistent with their own particular values—about the material that their children can access. Currently at America Online, for example, parents are able to block their children's access to Internet newsgroups while permitting them other access to the Internet. In addition, America Online last week announced a relationship with SurfWatch Software, Inc. that will provide its adult subscribers with easy tools to block unwanted inappropriate material on the World Wide Web. SurfWatch, which also is available to families who do not subscribe to commercial online services, incorporates a roster of sites known to carry sexually explicit content that is automatically updated each month.

NET NANNY and CYBERsitter are among other affordable products for controlling children's access to the Internet that are currently available. Another software product, WEBTrack School Edition (SE), which its developer recently announced would be provided at no charge to primary and secondary schools, gives school administrators the capability to restrict access to five categories of Internet sites (sex, drugs, hate speech, criminal skills, and online gambling) while allowing full access to the rest of the Internet's resources.

Among the more innovative proposals on the drawing boards is "KidCode," currently being developed by Internet standards developers. KidCode would establish voluntary labeling systems that identify Internet information that is inappropriate for children. These labels could then be used in new ways to empower parents and educators to select the Internet content that children could access.

The attention that content on computer networks has recently received continues to spur industry to invest in technologies that will further empower parents to protect their children from access to inappropriate materials.

But all of the empowerment tools in the world will not work unless we educate parents about their existence and use. Consequently, in conjunction with the efforts to deploy new empowerment tools, the ISA will launch an online and off-line Parental Empowerment Program next month. Even preceding this effort, which may include information kits that parents can request via an 800-number service and World Wide Web Home Page, the ISA and seven major online operators teamed with the National Center for Missing Children to publish a pamphlet entitled "Child Safety on the Information Highway." (See Appendix B). The pamphlet is available at no charge by calling 1-800-THE-LOST and over all the major online services. This pamphlet advises parents in setting rules and guidelines for their children's online activities, and helps parents understand the risks involved on the information superhighway. Our goal is to educate parents better about the tools available to keep indecent and other inappropriate materials out of the hands of computer-literate minors.

The goal of empowering and educating parents is to allow them to make their *own* choices and to customize those choices depending upon the age of their children and their *own* family values, *not* those of some monolithic government or special interest group. Finally, we realize that parents may not be as computer savvy as their own kids. For that reason, we have made all of our parental empowerment tools very simple and easy to implement with the click of a mouse. Our goal—to make these technology features easier for parents to use than setting the clock on their VCR.

Technology is one solution; parental awareness is another. These will work far better than cold words in a criminal statute to protect America's children from inappropriate material on the Internet. Indeed, the new technological tools will permit parents who wish to do so to block out a whole lot more than just material that online providers, if they permit its transmission, will go to jail for.

III. NEW LEGISLATION IS UNNECESSARY TO MEET CONGRESSIONAL GOALS

Law enforcement agencies and prominent pro-family groups agree that current laws already authorize prosecutions of constitutionally unprotected speech on computer networks.² Illegal conduct over computer networks has been punished under

² For example, in his May 6, 1995 letter to Rep. Thomas Bliley, the American Family Association's Patrick Trueman, the Section Chief during Bush and Reagan Administrations of the Child Exploitation and Obscenity Section of the Justice Department's states:

[T]he federal criminal code currently prohibits distribution of both child pornography and obscenity by computer.

Continued

existing federal laws concerning trafficking in obscenity, child pornography, harassment, illegal solicitation or luring of minors, and threatening to injure someone. The desire to create additional legislation in this area is somewhat curious in light of the ability to prosecute wrongdoers under current laws and of the prosecutions that have taken place.

To the extent that particular gaps may appear in the future, or if any obstacles arise to prosecution of those who make obscenity or indecency available to minors, Congress should examine whether there is a need for additional training or additional resources for enforcement of the current laws. No less an authority than the Department of Justice, the agency responsible for investigating and prosecuting these crimes, has requested not precipitous action but rather an in-depth analysis of the complex legal and policy issues surrounding the goals of protecting children while respecting First Amendment and privacy rights of computer users.³

It is also critical that Congress preserve a uniform national standard governing the behavior of online service providers. During the past year, at least five states—Connecticut, Georgia, New Jersey, Oklahoma, and Virginia—have enacted laws aimed at obscenity or harassment on computer networks. These statutes may create standards that are inconsistent with the goal of inciting industry to create technological tools to block and screen particular communications. Again, industry should be encouraged to continue to work with communities to develop tools that allow the appropriate levels of access to and control of online services.

Multiple regulations would be more than burdensome for online service providers; they may be impossible to satisfy for technical and economic reasons. Moreover, state requirements could conflict with one another, creating a situation in which compliance in one state could create culpability in another. Finally, because service providers are unable to accommodate varying standards, they would be forced to meet the content and activity standards of the most restrictive state. In this way, one state legislature, rather than the federal government, would control the content of our country's contribution to the global information superhighway.

Permitting every state to adopt its own standard would lead to uncertainty for business and drive away market participants, thereby severely undermining our nation's ability to develop and make use of the National Information Infrastructure to promote national economic, educational, and social goals.

CONCLUSION

Perhaps more than any other medium that has ever been used by Americans, online services support the fundamentals of our participatory democracy. Our government's role should be to facilitate—not inhibit—the development of the National and Global Information Infrastructure. And that is what government has done to date. The Congress has begun making congressional information available online; the White House and some federal agencies have set up sites on the World Wide Web; and federal agencies have established advisory committees to make recommendations on policies for the NII.

We believe that for every child empowered by the Internet's benefits there should be a parent empowered to protect his or her children from the risks that exist on the Internet, as elsewhere in life. We believe that empowering technology, and edu-

In the Justice Department's May 3, 1995 letter to Sen. Patrick Leahy, Kent Markus, the Acting Assistant Attorney General for Legislative Affairs, states:

[We have applied current law to this emerging problem. * * * The Department's Criminal Division has, indeed, successfully prosecuted violations of federal child pornography and obscenity laws which were perpetrated with computer technology.

³In the Justice Department's May 3, 1995 letter to Sen. Patrick Leahy, Kent Markus, the Acting Assistant Attorney General for Legislative Affairs, states:

We recommend that a comprehensive review be undertaken of current laws and law enforcement resources for prosecuting online obscenity and child pornography, and the technical means available to enable parents and users to control the commercial and noncommercial communications they receive over interactive telecommunications systems.

In the Justice Department's June 13, 1995 letter to Sen. James Exon, Acting Assistant Attorney General Markus states:

Again, we are committed to protecting children while also respecting First Amendment and privacy rights. While substantial progress has been made in your revised proposal, it still raises a number of complex legal and policy issues that call for in-depth analysis prior to congressional action.

cation not cumbersome regulation, is the most effective and least intrusive means for serving the public interest in protecting minors.

Any changes in federal law should seek to remove any disincentives for creating "child safe" areas rather than to impose criminal liability upon online providers for permitting others to engage in conduct not prohibited by federal law or S. 892—the transmission by others of indecent materials to minors.

APPENDIX A

INTERACTIVE SERVICES ASSOCIATION LIST OF MEMBERS

| | |
|---|------------------------------------|
| 1-800 Flowers | City of Hampton |
| 101 Online | Cole Group |
| Accu-Weather Inc. | Columbia Tristar Television |
| Accurate Info Ltd | CommSys Corp. |
| Axiom | CompuServe Incorporated |
| Advanced Telecom Services | Context Scientific |
| Aegis Publishing Group | Concentric Research Corporation |
| AGT Directory Limited | Conhaim Associates, Inc. |
| Air One Inc. | Connect, Inc. |
| Allstate Communications | Consumers Union |
| America Online | Continental Cablevision, Inc. |
| American Airlines/EAASY SABRE | Corporate Performance, Inc. |
| American Express | Council of Better Business Bureaus |
| American Greetings | Courtroom Television Network |
| American Telnet | CUC International |
| Ameritech | D.E. Shaw & Company |
| Apple Online Services | Darnark International Inc. |
| Arlen Communications Inc. | DataTimes |
| Associated Press Information Services | Delphi Internet Services |
| AT&T | Deutsche Telekom |
| Audiotex News, Inc. | Dickstein, Shapiro & Morin |
| Aural Digital Conference Marketing (ADCM) | DirectoryNet, Inc. |
| B.F.D. Productions, Inc. | Don Allan Associates of nj, Inc. |
| Bank of America | Duncan Resource Group |
| Bank South | Dunnington, Bartholow & Miller |
| Barrels of Fun | EchoVision, Inc. |
| Bell Canada | EDS - Electronic Commerce Division |
| Belcore | EDS Management Consulting Services |
| Bisnews Publishing Co., Ltd. | Education On-Line |
| Bloomberg Business News | EDventure Holdings, Inc. |
| BRP | Electronic Messaging Association |
| Budd Larner Gross Rosenbaum Greenberg & Sade | EON Corporation |
| Bureau One Inc. | Epsilon Data GMBH |
| Cable TV Administration & Marketing Society, Inc. | Etak, Inc. |
| Cabot, Richards & Reed | Fidelity Investments |
| Call Interactive | Find/SVP |
| CANNEX Financial Exchanges Limited | Fingertut Corporation |
| Cavanagh Associates | Ford Motor Company |
| CD3 Consulting, Inc. | Forrester Research |
| Chase Manhattan Bank, NA | FreeMark Communications, Inc. |
| Checkfree Corporation | FTD Direct Access, Inc. |
| Citibank, N.A. | Fujitsu Cultural Technologies |

Future Freedom
 Future Systems Incorporated
 Gary D. Schulz
 Gateway Software, Inc.
 General Electric
 General Media Worldwide Online Services Inc.
 George Kois
 Ginsburg, Feldman & Bress
 GRAFF Pay-Per-View
 GRAFX Group, Inc.
 Grey Advertising
 GTE Main Street
 Hall Dickler Kent Friedman & Wood
 Hallmark Cards, Inc.
 Hamilton Consultants
 Hawaii INC
 Hayes Strategies
 Heartland Free-net Incorporated
 Hewlett Packard
 Home Box Office (HBO)
 Honeywell, Inc.
 HSN Interactive
 Hughes Aircraft Co.
 ICN Corporation
 IdealDial
 Info Access Inc
 Institute For the Future
 Intel Corporation
 Intellimedia Sports Inc.
 Interactive Development Corporation
 Interactive Marketing
 Interactive Media Associates
 Interactive Media, Inc.
 Interactive Media Works
 Interactive Multimedia Association
 Interactive Network
 Interactive Publishing
 Interactive Telecommunications Services
 Interactive Video Enterprises, Inc.
 Interaxx Television Network, Inc.
 International Telemedia Associates (ITA)
 Interval Research Corporation
 ISED Corporation
 Issue Dynamics
 IT Network, Inc
 ITT World Directories
 IVI Publishing, Inc.
 J. Walter Thompson/OnLine
 Jared, The Galleria of Jewelry
 JCC Technologies, Inc.
 John Hall & Company
 Jupiter Communications
 Ketchum Interactive Group
 Lands' End
 Lapin East-West
 Legacy TV Inc.
 LINK Resources Corporation
 Little & Company
 Lochridge & Company
 Long Distance Billing Company
 Los Angeles Times
 Loto Quebec
 MapInfo Corporation
 MarCole Enterprises, Inc.
 Maritz, Inc.
 Market Information Exchange (MIX)
 Marketing & Advertising Services Center, Inc.
 Marketing Corporation of America
 Martin Hensel Corporation
 MasterCard International
 McClatchy Newspapers
 MCI Communications
 MCI Telecommunications
 Media General Inc.
 Mellon Bank, NA
 Meridian Bank
 Metamark International
 Metromall Corporation
 Michael Wolff & Company, Inc.
 Micro Voice Applications Inc.
 Microsoft
 Midlun HF
 Midratel US Inc.
 Morris Information Services
 MultiComm Development
 National Telephone Enterprises
 Network Telephone Services
 Neue Mediengesellschaft Ulm mbH
 New Tech Telemedia
 New Times Inc./NTI Communications

New York Switch Corporation
 New York University
 Newhouse New Media, Inc.
 News America New Media
 Newsday
 NIFTY Corporation
 Norpak Corporation
 North American Publishing Co.
 Northern Telecom
 NPD Group
 NTN Communications
 NUSTAR International, Inc.
 NYNEX Corporation
 OCLC Online Computer Library Center, Inc.
 Ogilvy & Mather Direct
 Online Interactive
 Open Market, Inc.
 Optigon Interactive
 PAFET
 Pamet River Partners
 Parks Associates
 Pat Dunbar & Associates
 PC Financial Network
 PC Flowers Inc.
 PC Travel
 PeaPod
 Personal Library Software
 Phillips
 PhoCusWright
 Phoenix Newspapers, Inc. (PAFET)
 Phone Programs, Inc.
 Physicians' Online, Inc.
 Pineapple, Ltd.
 Pinellas County Review
 Prensa Libre, S.A.
 Presentation Works
 Prevue Interactive Services
 PrivTel
 Prodigy Services Company
 Publications Resource Group
 Pulitzer Publishing Company
 Reality Online, Inc.
 Rede de Televisao Abril
 Reuters New Media, Inc.
 Rio Grande Travel

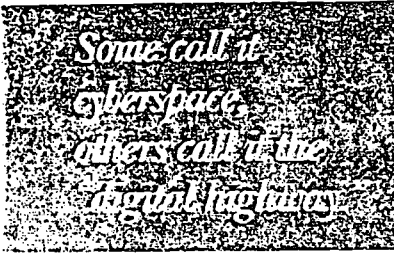
Rosenbluth Travel/Travelmation
 Saco River Tel & Tel Co.
 San Jose Mercury News
 Sanoma Corporation
 SBC Communications
 Scholastic Network
 Scripps Howard
 SECOM Information System Corp.
 Seelinger Communications
 SIMBA Information Inc.
 Simutronics
 SITEL Corporation
 Skytel
 SmartPhone Communications, Inc.
 Southam Electronic Publishing
 SportsLine USA, Inc.
 Springboard Productions/The Workshop
 Sprint Telemedia
 St. Clair Interactive Communications
 St. Petersburg Times
 Star Tribune
 Starwave Corporation
 STM Consulting Pty., Ltd.
 Strategic Systems, Inc.
 Strategic Telemedia
 Straube Centers International Corporation
 Swedish Information Technology Commission
 Swiss Online
 Symphony Management Associates Inc.
 (TDF) Teledifusion de France
 TecNet/Tufts University
 Telco Communications Group
 Tele Denmark Ktas Publishing
 Tele-Direct (Pub) Inc.
 Tele-Lawyer Inc.
 Tele-Publishing Inc.
 Telebase Systems
 Telecom Finland
 Telecompute Corporation
 Telefónica Publicidad e Información
 Telemedia Network Inc.
 TELMO ry
 The Globe & Mail
 The Hotel Industry Switch Company
 The Infoworks Group

The Irish Times
 The Kelsey Group
 The Marx Group
 The Poynter Institute
 The Promus Hotel
 The Reference Press, Inc.
 The Weather Channel
 The WELL
 The Yankee Group
 Times Information Services, Inc.
 Tom Lehman & Associates
 Trademark Register
 TravelLOGIX
 Tremblay & Company
 Tribune Interactive Network Services
 Tribune Media Services
 TV Data Technologies
 U.S. Network Services
 U S WEST Communications
 United Advertising Publications
 Universal Teleservices Corporation
 US Order
 US Postal Service
 USA Tax Service
 USA Today-Gannett Information Services
 USAA
 VeriFone, Inc.
 VIACOM Interactive Media
 VICOM Information Service
 Vicorp Interactive Systems, Inc.
 Videotex Development Corporation
 Videoway Communications Inc.
 Virtual Shopping, Inc.
 Virtual Vegas Incorporated
 VISA
 VISION Integrated Marketing
 Visual Services Inc.
 Voice FX Corporation
 Vos, Gruppo, & Capell, Inc.
 VRS Billing Systems Inc.
 Washington Post Company
 Weather Concepts Inc.
 Weissmann Travel Reports
 West Interactive Corporation
 Wilcox & Savage
 Women's Wire
 Working Assets Long Distance
 WORLDSPAN
 Worldview Systems Corporation
 Wunderman Cato Johnson
 Yahoo!
 Ziff-Davis Interactive
 Zycorn Network Services, Inc.



Child Safety on the Information Highway





Whatever it's called, millions of people are now connecting their personal computers to telephone lines so that they can

"go online." Traditionally, online services have been oriented towards adults, but that's changing. An increasing number of schools are going online and, in many homes, children are logging on to commercial services, private bulletin boards, and the Internet. As a parent you need to understand the nature of these systems.

- Online services are maintained by commercial, self-regulated businesses that may screen or provide editorial/user controls, when possible, of the material contained on their systems.

- Computer Bulletin Boards, called BBS systems, can be operated by individuals, businesses, or organizations. The material presented is usually theme oriented offering information on hobbies and interests. While there are BBS systems that feature "adult" oriented material, most attempt to limit minors from accessing the information contained in those systems.

- The Internet, a global "network of networks," is *not* governed by any entity. This leaves no limits or checks on the kind of information that is maintained by and accessible to Internet users.



The Benefits of the Information Highway

The vast array of services that you currently find online is constantly growing. **Reference information** such as news, weather, sports, stock quotes, movie reviews, encyclopedias, and airline fares are readily available online. Users can conduct **transactions** such as trading stocks, making travel reservations, banking, and shopping online. Millions of people **communicate** through electronic mail (E-mail) with family and friends around the world and others use the public message boards to make new friends who share common interests. As an **educational and entertainment** tool users can learn about virtually any topic, take a college course, or play an endless number of computer games with other users or against the computer itself.

User “**computing**” is enhanced by accessing online thousands of share-ware and free public domain software titles.

As an educational tool users can learn about virtually any topic.

Most people who use online services have mainly positive experiences. But, like any endeavor – traveling, cooking, or attending school – there are some risks. The online world, like the rest of society, is made up of a wide array of people. Most are decent and respectful, but some may be rude, obnoxious, insulting, or even mean and exploitative.



Children and teenagers get a lot of benefit from being online, but they can also be targets of crime and exploitation in this as in any other environment. Trusting, curious, and anxious to explore this new world and the relationships it brings, children and teenagers need parental supervision and common sense advice on how to be sure that their experiences in "cyber-space" are happy, healthy, and productive.

Putting the Issue in Perspective

Although there have been some highly publicized cases of abuse involving computers, reported cases are relatively infrequent. Of course, like most crimes against children, many cases go unreported, especially if the child is engaged in an activity that he or she does not want to discuss with a parent. **The fact that crimes are being committed online, however, is *not* a reason to avoid using these services.** To tell children to stop using these services would be like telling them to forgo

attending college because students are sometimes victimized on campus. A better strategy would be

for children to learn how to be "street smart" in order to better safeguard themselves in any potentially dangerous situation.



What Are the Risks?

There are a few risks for children who use online services. Teenagers are particularly at risk because they often use the computer unsupervised and because they are more likely than younger children to participate in online discussions regarding companionship, relationships, or sexual activity. Some risks are:

Exposure to Inappropriate Material

One risk is that a child may be exposed to inappropriate material of a sexual or violent nature.

Physical Molestation

Another risk is that, while online, a child might provide information or arrange an encounter that could risk his or her safety or the safety of other family members. In a few cases, pedophiles have used online services and bulletin boards to gain a child's confidence and then arrange a face-to-face meeting.

Harassment

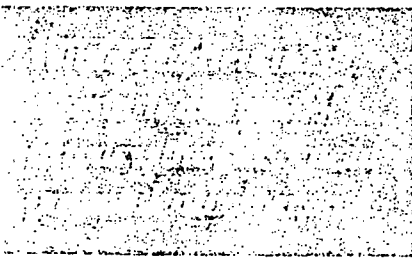
A third risk is that a child might encounter E-mail or bulletin board messages that are harassing, demeaning, or belligerent.



How Parents Can Reduce the Risks

To help restrict your child's access to discussions, forums, or bulletin boards that contain inappropriate material, whether textual or graphic, many of the commercial online services and some private bulletin boards have systems in place for parents to block out parts of the service they feel are inappropriate for their children. If you are concerned, you should contact the service via telephone or E-mail to find out how you can add these restrictions to any accounts that your children can access.

The Internet and some private bulletin boards contain areas designed specifically for adults who wish to post, view, or read sexually explicit material. Most private bulletin board



operators who post such material limit access to people who attest that they are adults but, like any other safeguards, be

aware that there are always going to be cases where adults fail to enforce them or children find ways around them.

The best way to assure that your children are having positive online experiences is to stay in touch with what they are doing. One way to do this is to spend time with your



children while they're online. Have them show you what they do and ask them to teach you how to access the services.

While children and teenagers need a certain amount of privacy, they also need parental involvement and supervision in their daily lives. The same general parenting skills that apply to the "real world" also apply while online.

If you have cause for concern about your children's online activities, talk to them. Also seek out the advice and counsel of other computer users in your area and become familiar with literature on these systems. Open communication with your children, utilization of such computer resources, and getting online yourself will help you obtain the full benefits of these systems and alert you to any potential problem that may occur with their use.

Guidelines for Parents

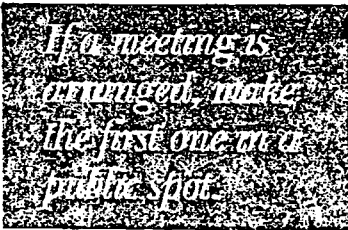
By taking responsibility for your children's online computer use, parents can greatly minimize any potential risks of being online. Make it a family rule to:

- Never give out identifying information – home address, school name, or telephone number – in a public message such as chat or bulletin boards, and be sure you're dealing with someone that both you and your child know and trust before giving it out via E-mail. Think carefully before revealing any personal



information such as age, marital status, or financial information. Consider using a pseudonym or unlisting your child's name if your service allows it.

- Get to know the services your child uses. If you don't know how to log on, get your child to show you. Find out what types of information it offers and whether there are ways for parents to block out objectionable material.
- Never allow a child to arrange a face-to-face meeting with another computer user without parental permission. If a meeting is arranged, make the first one in a public spot, and be sure to accompany your child.
- Never respond to messages or bulletin board items that are suggestive, obscene, belligerent, threatening, or make you feel uncomfortable. Encourage your children to tell you if they encounter such messages. If you or your child receives a message that is



harassing, of a sexual nature, or threatening, forward a copy of the message to your service provider and ask for their assistance.

Should you become aware of the transmission, use, or viewing of child pornography while online, immediately report this to the National Center for Missing and Exploited Children by calling 1-800-843-5678. You should also notify your online service.



- Remember that people online may not be who they seem. Because you can't see or even hear the person it would be easy for someone to misrepresent him- or herself. Thus, someone indicating that "she" is a "12-year-old girl" could in reality be a 40-year-old man.
- Remember that everything you read online may not be true. Any offer that's "too good to be true" probably is. Be very careful about any offers that involve your coming to a meeting or having someone visit your house.
- Set reasonable rules and guidelines for computer use by your children (see "My Rules for Online Safety" on last page as sample). Discuss these rules and post them near the computer as a reminder. Remember to monitor their compliance with these rules, especially when it comes to the amount of time your children spend on the computer. A child or teenager's excessive use of online services or bulletin boards, especially late at night, may be a clue that there is a potential problem. Remember that personal computers and online services should not be used as electronic babysitters.

Be sure to make this a family activity. Consider keeping the computer in a family room rather than the child's bedroom. Get to know their "online friends" just as you get to know all of their other friends.



This brochure was written by Lawrence J. Magid, a syndicated columnist for the *Los Angeles Times*, who is author of *Cruising Online: Larry Magid's Guide to the New Digital Highway* (Random House, 1994) and *The Little PC Book* (Peachpit Press, 1993).

Child Safety on the Information Highway was jointly produced by the National Center for Missing and Exploited Children and the Interactive Services Association (8403 Colesville Road, Suite 865, Silver Spring, MD 20910).

This brochure was made possible by the generous sponsorship of:



e.World



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My Rules for Online Safety

*Tear off and
keep this pledge
at your computer.*

- I will not give out personal information such as my address, telephone number, parents' work address/telephone number, or the name and location of my school without my parents' permission.
- I will tell my parents right away if I come across any information that makes me feel uncomfortable.
- I will never agree to get together with someone I "meet" online without first checking with my parents. If my parents agree to the meeting, I will be sure that it is in a public place and bring my mother or father along.
- I will never send a person my picture or anything else without first checking with my parents.
- I will not respond to any messages that are mean or in any way make me feel uncomfortable. It is not my fault if I get a message like that. If I do I will tell my parents right away so that they can contact the online service.
- I will talk with my parents so that we can set up rules for going online. We will decide upon the time of day that I can be online, the length of time I can be online, and appropriate areas for me to visit. I will not access other areas or break these rules without their permission.

For further information on child safety, please call the National Center for Missing and Exploited Children at 1-800-THE-LOST (1-800-843-5678).

Senator GRASSLEY. Mr. Balkam, before I call on you, let me read into the record a short paragraph from the letter I received from Professor Harrison, previously referred to, because I am concerned, as you are—in fact, the whole basis for my legislation is to meet the constitutional test of the least restrictive means.

It is difficult to imagine a less restrictive means of protecting minors from indecent material than forbidding the transmission to minors (and no one else) of indecent materials. In order to keep the law abreast of technical changes, the bill charges the Attorney General to report to Congress within 2 years concerning the availability of technology that would enable parents to control their children's access to indecent material. The report is specifically to address the question of whether the use of such technology should be treated as a defense to the offenses created in S. 892. The presence of this provision underscores the point that the bill is designed to minimize interference with the materials available to adults.

Mr. Balkam?

STATEMENT OF STEPHEN BALKAM

Mr. BALKAM. Thank you, Mr. Chairman, for the opportunity to give testimony to this committee. My name is Stephen Balkam, and I am executive director of the Recreational Software Advisory Council. I do not work for AOL, and I am not an investigative journalist, so I am over on this side of the table.

RSAC is an independent not-for-profit organization established only in September of last year with the help of the Software Publishers Association and five other trade associations. RSAC's very existence is a direct result of the legislative initiative taken last year by Senators Lieberman and Kohl, who raised the issue of excessive violence in video and computer games. We are what is now commonly referred to as a "third party rating system."

There are many ways in which the RSAC rating system could be used to empower parents and consumers with the information they need to make choices about the material they and their children see on their computer screen. Through the RSAC system, many hundreds of not thousands of web sites and home pages could be rated and regulated. And, together with the emerging technologies, such as KidCode, Net Nanny, SurfWatch, and the work of progressive networks, parents could block all Internet sites that were not already rated.

Content labeling is essential for the new screening technologies being developed for the Internet and television. The software needs code to read to enable it to do more than just simply block out entire sites. And I wanted to respond to Senator Feingold's comment about Playboy. If your 15-year-old high school student wanted to download former President Jimmy Carter's Playboy interview in 1976, he could do so under this system, but not have a look at Miss Playmate of July 1995.

If increasing numbers of parents and guardians exercise their choices, then market forces alone would encourage web site providers to rate their materials, and in some cases, reduce or withdraw what would seem to be highly sexual or violent in nature.

Now, the RSAC content labeling system is most appropriate for "static" sites, such as home pages, documents, games, picture galleries, and libraries. It would not be able to deal with interactive chat groups or bulletin boards as the nature of such sites is highly

fluid and instantaneous. In this case, however, the new screening software packages could simply deny access to these chat groups.

The working party that established the Recreational Software Advisory Council frankly acknowledge that not all families are the same and instead looked to devise a system which would give parents the information they needed to choose the software they thought was appropriate for their children. The system is a content labeling system which is as objective as possible, open and accessible to the public, nonjudgmental, and regularly reviewed and developed.

Because of the nature of recreational software, full prior review of every title was not a feasible option. Whereas a movie takes 2 hours to view, interactive software can take upwards of 100 or even 200 hours of viewing, and the viewer may still not have opened all the doors or reached all of the levels.

It was essential, therefore, that the rating system include a self-disclosure questionnaire as a basis for reaching the rating levels and descriptors in each category together with tough sanctions for any willful misrepresentation by a software publisher.

The three categories of the RSAC system are violence, nudity/sex, and language. Within these categories are four levels, zero to four. The higher the level, the greater the objectionable content to be found in the software product. In addition, there are brief descriptors that give further information about the title, such as "blood and gore" or "explicit sexual activity." If a title has no objectionable content, it receives an "all" rating, that is, suitable for all audiences.

These labels are then placed on the front of the boxes or on the opening screen of the software. Examples of these rating labels can be seen in my written testimony on page 96.

Now, it was imperative that the RSAC system had a strongly regulated series of controls to ensure that software publishers and other media providers were not able to cheat the system. The contract lays out stiff penalties for nonconformance, includes fines of up to \$10,000, removal of product from retail outlets and enforced re-rating. Spot-checks ensure that a software publisher is fully aware that its products are closely monitored and reviewed. And Mr. Chairman, to date we have rated over 200 software titles with over 80 software companies.

I would like to conclude by mentioning the work of Senator Kent Conrad and his successful amendment to the recent telecommunications bill, with a call to television manufacturers to install choice chips inside all television sets and for the networks to develop a rating system to empower parents to make real choices about the programs that they and their children watch. On the floor of the Senate last month and in subsequent press conferences, Senator Conrad commended the RSAC system as an excellent example of what could be achieved in a short period of time. I would just add that at the Nashville conference only 2 weeks ago, both Vice President Gore and President Clinton also agreed that a rating system for television, together with choice chips, would be the way forward.

In conclusion, RSAC, my organization, is committed to providing parents and consumers accurate information about the software

and other media that they purchase for themselves and for their children. We are opposed to censorship and respect the right of free speech and expression.

While we have a number of reservations about the act as drafted, particularly regarding reference to indecency, we would like to invite any organization interested in our system to work together with us to find a practical solution to the necessary protection of children from objectionable material on the Internet and in other media.

Thank you.

[The prepared statement of Mr. Balkam follows:]

PREPARED STATEMENT OF STEPHEN BALKAM

TESTIMONY SUMMARY SHEET

- (1) RSAC is an independent, non for profit organization which provides, promotes and administers a content labeling system for recreational software and other media.
- (2) The RSAC system could be adapted to rate Internet home pages, individual documents, on-line games, pictures and video. A content labeling system is essential for the new screening technologies to work effectively. SurfWatch, which has already developed software to block certain parts of the Internet, will be able to read the RSAC rating labels and provide parents with a way to block objectionable material being seen by their children.
- (3) The ratings for Violence, Nudity/Sex and Language are determined by the Self-Disclosure Questionnaire developed by Dr. Donald Roberts, Chairman of the Communications Department of Stanford University.
- (4) Each rating category has four levels, 0-4, which indicate the level of objectionable material in the product. In addition, detailed descriptors give the parent or consumer further information about the software, e.g., *Blood and gore; Explicit sexual activity.*
- (5) RSAC has rated over 200 titles with 80 companies including LucasArts, Broderbund, Interplay and id Software, maker of Doom. The cost ranges from \$25 to \$350 per title depending on the gross revenue of the company.
- (6) A series of checks and balances are used to ensure full compliance with the RSAC requirements including spot checks, stiff penalties for non-disclosure and enforced re-rating of products.
- (7) Senator Kent Conrad commended the RSAC system to the Senate last month in his successful amendment to the Telecommunications Bill. It calls upon the TV networks to develop a similar rating system for television linked to "Choice Chips".
- (8) RSAC is committed to providing parents with accurate information about the software and other media they and their children view. We are opposed to censorship and we respect the right of free speech and expression. RSAC invites any interested party to develop a practical solution to the problem of protecting children from pornography on the Internet.

INTRODUCTION

My name is Stephen Balkam and I am the Executive Director of the Recreational Software Advisory Council. Thank you for the opportunity to give testimony to this Committee on what is an increasingly important issue as the span and breadth of the Internet continues to grow. I would like to request, Chairman, that the record be left open so that I and others may supplement my testimony after the hearing.

The RSAC is an independent, not for profit organization established in September 1994 with the help of the Software Publishers Association and five other trade associations. The rating of computer software is too important an issue to be left to a trade association, so our independent constitutional status and our Board of Directors (made up of a majority of those from outside the industry) is free from any undue outside or commercial influence.

RSAC's very existence is a direct result of the legislative initiative taken by Senators Lieberman and Kohl last year that raised the issue of excessive violence in video and computer games. During Senate hearings last year, the case was made for the establishment of an industry sponsored ratings board for recreational software in order to give parents and consumers accurate information regarding the games and educational software they were buying for their children and for themselves. The Computer Games Working Group, a coalition of six trade associations, parents, pediatricians and academics, enlisted the help of Dr. Donald Roberts, Chairman of the Communications Department at Stanford University to develop the RSAC rating system.

RSAC AND THE INTERNET

There are many ways in which the RSAC rating system could be used to empower parents and consumers with the information they need to make choices about the material they and their children see on their computer screen. The output of the Internet is vast and would far outstrip any one agency's ability to fully review everything on it before it was posted on a home page or downloaded onto a hard drive. Through the RSAC system, however, many hundreds if not thousands of web sites and home pages could be rated and regulated. And, together with the emerging technology, such as what SurfWatch has developed, parents could block all Internet sites that were not already rated. And of those, they could block out any site with a high violence or sexual content or vulgarity content.

Content labeling is essential for the new screening technologies being developed for the Internet and television. The software needs code to read to enable it to do more than just simply block out entire sites. RSAC anticipated this eventuality when we devised display standards for the RSAC labels to be used in digital format at the beginning of a piece of software.

The screening technology used together with the RSAC rating system would not be censorship by government or by an outside agency. It would simply be a mechanism for choice. If increasing numbers of parents and guardians exercised their choices, then market forces alone would encourage web site providers to rate their material and in some cases, reduce or withdraw what would be seen to be highly sexual or violent in nature.

The RSAC content labeling system is most appropriate for "static" sites such as home pages, documents, games, picture galleries and libraries. It would not be able to deal with interactive chat groups or bulletin boards as the nature of such sites is highly fluid and instantaneous. In this case, however, the new screening software packages, such as SurfWatch, could simply deny access to these chat groups.

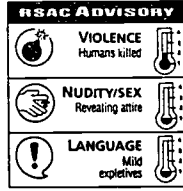
UNIQUE RATING SYSTEM

In the early days of RSAC's creation, the founder members decided not to develop an age-based rating system. The Working Party frankly acknowledged that not all families are the same and instead, looked to devise a system which would give parents the information they needed to choose the software they thought was appropriate for their children. The FDA food labeling system was used as a model, as it provides objective and quantifiable measures of various ingredients within a product without making a judgment as to who should or should not purchase it. The new system would be a content-labeling system which would be as objective as possible, open and accessible to the public, non-judgmental and regularly reviewed and developed. A methodology was created which included an integral algorithm that branches the applicant to a series of questions to determine the levels of violence, nudity/sex and vulgarity.

Because of the nature of recreational software, full prior review of every title was not a feasible option. Whereas a movie takes two hours to view, interactive software can take upwards of one or two hundred hours of playing and the viewer may still not have opened all the doors or reached every level. In addition, there are an estimated 2,000 new titles published each year which would make full prior review virtually impossible unless a vast army of reviewers were employed, making the system extremely expensive and unwieldy. It was essential that the rating system include a self-disclosure questionnaire as the basis for reaching the rating levels and descriptors in each category together with tough sanctions for any willful misrepresentation by a software publisher.








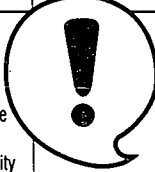
The three categories of the RSAC rating system are: Violence; Nudity/Sex; and Language. Within these categories are four levels: 0-4. The higher the level, the greater the objectionable content to be found in the software product. In addition, there are brief descriptors that give further information about the title, such as: *Blood and gore* or *Explicit sexual activity*. If a title has no objectionable content it

receives an *All* rating, i.e., *Suitable for All Audiences*. These labels are then placed on the front of the boxes or on the opening screen of the software. Examples of these rating labels can be seen below:



RSAC

The Recreational Software Advisory Council informs consumers about the content of software games using the symbols shown below. These symbols appear along with more specific information about each category as labels on software packaging.

|  CONTENTS MAY INCLUDE |  LEVEL 1 |  LEVEL 2 |  LEVEL 3 |  LEVEL 4 | | | | |
|--|---|--|--|--|--|---|--|---|
|  Harmless conflict; some damage to objects | <h2 style="text-align: center;">VIOLENCE</h2> <table border="1" style="width: 100%; text-align: center;"> <tr> <td data-bbox="443 884 542 1029">Creatures injured or killed; damage to objects; fighting</td> <td data-bbox="557 884 656 1029">Humans injured or killed with small amount of blood</td> <td data-bbox="671 884 770 1029">Humans injured or killed; blood and gore</td> <td data-bbox="785 884 883 1029">Wanton and gratuitous violence; torture; rape</td> </tr> </table> | | | | Creatures injured or killed; damage to objects; fighting | Humans injured or killed with small amount of blood | Humans injured or killed; blood and gore | Wanton and gratuitous violence; torture; rape |
| Creatures injured or killed; damage to objects; fighting | Humans injured or killed with small amount of blood | Humans injured or killed; blood and gore | Wanton and gratuitous violence; torture; rape | | | | | |
|  No nudity or revealing attire / Romance; no sex | <h2 style="text-align: center;">NUDITY/SEX</h2> <table border="1" style="width: 100%; text-align: center;"> <tr> <td data-bbox="443 1128 542 1274">Revealing attire / Passionate kissing</td> <td data-bbox="557 1128 656 1274">Partial nudity / Clothed sexual touching</td> <td data-bbox="671 1128 770 1274">Non-sexual frontal nudity / Non-explicit sexual activity</td> <td data-bbox="785 1128 883 1274">Provocative frontal nudity / Explicit sexual activity; sex crimes</td> </tr> </table> | | | | Revealing attire / Passionate kissing | Partial nudity / Clothed sexual touching | Non-sexual frontal nudity / Non-explicit sexual activity | Provocative frontal nudity / Explicit sexual activity; sex crimes |
| Revealing attire / Passionate kissing | Partial nudity / Clothed sexual touching | Non-sexual frontal nudity / Non-explicit sexual activity | Provocative frontal nudity / Explicit sexual activity; sex crimes | | | | | |
|  Inoffensive slang; no profanity | <h2 style="text-align: center;">LANGUAGE</h2> <table border="1" style="width: 100%; text-align: center;"> <tr> <td data-bbox="443 1376 542 1470">Mild expletives</td> <td data-bbox="557 1376 656 1470">Expletives; non-sexual anatomical references</td> <td data-bbox="671 1376 770 1489">Strong, vulgar language; obscene gestures</td> <td data-bbox="785 1376 883 1470">Crude or explicit sexual references</td> </tr> </table> | | | | Mild expletives | Expletives; non-sexual anatomical references | Strong, vulgar language; obscene gestures | Crude or explicit sexual references |
| Mild expletives | Expletives; non-sexual anatomical references | Strong, vulgar language; obscene gestures | Crude or explicit sexual references | | | | | |



Recreational Software Advisory Council

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CHECKS AND BALANCES

It was imperative that the RSAC system had a strongly regulated series of controls to ensure that software publishers and other media providers were not able to cheat the system. The RSAC application includes a three page legal contract that is signed by the producer stating that he or she has fully disclosed all the potentially objectionable material within the product. The software publisher also agrees to adhere to the RSAC regulations regarding the display and use of the trademarked icons and logos. Further, the contract lays out stiff penalties for non conformance, including fines of up to \$10,000, removal of product from retail outlets and enforced re-rating. In addition, RSAC regularly audits a percentage of all products that have been rated by the RSAC system. These spot checks ensure that a software publisher is fully aware that their products are closely monitored and reviewed.

STATISTICS

Since RSAC's incorporation in September of last year, over 200 software titles have been rated with nearly 80 software companies. It is anticipated that some 500 titles will have been rated by the Christmas season. The current cost to rate a product with RSAC is \$350 with a sliding scale for smaller companies who may only pay \$25 per title depending on their size. Over 500 RSAC Self-Disclosure Questionnaires have been distributed to software publishers, the media, schools and individual consumers. Over one million RSAC educational postcards are being distributed by Wal*Mart and through software companies in their software packaging.

RETAILERS

A key part in making the RSAC system effective is the active involvement of major retailers in the scheme. Wal*Mart, the country's leading retailer has announced that they will no longer accept titles unless they have been rated. Toys R Us has made a similar statement. Sears and Target strongly encourage software publishers to rate their products, though they have not, to date, set a time limit after which they will no longer accept unrated products. Senator Lieberman has taken a strong stance on this issue and together with Senator Kohl, continues to try to persuade more retailers to take the Wal*Mart line. It is our hope that many more of the top retailers in the country will announce their requirement of ratings on recreational software before the Christmas shopping season.

RATINGS AND OTHER MEDIA

Considerable research has shown that TV violence and images of explicit sex have a profound effect on children. In the recent Telecommunications Bill debate, Senator Kent Conrad successfully amended the Bill with a call to television manufacturers to install "Choice Chips" inside all television sets and for the networks to develop a ratings system to empower parents to make real choices about the programs that they and their children watch. On the floor of the Senate and in subsequent press conferences, Senator Conrad commended the RSAC system as an excellent example of what could be achieved in a short period of time. Senator Conrad was praised for his steadfast work on a rating system for television by both the President and Vice President at the recent "Families and the Media" conference in Nashville. At that conference, RSAC offered to work with the Coalition that Senator Conrad has developed over the past two years, to help the television networks to set up a system by July 1996.

CONCLUSION

The Recreational Software Advisory Council is committed to providing parents and consumers accurate information about the recreational software and other media they purchase for themselves and their children. RSAC is opposed to censorship and respects the right of free speech and expression.

While we have a number of reservations about the Act as drafted, we would like to invite any organization interested in the RSAC system to work together with us to find a practical solution to the necessary protection of children from objectionable material on the Internet and in other media.

Senator GRASSLEY. Thank you.

Mr. Crimmins, again for the audience, I would like to remind them what you have told us, that you were posing as a child in your investigative report.

Mr. CRIMMINS. Much of the time. Often, I would be in there with a profile that said I was a children's rights and safety advocate, and people are so brazen, they just go ahead and send it to you anyway.

Senator GRASSLEY. Just remind us a little bit of what you have already told us. Tell us about some images that you received online and how other users responded to you while posing as a child.

Mr. CRIMMINS. Well, when you are a child and you enter—by the way, I was online this weekend, and there are certainly child pornography exchanges active and online on AOL this weekend; and a week ago today, I was transmitted or send child pornography on AOL, which I forwarded to your staff—actually, I forwarded it to Mr. Hypolite because your mailboxes were all full for the areas where you are supposed to be able to forward it to. So I sent it to the head of Terms of Service, Mr. Peter Hypolite, just last Monday.

When you are a child, and you come into the room, the pedophiles come after you like they are flies and you are rancid meat. The messages begin instantly. And I have shown this to prosecutors. I have brought a number of legal officials and law enforcement officials into my office, and they thought they were hardened, they thought they had seen everything, and they came out of my office transformed and shocked at how quickly the pedophiles swooped down and immediately began making completely obscene advantages to someone they thought was a 12-year-old child.

Senator GRASSLEY. Do you believe that your experience is unique or unusual, and do you feel that there is a need for congressional action to protect children?

Mr. CRIMMINS. Oh, there is a definite need for congressional action if only—if only—to free up the funds for law enforcement against this crimewave of child pornography. If there were a murder crimewave, we would put a lot more cops on the street. There is a child pornography crimewave, and we need a lot more people out there enforcing these laws right away—not 6 months from now, but right now—because every single day these people see this stuff, it creates more of a demand for it, and that is a demand for more abused children. So that each minute that passes, more children are in jeopardy and more children are harmed. And this is brazen. Anybody with common sense who sees what I have seen comes away transformed. It is brazen. It is right in front of your face.

Senator GRASSLEY. Mr. Burrington, do you have a record of parent complaints and a record of how your company dealt with them?

Mr. BURRINGTON. Mr. Chairman, a record of complaints with respect to—or, general complaints?

Senator GRASSLEY. No; the type of complaints that Mr. Crimmins has referred to.

Mr. BURRINGTON. We do get complaints from people. I do not think we maintain any kind of systematic records concerning those complaints. But when we receive complaints—and let me, if I may, Mr. Chairman, walk through what I went through this weekend—

Senator GRASSLEY. Before you do that, could I ask, if you do not have a record, if you do not maintain a file or a record of this, then how do you know how many complaints you have had or how serious the problem is?

Mr. BARRINGTON. What I am saying is that we do not necessarily keep systematic comprehensive records, but we do certainly keep statistics on complaints we get and the types of complaints we get, and frankly, a lot of that information we do get is turned over directly to law enforcement.

Senator GRASSLEY. Could you submit for a certain period of time statistics or records that you have for our record?

Mr. BARRINGTON. I can certainly check into doing that, Mr. Chairman.

Senator GRASSLEY. Obviously without violating anybody's privacy, but we can surely have it without names. I think it would be beneficial to us.

Mr. BARRINGTON. Right; under Federal law, we can certainly give you sort of aggregate information, if you would like, in terms of statistical information.

Senator GRASSLEY. Thank you. Now I should allow you to continue.

Mr. BARRINGTON. Thank you, Mr. Chairman.

What I want to walk through for the benefit of this committee is that at least on America Online—and it varies the sort of process we go through when we are talking about these member rooms—one of the more popular areas of the online world is what is called “chat,” and within that, we have what are called “public member rooms,” and that is what I went into this weekend. Essentially, I went in, and you can see all kinds of chat rooms, ranging from “teen chat” to other types of topical chat rooms, and at any given moment, we have between 600 to 800 of these rooms open, and up to a maximum of 23 people can enter them simultaneously. This is live chat going back and forth, and they are very public rooms.

Our terms of service advisors that Mr. Crimmins has referred to have made, I think, dramatic improvements since February, and I am not suggesting that we have a 100-percent perfect system because of the sheer volume of what we are dealing with here, but we have made significant improvement, and we have full-time, 24 hours a day, 7 days a week, people who are monitoring those member rooms, and they immediately get rid of the ones that we think might suggest inappropriate activity.

I just want to clarify that, so when I was online on Sunday afternoon, I did not see—I saw one room that I thought could be considered objectionable of the type that Mr. Crimmins was referring to, and I watched to see how long it took for it to be removed, and it was approximately 5 to 10 minutes by the time the terms of service advisor got in there and zapped it off.

So I want to stress that we are mindful of the problem. I in no way suggest to Mr. Crimmins that it is 100 percent solved, but I think it has dramatically improved over February, and I think we need to state that for the record.

Senator GRASSLEY. Mr. Crimmins?

Mr. CRIMMINS. Well, as it happens, I thought this might come up, so in the past week—and this is at home on my computer in Ohio, but I will get it and furnish it to the committee or the media or anyone—I have copied the entire member room list several times just in the past week, and people can judge for themselves from

those lists just in the past week how many objectionable rooms you might find.

Mr. BURREINGTON. I am sorry—because of what he is doing, I have to respond to these statements.

Mr. CRIMMINS. And they have 23 people in them often.

Senator GRASSLEY. OK; then, after you respond, I will go to Senator Leahy for his round of questioning. Go ahead.

Mr. BURREINGTON. Very briefly, again, I am not suggesting, Mr. Crimmins, that there are not those types of rooms that are created, and I would be happy to look at that list, but I would bet you if you went back and could do a comparison of 5 minutes, 10 minutes, half an hour out, a lot of them would not be on that list still. So it is slightly misleading. I am not suggesting that those rooms are not created. We have 3 million people in our community, and there are bound to be a few strange people, frankly, and there are, and we are trying our best to wipe those people off of our system.

Senator GRASSLEY. Senator Leahy, I am going to step out for just a minute; you go ahead, and then when you are done, Senator DeWine may ask questions.

Senator LEAHY. Mr. Chairman, earlier I made a comment about the Marty Rimm study, and I want to make clear that that was published after the floor debate on the Exon-Coats legislation.

Senator GRASSLEY. And also after my bill was put in.

Senator LEAHY. That is right, after your bill. What I was thinking about was that it was used in a discussion and justification of the Exon-Coats bill later, but it was not used during the debate, and I did not want to leave a misconception on that.

Senator GRASSLEY. Fine.

Senator LEAHY. Mr. Crimmins, I just want to follow up a little on what the chairman was saying about the laws on the books. If I read your testimony correctly, you feel that current law makes illegal the distribution over computer networks of child pornography; is that correct?

Mr. CRIMMINS. Yes; it is illegal, no question.

Senator LEAHY. And you reported what you found on AOL to a law enforcement agency?

Mr. CRIMMINS. Yes, sir, I did.

Senator LEAHY. Do you know what steps law enforcement has taken in response to your report?

Mr. CRIMMINS. I have been informed of some things. I really cannot discuss it right now.

Senator LEAHY. It is possible that active criminal investigations are now underway; right?

Mr. CRIMMINS. They are underway.

Senator LEAHY. Are there instances in which obscenity or child pornography transported over computer networks could not be prosecuted because of gaps or inefficiencies in our Federal laws?

Mr. CRIMMINS. I do not believe so.

Senator LEAHY. So that basically, the laws are good, but the enforcement is lax.

Mr. CRIMMINS. It is de facto decriminalization right now.

Senator LEAHY. Were you here earlier with the other testimony when it brought out how somebody in Florida used the laws to

prosecute whereas, obviously, from testimony of the young woman who was here earlier, somebody else did not prosecute?

Mr. CRIMMINS. You are right. I think that the laws as far as the pedophiles are concerned are fine. I think that if an organization has extensive prior knowledge of how its system is being used on a regular basis to transmit child pornography, that there might be a need for some sort of law that would hold the responsibility there. I am a card-carrying member of the ACLU.

Senator LEAHY. As a former prosecutor, I know of a lot of cases where you have laws, and people do not enforce them, and some prosecutors will, and some will not. And of course, also, in some of these chat groups, there are things that may be very graphic, but there are also people who are seeking help from each other, is that true—almost like the graphic statements you might hear at an Alcoholics Anonymous meeting?

Mr. CRIMMINS. Well, I would say that first of all, the vast majority of the member rooms on AOL are geared toward sexuality—

Senator LEAHY. But I am asking, is it possible that there are some discussion groups—there may be some graphic discussions, but they are occurring with people who are truly seeking help with each other.

Mr. CRIMMINS. Right, right, and I am in support of that. I am in support of groups for, for example, gay and lesbian teens, who have one of the highest suicide rates. Certainly, if there is some way for them to network online with proper adult chaperoning, and there are no predators there, that would be fine, and there may be some sort of graphic thing discussed there that I would not have a problem with.

Senator LEAHY. You have anticipated my next question with that, and I appreciate it.

Mr. CRIMMINS. I have been working at this for a long time.

Senator LEAHY. I know you have, Mr. Crimmins, and I am glad you are here because of that, and that is why I wanted to ask you those specific questions to get your own knowledge, and your answers basically bear out what I have thought instinctively, but I want to tap into your own knowledge.

Mr. CRIMMINS. Common sense—if you could go and see what I have seen, common sense would dictate. And I think that when you read my full written report and what follows at the end of it, the documentation, there are some commonsense solutions.

Senator LEAHY. I have read it.

Mr. CRIMMINS. If the problem is that these rooms exist, then you have to stop them where they exist.

Senator LEAHY. If I could follow up with Mr. Burrington, Mr. Crimmins obviously disagrees with AOL's response to his reports of child pornography in the private sections of your "People Connection" service. But in a letter to Mr. Crimmins, America Online stated that it—I believe I am quoting this correctly—"cooperates with investigations by local, State, and Federal law enforcement agencies in order to curb this activity." Again, just reaching back into the dim past when I was in law enforcement, might there also be a case when law enforcement might ask you to keep a service online as they continued their investigation, because that might be

an effective investigative tool for them, rather than simply cutting it off? I do not want to go into specifics, but is that a possibility?

Mr. BURREINGTON. That is certainly a possibility, Senator.

Senator LEAHY. If criminal liability is imposed on computer users or online providers for transmitting material that may be viewed by someone somewhere as indecent, what is that going to do to communications over the Internet?

Mr. BURREINGTON. I think it is going to stifle it dramatically. One of the problems with the original Communications Decency Act was that we felt strongly that we would have to, frankly, shut down perhaps electronic mail, chat rooms, and other areas simply because of the risk of liability.

I really feel here, Senator, that the solution and the role for Congress at this point and the role for government, at least in the United States, recognizing this is a global problem and a global medium, is to help bring together the Mr. Crimmins' of the world and the America Onlines and Mr. Balkam and others, like you are doing today, and let us talk about solutions. Let us get the Justice Department in here and find out if there are gaps in the criminal law so that we can take care of those gaps. Let us create a partnership and help educate parents about the medium and that these technological tools are available, such as SurfWatch, which we will make available free to our members; parents do not have to pay for it. But let us not rush in here while we are going through the growing pain period.

Mr. Crimmins talks about a period of America Online in February, and now, 6 months later, in this industry, that is like a lifetime. Dramatic change occurs in 6 months. And again, I am not lessening the severity of the problem, but we are talking about less than one-half of 1 percent of the content on the Internet, and we need to regulate that responsibly.

But remember also that this is a global medium, so we can come up with all kinds of criminal laws here in the United States that I think frankly already exist. We need more enforcement, but U.S. Government solutions are not going to work in Singapore or in Finland or somewhere else, and that is why we tend to favor an approach that empowers parents, empowers users, educates children—we have a "Child Safety on the Information Highway" brochure that the industry put together that tells kids not to give their names and addresses out, and these are some basic things we need to educate and convey to children. And to the individuals up here from Florida, my message to Florida is that they should be prosecuting under their current laws, and if you are a child, do not go back to a place that you know is causing some problems or that you do not like. Get rid of it; tell your parents; make sure they report those individuals to the police, like what happened here. But do not go back time and time again. It is just common sense, again; I agree with Mr. Crimmins.

Senator LEAHY. Mr. Chairman, again, I reiterate my appreciation to you in having the first of these hearings—and I think the last comment about the Internet being international, global, is something that we have to really look at and should be working very closely on. I took my family on a vacation outside the country and just clicked onto the area where we were going and was able to pull

up maps and so on out of an overseas site. It just shows you—I was doing that as quickly as I can pull up a Vermont map on my Web Page. So we are dealing with something that goes way beyond just the confines of our own country.

Thank you, Mr. Chairman.

Senator GRASSLEY. Before I call on Senator DeWine, just a point that comes out here continually, from Senator Leahy and now from Mr. Burrington, that current laws, if enforced, would somehow address this problem.

The point has to be made that under current law, noncommercial computer obscenity is not covered by any Federal statute, 18 U.S.C. 1465. My bill is meant to remedy this problem when pornography is sent to children because all obscenity is necessarily indecent under our Constitution.

Senator DeWine?

Senator DEWINE. Thank you very much, Mr. Chairman.

Mr. Balkan, I want to make sure I understand. The blocking system, rating system, I think you did a nice job of explaining that. However, that would not help Ms. Gruff, who testified on the first panel, and her situation—and I think that that is what you said, interactive back and forth, it is just not relevant to that; right?

Mr. BALKAM. I have to be very open about that; it would not, and I was very grateful for the invitation from Senator Grassley to come and explain where we could help in terms of static sites, which by the way, is really where much of what goes on in the Internet is happening. I know we have been focusing on the chat groups, but a great deal also happens with the static sites.

Senator DEWINE. Thank you very much.

Mr. Burrington, let me make sure I understand what your testimony is. We are talking about these chat rooms, and you mentioned that it is your company's policy that if we have a room full of pedophiles, and you see that going on, that you try to zap that out; is that correct?

Mr. BURREINGTON. That is correct, and those kinds of people are, frankly, removed from our service. We truly have pretty much "three strikes and you are out" at America Online, as a lot of the services do, which means that you are given a warning if you are violating our terms of service agreement, and then you are removed permanently from the system.

Senator DEWINE. I do not understand the difference between the public room and the private room. I thought I heard you testify that you will zap them out of they are in a public room.

Mr. BURREINGTON. That is correct.

Senator DEWINE. What about private rooms?

Mr. BURREINGTON. Well, let me explain private rooms, because this does get confusing, and the terminology is confusing. Those kinds of individuals—and what we are talking about here is if it is a room that we find, we have trained terms of service advisors—they do not claim to know every, single thing out there, but if they see something that they think, just based on the label of the room, might be deemed to be a violation of our terms of service or Federal law, then they will zap those people into what is called a private area, which means that only those people can be in that area, and then it is essentially private.

Senator DEWINE. You lost me about 20 seconds ago. Who can get in, and who can get out—I mean, who cannot get in? You said you put them into a private room, and only they can get in. What does that mean?

Mr. BURREINGTON. Well, what that means is that—let us start in the public room, OK, and just for fun, we will come up with a public room called “baseball,” and we are talking about baseball, and maybe we get into some baseball team we should not be talking about or something—this is very hypothetical—then that room and those members in that room would be essentially placed into a private room so that only those members who are in that room could have that kind of conversation about baseball, as an example.

Does that help you?

Senator DEWINE. Mr. Crimmings, do you want to comment on that?

Mr. CRIMMINGS. Well, the private rooms are formed for people who know—occasionally, I will check private rooms. Let us say I will check for NAMBLA as a private room, and I will find it sometimes; the North American Man Boy Love Association will form a private room. You have to create private rooms. You have to know the title of the private room to get into it. So I will type in “NAMBLA,” and every once in a while I hit the lottery, and there is NAMBLA meeting, and I go in and comment to them.

Also, this is interesting to me—the three strikes. I do not think people trafficking in child pornography should get three strikes. I think they should get one strike. I do not think that they deserve three strikes. I think that is a heinous crime, and I think it should be one strike and you are out for child pornography.

Senator DEWINE. If you will both indulge me for a moment, let us take an actual child, not someone pretending to be a child, but an actual child, who is into the system and does this quite a bit. What are the odds of them getting into the private room? Can they ever get into a private room? You say they have got to know the name.

Mr. CRIMMINGS. The member rooms are just as dangerous as any private room, a very dangerous area for a child, and parents should use that—good parents, and I am all for parental control software. I was mischaracterized as being against it. I just pointed out a flaw in it that some parents abuse their children, but parental control software is great when you have great parents.

Senator DEWINE. So are you telling me that parental control software—

Mr. CRIMMINGS. Could keep them from the chat areas—but it often does not.

Senator DEWINE. But I noticed you making faces when Mr. Burreington was talking about how they zap them off very quickly.

Mr. CRIMMINGS. Well, I have complained about rooms and watched them remain online for hours afterward.

Senator DEWINE. Mr. Burreington, go ahead.

Mr. BURREINGTON. I did not hear what he said.

Senator DEWINE. He said he has complained about them and could see them stay up for hours after that.

Mr. CRIMMINS. Yes; after filing the complaint, I have watched rooms remain active, and I mean rooms with the titles that are at the end of my testimony.

Senator DEWINE. Mr. Burrington, do you want to respond?

Mr. CRIMMINS. Yes, let me respond. First of all, I agree with Senator Grassley that this is a hearing about a much broader issue, and hopefully not just about America Online. I think the problems that we have experienced reflect the problems of the broader Internet community and the rapid growth of this technology. We are the largest online providers, so we are inevitably going to have, frankly, the largest number of problems. And again, in any community of 3 million people, there are bound to be some problems.

We do have prompt control technology that is very easy to use, does not cost a dime; it has been in place for 2 years. We are doing a better job of educating our members about it. Steve Case, our CEO who communicates with each member every month in a letter online, spend an entire letter just talking about child safety and parental control technology and violations of Federal law for trafficking in child pornography, for example, stating that we will not tolerate it.

I do not claim that we are perfect—we are not—but we are doing a very good job. And if you do a comparison from February to today, I think the problem is different.

And since it has been brought up by Mr. Crimmins, let me just quickly make a couple of comments. Our terms of service staff, the people out there that are trying to get these people out of these member rooms that we are talking about, has increased 600 percent in the last year. We have gone from 4 people to 24 full-time people, and we are going to double that again. As we are growing exponentially as a service, we are trying to keep up with it as a service. It is like a city, essentially, that would grow from 300,000 2 years ago to 3 million. You have got to hire a lot of law enforcement people and firemen and policemen, and that is what we are trying to do, essentially, to keep up with the pace of growth.

Now, perhaps the reason our terms of service room or whatever that you sent stuff too was full recently is frankly because people are out there. You would be amazed in the online community, when we are trying to get people involved in their own communities here in America and in our cities, it is amazing in the online medium how people get involved. They are not afraid to call up and say, "We have a problem. I think these people are dealing in child pornography."

Senator DEWINE. Mr. Chairman, I see my time is up, but I wonder if I could ask Mr. Crimmins one more question on the same line.

Senator GRASSLEY. Yes.

Senator DEWINE. Mr. Crimmins, in light of Mr. Burrington's comments, you made a comment earlier in your testimony about what you did last weekend, and you said if we could only see that. Give us a summary.

Mr. CRIMMINS. A week ago today, I signed on because I decided I was going to make some room lists, to see the rooms that were listed within a week of when I was going to testify here. And I saw a room that was called "M and F Preteen Pick Exchange," I think

is what it was called. So "preteen" means child "pick exchange." It means child pornography.

So I went in, not as a child, but with my adult profile that says I am a children's rights and safety advocate. And last Monday afternoon, I was sent numerous files of child pornography. I attempted to forward it to AOL's post office box, the terms of service advisor, terms of service e-mail, and they said that it was unavailable because it was full in both cases. I do not know how much it would cost them to open up another mailbox for themselves.

So because I happened to know the name of the head of terms of service, I forwarded it to Peter Hypolite, and I have not heard back about those files—and I very rarely do.

For example, the time I sent the 8½ hours' worth, I did not even get a note that said thank you. And at that point, I asked, hey, how about a credit to my account? Why should I spend my money to do this? Could you credit me for doing this investigation? Here is 8½ hours. Could I get a credit for that? No response. They are very unresponsive.

I am glad to see them here today, and I am glad to hear that they would like to cooperate with me in the future, and that they would like to cooperate with people like me in the future, because that certainly has not been my experience.

Mr. BURLINGTON. Well, Mr. Crimmins, it has not been your experience, but I would argue that it has been the experience of many others we work with, such as Enough is Enough and other groups that we have met with over time and established relationships with.

The fact that our mailboxes are full is an indication of the fact that people are responding to Steve Case's call to help us keep our service clean and family-friendly, and it is working.

In your case, you did receive responses. I have reviewed the correspondence, and you received responses—

Mr. CRIMMINS. I have received responses at times, but I have not received responses from at times. And the more heinous it is, the less response I get. It is like there is denial involved, or something.

Mr. BURLINGTON. Well, there is no denial here. We are trying the best we can to manage our growth, which has been very rapid. And this goes back to what I said about growing pains. We are doing the best we can, the industry is, I think Congress is. We are all trying to understand this and come up with the best approaches to the problem.

And in the case of you, Mr. Crimmins, I know that you received responses on certain things. When you forward us, for example, what you deem to be child pornography files, for example, we will do our own investigation of that and turn that information over to Federal or appropriate law enforcement agencies, and we do not get back, and frankly, we feel that we cannot get back to the individual who sends us that information for law enforcement reasons.

Senator DEWINE. Thank you, Mr. Chairman.

Senator GRASSLEY. Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman.

Let me say that I think this has been a very good and helpful discussion. I realize there are issues between the two gentlemen here, but I think the tone has been good and that it points out the

value of Congress waiting for something to get to the point where everybody in the country understands the issue. It is better that we get involved at this point, not necessarily in passing legislation—that may be meritorious—but this is such a complicated area, it is important that Congress try to fully understand the issue first. I personally appreciate the way in which you have discussed this today.

Mr. Burrington, when Mr. Crimmins was discussing your comment about the “three strikes and you are out,” you looked like you may have wanted to respond, and I am kind of curious to know what you would say about the one strike versus the three strikes.

Mr. BARRINGTON. Well, again I want to stress that I think we are all in agreement here. Without doubt, we do not in any way condone illegal activity on our service or child pornography. We are as repulsed about it as you are, Mr. Crimmins, and we are trying to work on it as best we can.

It is the nature of this medium, because of its instantaneous nature and what have you, that it is very hard to be 100 percent on top of this every, single second of the day; but we have made vast improvement.

If I had my choice, if we could somehow determine whether you were a child pornographer, you would not be on our service, period; we do not want their business, frankly, and we would appreciate it if they would leave us, frankly, because for the other 98, 99 percent of the parents and kids who use our service and all of the other online services and the Internet, they are getting some real value from it, there is no question about it.

And I hope that the message here today is not that the online industry or online services in the Internet are a terribly dangerous place, because again, we are talking about a problem that is less than one-half of 1 percent. It is a significant problem.

So that in the case of child pornographers, Senator, yes, one strike and they should be out; I agree.

Senator FEINGOLD. So there are other situations where there would be a warning, but not child pornography.

Mr. BARRINGTON. In child pornography, it should be “one strike and you are out.”

Senator FEINGOLD. And what would be a scenario where you would give a warning, but not kick them off right away?

Mr. BARRINGTON. Somebody who might be using, for example, hate-related speech, speech that we deem to be offense, or perhaps talking somebody—doing something that is in violation of our terms of service—illegal downloading of software, whatever. Those people will get a couple warnings, and then they are off—and they are off for good; they can never rejoin our service.

Senator FEINGOLD. Let me ask you a couple of questions about what your response might be if the chairman’s legislation passes. A lot of what has been discussed so far has dealt with material or behavior that is already criminal under existing statutes. However, there are a number of proposals out there, as you have indicated, that would subject users to criminal penalties for indecency, the Exon-Coats proposal being one, or the online providers who allow the transmission to occur.

Given that "indecent" is a pretty vague term that could be interpreted differently by a variety of communities, how would AOL interpret indecency if it were liable under criminal law to prevent its transmission to minors?

Mr. BARRINGTON. Frankly, Senator, I think you raise an excellent point, and it is a problem that we have had with this approach, that there are 50 States with definitions of what is considered indecency, not to mention the global nature of this, not to mention all of the content flowing into our service from the Internet that we literally have no control over.

I guess that is the whole question for us is how would we determine what constitutes indecent material. And I think, frankly, to protect ourselves from criminal liability, we would probably just have to shut down large chunks of our service.

Senator FEINGOLD. You would have to err on the side of the broadest possible definition of indecency to protect yourself from liability.

Mr. BARRINGTON. And err on the side of extreme caution, and I do not think that that is what this new medium was intended to be, this incredibly empowering democratic medium; I do not think that that is what it was intended to be.

Senator FEINGOLD. And I assume you are familiar with Chairman Grassley's bill. How has AOL interpreted the legislation in terms of what might constitute the knowledge of an indecent message and its willful transmission? How have you interpreted that?

Mr. BARRINGTON. I think what we see there is where we would be made aware—and it gets difficult because you have to know the ins and outs of our service and the other services—but we would be made aware specifically that somebody with x screen name is transmitting, let us say, Playboy Magazine to Johnny in Topeka. That is how I think we would see that. It has to be very specific kind of knowledge that that is happening. And that is what is so odd about this legislation, that the production of Playboy and the distribution in other ways of Playboy is not cause for liability, but somehow we would be the ones solely liable for the distribution of that indecent material, and we just think that is wrong.

Senator FEINGOLD. As opposed to other ways that that document could be received by a child?

Mr. BARRINGTON. Precisely; I mean, we should not just be zeroing in on this medium. I know that is the thing to do these days, but I think we have to be very careful here as this medium is developing.

Senator FEINGOLD. And you mentioned that you feared that S. 892 would act as a disincentive for online service providers to develop new ways to protect their users from indecent communications. Is this because you fear that any effort to search, screen, and know more will actually increase your liability if the system is not foolproof?

Mr. BARRINGTON. You are absolutely right. You hit it right on the head.

Senator FEINGOLD. You would be in effect discouraged from doing that.

Mr. BARRINGTON. Yes.

Senator FEINGOLD. Once AOL is put on notice that children are receiving indecent materials, what would be your options, in your view; what would be available to you to prevent further transmission?

Mr. BURREINGTON. Are you talking about in a specific instance?

Senator FEINGOLD. What would be the options you would have?

Mr. BURREINGTON. Well, I think if we became aware of that, we would have to terminate the account that it was coming from, if we could determine that. If it was coming from the Internet, we could not do much with that; that brings up the global problem.

Senator FEINGOLD. So, canceling the account?

Mr. BURREINGTON. Canceling the account; and perhaps, if we see a pattern of types of indecent materials, I suppose, blocking out or getting rid of those areas of the service.

Senator FEINGOLD. In your testimony, you propose that voluntary editorial control is preferable to government regulation. However, the type of concern raised by Mr. Crimmins leads a lot of people to say that the industry will not self-police criminal activity on their service until they are forced to. Was AOL taking steps before this incident to prevent the transmission of illegal material?

Mr. BURREINGTON. Well, we have been in the sense that—and I know from Mr. Crimmins, and I respect his passion on this issue, and we happen to agree with him—but give the service as it was developing—and this again has happened very rapidly—we have had parental control technology in place for 2 years; our terms of service have made it very explicit. But frankly, it has been difficult to keep up with the growth. It is great for our company and our industry that we are growing so fast, and that gets back to my statement about the growing pains here; I think we are all going to go through them together. But we certainly have been taking steps well before these hearings were called or this issue became a hot issue in the media.

Senator FEINGOLD. Thank you, Mr. Burreington.

I see my time is up, Mr. Chairman. Thank you.

Senator GRASSLEY. If it is OK, we will not have a second round.

Senator LEAHY. That is fine. If I have further questions, I will submit them in writing.

Senator GRASSLEY. I think we could keep you here another half an hour, for sure. I have some more questions, but I think you can expect to receive those in writing.

I had invited Senator Exon to come to the meeting if he wanted to, and I see he has come. If you would like to make any short comments, I would be glad to have you do that right now. I am going to dismiss the panel.

**STATEMENT OF HON. J. JAMES EXON, A U.S. SENATOR FROM
THE STATE OF NEBRASKA**

Senator EXON. Mr. Chairman, thank you very much. I am sorry I was delayed. I wanted to be here earlier.

I first want to thank you for calling this hearing. I complimented you on the floor when you announced that you were going to hold this hearing. I think we need to go into these matters very, very carefully, and I certainly will not delay the activity of the committee by asking any questions at this time, except the brief part that

I have heard today indicates to me that the industry is starting to do something about this. I am not sure that I agree completely with what the industry is doing, but they are making significant steps in the right direction. I appreciate your interest in this, Mr. Chairman, and that of the subcommittee.

I will listen to the next panel.

Senator GRASSLEY. We would certainly invite you to stay.

I think that Senator Exon being here, because he has had legislation through the Senate and the introduction of other bills, and the hearing—I think this all indicates that we have had the concern really highlighted and brought to people's attention. I know that that is not satisfying to me at this point, and it is surely not satisfying to Mr. Crimmins, but the point is that this is being discussed, it is being highlighted, and all of the activity, both private and public sector, I think is showing some positive responses.

I am sorry that Senator Feingold has left—I should not say I am sorry he has left; he is entitled to leave—I was just hoping to make one little comment before he left, so perhaps his staff could report to him what I was going to say. This is on the question of vagueness and overbreadth.

I wanted to quote, if I could, again from Professor Harrison, just one sentence from the letter that you have a copy of. "The legislation"—meaning my legislation—"also would survive challenge on vagueness and overbreadth grounds. The category of 'indecent material' as currently understood by Congress, the courts and the FCC, is well enough defined to give adequate notice to operators of their responsibilities under the bill."

Thank you all for participating.

I will now call forward the next panel. Dee Jepsen is director of the "Enough is Enough" campaign, a nonpartisan women's campaign designed to educate the American public about illegal pornography. And I also want to add that Dee Jepsen is an Iowan, and I want to say—and I hope I do not embarrass her—that she is a longtime friend of mine.

The second witness on the panel is Michael Hart. He is a professor of electronic texts at Illinois Benedictine University. Professor Hart has been doing good work, translating classic works of literature into electronic format.

And the final witness is Jerry Berman. He is executive director of the Center for Democracy and Technology. He also chairs the Interactive Working Group, and until 1988, Mr. Berman served as chief legislative counsel to the American Civil Liberties Union.

If it is OK, we will hear first from Ms. Jepsen, then Professor Hart, and then Mr. Berman.

PANEL CONSISTING OF DEE JEPSEN, EXECUTIVE DIRECTOR, ENOUGH IS ENOUGH CAMPAIGN, FAIRFAX, VA; MICHAEL S. HART, EXECUTIVE DIRECTOR, PROJECT GUTENBERG, AND PROFESSOR OF ELECTRONIC TEXTS, ILLINOIS BENE-DICTINE COLLEGE; AND JERRY BERMAN, EXECUTIVE DI-RECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY, WASHINGTON, DC

STATEMENT OF DEE JEPSEN

Ms. JEPSEN. Mr. Chairman and members of the Judiciary Committee, I would like to speak today as not only president of Enough is Enough, a women's organization, nonprofit, nonpartisan, that works to combat child pornography and other forms of illegal obscenity, but I would like to also speak as a woman, as a grand-mother of nine, and I think as I have listened today, I would also like to try to speak on behalf of the children. We hear a lot of legalese and a lot of concern about methodology, and we sometimes get lost in the complexity of things, and it is the kids who are the ones who suffer in the end, and we deal with them, those who have become victims of pornography, every day. And I cannot forget their faces or forget their stories.

I would first of all like to commend you, Senator Grassley, for your moral courage in attacking this issue, as I would also like to take this opportunity to again say to Senator Exon, we are very grateful for your initiative also.

This is not an easy issue. I have worked on the pornography issue exclusively for 4 years, and it is like trying to bring clarity to a glass of mud sometimes, and maybe the analogy is appropriate. We have talked here today about indecency, and it is a difficult thing to understand how the pornography laws work, and now, with this new technology, how they might be applied.

Indecency is a lot different from obscenity, which is hardcore pornography. There are areas of speech that are not protected, and those that have in recent times brought to the public focus the problem of pornography in America and the type of pornography that is available, I have been amazed to see the viciousness of the attacks that have been leveled against them. It is sort of like if you do not like the message, beat up the messenger. I think that that is tragic. But the secretary is out. The material is there. Our children are consuming it, and it will affect their hearts, their minds, and their lives for years to come.

I cannot tell you how many times I have looked into the eyes of people in the audience when I have finished speaking on this issue, and perhaps they are 60, 65 years old, and women will come up and tell me about what happened to them as children, pornography having been involved, and the pain and the hurt that has never left them, never left them, and they have perhaps never even told anyone else.

So I know the problems that this material does provide to society.

I believe that women have a special authority to speak on this issue because we are the primary subjects of this material; we and our children are its primary victims. This material degrades and demeans women, it eroticizes inequality, it victimizes children, and

it ruins men because it holds a fatal attraction to many men. It will invade their thoughts and manipulate their behavior, sometimes for life.

It contributes to domestic violence and abuse, spousal abuse, rape, incest, and child molestation. And a great share of what is available today is not protected speech any more than libel, slander, or false advertising are protected speech. Most Americans do not realize that.

Due to the recent focus on cyberporn, or pornography by computer, America has put this on the front burner, and it is getting a lot of attention these days. And I believe that, as our common cultures become coarser, the children have been robbed of childhood. There is no protected place for childhood, no time for innocence anymore.

A recent "Prime Time" television program on children and sex starkly revealed that children age 10 and younger are being sexualized due to the constant exposure to sexually-oriented materials. I think that every mom and every dad and every grandmother and every grandfather, every responsible citizen in this country ought to be concerned, and they ought to be outraged. And while they do become passionate about it, I think they also have to be reasoned and reasonable, as well as responsible.

I believe that your bill, Senator Grassley, is just that. I do not think it places an undue burden upon the access providers, but it does call for responsibility, as there should be.

I believe there are two things that the pornography industry has tried to do over the years to increase its business, if you will—first of all, to remove as much as possible the social stigma associated with consuming pornography, and second, to use every advance in technology to lessen the difficulty of purchasing and consuming pornography. This is a multi-billion-dollar business, and we need to do everything we can. And I would hope that those within the industry would continue to cooperate and to be more cooperative, that legal solutions be sought where they are needed, that parents get involved—to lay it all on the parents is too much responsibility, in my opinion. It used to be also that you paid to go and get pornography; now, if we are seeking technological fixes—I had not heard about the free one that was mentioned here earlier—but what we are saying is that we are going to change the baseline, and you are now going to have to pay to protect your children from pornography, rather than paying to go out and consume it.

There are many other things that I could say, but I know the day has worn on, and a lot has been said here, so I would be happy to respond to questions.

Senator GRASSLEY. Thank you, Ms. Jepsen.

[The prepared statement of Ms. Jepsen follows:]

PREPARED STATEMENT OF DEE JEPSEN

SUMMARY

This statement is in support of S. 892, *The Protection of Children from Computer Pornography Act of 1995*. In my capacity as President of "Enough is Enough!"—a non-profit, non-partisan women's organization opposing child pornography and illegal obscenity, I am very familiar with the issue of contemporary pornography—its content, availability and its harms.

Pornography demeans and degrades women, victimizes children and ruins men. It contributes to domestic and spouse abuse, rape, incest and child molestation. And a great share of it is not protected speech, any more than libel, slander or false advertising are protected speech. Many Americans do not realize this fact.

Due to the recent media focus upon "cyberporn," and consequent growing public awareness of computer pornography and its availability, especially to children, pornography has been thrust into prominence on America's reassessment agenda.

We must provide a protected space in which our children and grandchildren can grow up. A time of innocence has been stolen away from today's children. It is time that adults of this nation take responsibility to combat the predators who are polluting the minds of our nation's most valuable resource—our children. *The Protection of Children from Computer Pornography Act of 1995* is a step in that direction, and is needed.

Recently, PRIME TIME did a television program on children and sex, starkly revealing that children 10 and younger are being "sexualized" due to constant exposure to sexually-oriented materials. Moms and dads, grandmothers and grandfathers—all responsible citizens, will not accept a feeble defense of doing nothing to protect the well-being and safety of children.

Clinical studies and life experiences attest to the fact that pornography numbs the moral conscience, stunts moral growth and encourages anti-social behavior. Once pornography has been viewed by young, vulnerable children, it can start a chain of abuse that carries over into their adult and family lives. You cannot simply push the delete button and eliminate those pornographic images from their memories; they will continue to play over and over again in the theater of their minds * * * perhaps for life.

With the advent of personal computers (PC's), a whole new world of pornography access rushed in through its floodgate. Today, we face an insidious threat—hard-core, child pornography and "indecent" material, which is harmful to minors, are being transmitted over the Internet directly into our homes. Children are usually more adept than adults at operating computers, and today, with little effort, a child with a computer and a modem can download the most vile and perverse, often violent, hard-core pornography ever produced.

Not only is any child with a computer and a modem at risk of exposure to pornography on the Internet, but they are at risk of being exposed to pedophiles there as well. Pedophiles are those adults who have a sexual appetite for young children. They now electronically lurk on the Information Super Highway, as in schoolyards, to stalk their prey, unsuspecting children. As the public debate about computer pornography has intensified in recent weeks, there has often been misinformation, or partial information appearing in print.

To find effective solutions to the computer pornography problem, it will take the combination of education, legislative action, public policy initiatives and aggressive law enforcement, as well as the exercise of corporate and individual responsibility. The answer is everyone working together—parents, individual citizens, schools, legislators, law enforcement and the corporate electronic business community.

I am urging the passage of the Grassley Bill S. 892, *The Protection of Children from Computer Pornography Act of 1995* because it will help to protect children from exposure to pornography and suffering its life-changing impact. This Act does not place an unfair burden upon the access providers, but it does place responsibility upon them to do what they can do to protect the nation's computer-using children.

I am hopeful that members of both parties will check their other differences at the door and join ranks on this issue * * * for the sake of the children.

Mr. Chairman, I speak today in support of S. 892, *The Protection of Children from Computer Pornography Act of 1995*. In my capacity as President of "Enough is Enough!"—a non-profit, non-partisan women's organization opposing child pornography and illegal obscenity, I am very familiar with the issue of contemporary pornography—its content, availability and its harms. I speak not only on behalf of "Enough is Enough!" but, on a personal level, as a woman and as a grandmother of nine.

Although we have many caring men involved in our work, our organization focuses primarily upon educating and mobilizing women, because women speak with a special authority on the issue of pornography—for we, and our children are its primary subjects * * * and its primary victims. Pornography demeans and degrades women, victimizes children and ruins men. It contributes to domestic and spouse abuse, rape, incest and child molestation. And a great share of it is not protected speech, any more than libel, slander or false advertising are protected speech; there-

fore, it is not a 1st Amendment issue. It is *not* legal material. Many Americans do not realize this fact.

Today, America finds itself at a point of serious reassessment. Americans are coming rapidly to the awareness that the moral fabric of our country has become badly frayed. The consequences have become apparent. Due to the recent media focus upon "cyberporn," and consequent growing public awareness of computer pornography and its availability, especially to children, pornography has been thrust into prominence on America's reassessment agenda. The problem of pornography is an issue whose time has come.

From all sides more and more voices are proclaiming that our culture is in crisis—a crisis of character. A second *White House Conference on Character* was convened. Organizations to promote character have been formed. For over a year, Bill Bennett's book, *The Book of Virtues*, has been near the top of the New York Times best-seller list. Traditional family values are being touted in nationwide political campaigns, by both parties. The entertainment industry is being challenged "to clean up its act."

And while Congress and the Administration are wrestling with how to balance the budget and reduce the deficit so our children and grandchildren will not inherit our debts, there is another issue they must address as well * * * how to provide a protected space in which our children and grandchildren can grow up. As our common culture has become coarser, children have been robbed of their childhood. A time of innocence has been stolen away from today's children. It is time that adults of this nation take responsibility to combat the predators who are polluting the minds of our nation's most valuable resource—our children. *The Protection of Children from Computer Pornography Act of 1995* is a step in that direction, and is needed.

Recently, PRIME TIME did a television program on children and sex, starkly revealing that children 10 and younger are being "sexualized" due to constant exposure to sexually-oriented materials. In an interview with Oprah, discussing sensational TV talk shows, First Lady Hillary Clinton asserted, "I'm tired of folks saying we can't change it because that's censorship." I, and many other Americans, would agree that tired excuse, which is now also being used in reference to any legislation or regulation of computer pornography, will no longer work in this country. Moms and dads, grandmothers and grandfathers—all responsible citizens, will not accept this feeble defense of doing nothing to protect the well-being and safety of children.

Clinical studies and life experiences attest to the fact that pornography numbs the moral conscience, stunts moral growth and encourages anti-social behavior. In our organization's work with victims, we continually look into the eyes and hear from the hearts of those that have been bruised and broken by the effects of pornography. When we allow pornography to be freely available to children, pornography is not only an attack upon the present, but an attack upon the future as well. Once pornography has been viewed by young, vulnerable children, it can start a chain of abuse that carries over into their adult and family lives. You cannot simply push the delete button and eliminate those pornographic images from their memories; they will continue to play over and over again in the theater of their minds * * * perhaps for life.

Over the years the pornography industry has had two basic business goals. To remove as much of the social stigma as possible from consuming pornography; secondly, to use every advance in technology to lessen the difficulty of purchasing and consuming pornography.

Until the late 1970's, pornography was primarily available in magazines and 8mm film loops. It was distributed through the mail, street stalls and pornographic bookstores in the "bad part of town." The distasteful locations limited the market.

In the 1980's the advent of the VCR was exploited by pornographers. Consumers could purchase videos and watch pornography right in their own homes. In addition, the ability to charge customers for special phone numbers led to the development of dial-a-porn. Satellite technology and the growth of cable led to further inroads by pornographers world-wide.

Then came the advent of personal computers (PC's), and a whole new world of pornography access rushed in through its floodgate. Computer related developments will shape how the pornography industry seeks to market its products over the next quarter-century. And who will suffer the most? * * * the children!

Today, we face an insidious threat—hard-core, child pornography and "indecent" material, which is harmful to minors, are being transmitted over the Internet directly into our homes. The Information Super Highway has been invaded by morally-irresponsible, reckless drivers, who travel the Highway with total disregard for the damage inflicted on young minds through the pornography they provide. Children are usually more adept than adults at operating computers, and today, with little effort, a child with a computer and a modem can download the most vile and

perverse, often violent, hard-core pornography ever produced. This material includes such themes as incest, rape, bestiality (actual sex with most of the animals in Noah's Ark), torture and mutilation. This material can be accessed in full and clear color with just a few computer key clicks. This is pornography that the Supreme Court has ruled not to be protected speech, and is illegal for adults as well as children. There is federal legislation outlawing it. We need S. 892, however, to provide federal legislation outlawing "indecent" material. This material is not protected speech and is already legislated against in most states and many local communities under the rubric of "material harmful to minors." With the advent of computers which send indecent material across state lines this federal legislation is needed.

Pornography is harmful and destructive in the following ways:

- It plays a major role in the molestation of children, serving as an instruction manual for these crimes;
- it exposes children at an impressionable age to attitudes and behaviors that warp and twist their view of human dignity and sexuality;
- it shapes negative, degrading attitudes about women, erotizing inequality;
- it encourages rape and the rape myth, that women say "no" but mean "yes" and they like violence;
- it erotizes violence and then fuels sexual violence;
- it holds an addictive and fatal attraction for many men and teenage boys, it invades their thoughts and manipulates their behavior;
- it encourages the transmission of STD's (sexually transmitted diseases) and
- it lowers community standards, which has a denigrating affect upon our entire culture.

Some say that pornography is a victimless crime; this is a myth perpetrated by those profiting through this multi-billion dollar industry and pornography consumers. What we see, and what we hear and read affect how we think and how we act. That is why companies spend millions of dollars on advertising each year * * * it works. And, of course, this premise is the very basis of all education.

Not only is any child with a computer and a modem at risk of exposure to pornography on the Internet, but they are at risk of being exposed to pedophiles there as well. Pedophiles are those adults who have a sexual appetite for young children. They now electronically lurk on the Information Super Highway, as in schoolyards, to stalk their prey, unsuspecting children. Let me give you a real life example.

A friend of one of the *"Enough is Enough!"* staff members tells how her husband intercepted a suspicious letter from a distant state addressed to their 16-year-old daughter. The letter proved to be from an adult man to whom the young girl had given her real name and address over her computer.

This electronic predator began his letter by asking the girl to describe her fantasies, and then described his. He went into graphic, vulgar sexual detail. At first the teenager laughed about it, but quickly realized that it was no laughing matter, for her obscene "pen pal" could show up on her doorstep one day to fulfill his fantasy. She had made the dangerous mistake of giving out her real name and address to an unknown person through her home computer.

As the public debate about computer pornography has intensified in recent weeks, there has often been misinformation, or partial information appearing in print. The detractors of efforts to address the issue legislatively have taken to various forms of attack in defense of electronic pornography. Their desperation is apparent as the truth about this situation has been brought to light. Seldom, even in these times of hyper-scrutiny and scathing criticism, does the level of viciousness reach the level it has on this issue. These detractors have tried to discredit and "beat-up" the messengers when they haven't liked the message. They have contested the exact percentages of various types of computer pornography available and how many people consume it. For those of us who are battling this vile and degrading material, that is exactly where we would like to stage the debate. Does it really matter what the exact percentage is of material that is available by computer, to children as well as adults—material that degrades and tortures women, sexually uses children and debases human beings (and, in the view of animal lovers, even animals). Any is too much. One child's life misdirected into unhealthy sexual behavior is too much.

If we do nothing to stem this flood of pornography available to children by computer, we will be changing the base line on the availability of illegal material. It will be comparable to inviting children to have free access into adult x-rated bookstores and theaters.

In reality, we will never be able to eliminate all illegal pornography and protect all children from exposure to pornography. It is, however, imperative that we do all we can and we should do it in a reasoned, reasonable, yet responsible manner. It will take everyone working together to produce the best answer, or answers, to the problems of cyberporn.

Some are saying that this problem is totally the parents responsibility. Parents must become educated about the dangers present in unmonitored computer use by their children. Parents also need to learn more about computer technology in order to do so. But to place all the responsibility upon the parents not only is unfair, it is inadequate to protect children. Parents can't be present 100 percent of the time to monitor their children, and they certainly cannot monitor what happens when they are at the homes of friends, whose parents may not be as informed or vigilant. Bringing a computer into your home for your child's use under this proposed solution is like having them bring home a rabid dog for the kids to play with, sitting him in a corner and then having to watch them constantly so the dog won't bite them.

Some suggest technical screening "fixes". There are some developed now and more are being worked upon. These are good ideas, but to say that this is the total answer is once again unfair and inadequate. Prior to this time those who wanted to consume pornography had to pay for it. Are we now going to say those who do *not* want pornography for their kids have pay *not* to get it? This would be a major shift of policy and approach. In addition, those who have in-depth computer understanding acknowledge that there is no way to screen *all* pornographic material.

It is often asked that if much of this material is illegal (not protected speech) isn't it up to law enforcement to simply enforce the law? There *should* be aggressive enforcement of the pornography laws in the area of computer porn. The reality is, however, that law enforcement resources are limited and it is difficult to monitor and enforce this electronic outlet.

To find effective solutions to the pornography problem, it will take the combination of education, legislative action, public policy initiatives and aggressive law enforcement, as well as the exercise of corporate and individual responsibility. The answer is everyone working together—parents, individual citizens, schools, legislators, law enforcement and the corporate electronic business community. We must all take the responsibility to protect the welfare of our nation's children. Those in the technology community should be encouraged to work diligently to find every way possible to protect children from destructive pornographic material via computer. Yet we must all be committed to protecting *both* the free flow of material on the Information Superhighway and the children of the country. The Grassley bill does not place an unfair burden upon the access providers, but it does place responsibility upon them to do what they can do to protect the nation's computer-using children.

Serial killer Ted Bundy said just hours before he was executed in 1989 for his heinous, sex crimes against women and children, " * * * I take full responsibility for what I've done * * * My experience with pornography that deals on a violent level with sexuality you become addicted to it * * * the barriers to really doing something were being tested constantly, and assailed through the kind of fantasy life that was fueled by pornography * * * pornography, which was an indispensable link to the chain of behavior, the chain of events that led to the behavior, to the assaults, to the murders. I have met a lot of men who were motivated to commit violence just like me. Without exception, every one of them was deeply involved in pornography * * * "

I am urging the passage of the Grassley Bill S. 892, *The Protection of Children from Computer Pornography Act of 1995* because it will help to protect children from exposure to pornography and suffering its life-changing impact. I am hopeful that members of both parties will check their other differences at the door and join ranks on this issue * * * for the sake of the children.

Senator GRASSLEY. Mr. Hart?

STATEMENT OF MICHAEL S. HART

Mr. HART. I would just like to make three points. We have the technology to bring millions of books to billions of people, so let us do it, even if we have to put them behind a computer "firewall."

We need "mom and pop" shops to provide Internet on-ramp services to the rest of the country, besides the large metropolitan areas.

We need "mom and pop" shops to provide the means to talk to the rest of the world. Otherwise, only those who can hire an expen-

sive code writer can have a World Wide Web Page anyone will want to read.

If you put undue restrictions on these information providers, then you will keep these wonderful things from happening, and you will further increase the distance between information-rich and information-poor.

A rich person will always be able to get a copy of Shakespeare's "Romeo and Juliet," but the information-poor will not be able to get it at all, unless we make it incredibly easy. The main characters in that play were 13 and 15 years old.

Only 1.5 out of 10 people have college degrees, and many of these manage to graduate without ever reading a Shakespeare play. I would like to see this country more well-read.

Last year's Adult Literacy Report showed that the division between literate and illiterate adults in this country was about 50-50-53-47, to be exactly. I would like to fix that.

So we have the technology to put millions of books out to billions of people. That stack right there has enough CD-ROMS to hold a million books, and they could be afford at a dollar apiece and put on anyplace on the Internet.

Project Gutenberg is doing this, and it has been doing it for 25 Fourth of July's now. The Declaration of Independence was the first electronic text ever posted on the Internet, in July of 1971, and this month marks our 300th E-text on the 25th Fourth of July that has seen electronic books on the Internet.

Project Gutenberg is all volunteers, has no budget, has never received a government grant, nor a grant from any foundation, other than computers and programs from computer and software companies—nothing that would provide for a first amendment lawyer to proofread an entire book every day of the week.

We need "mom and pop" shops to provide Internet on-ramp services to the rest of the country, and I have brought you a couple of exhibits of "mom and pop" shops that provide Internet access in the middle of the Corn Belt. Christina Heal is from Shelbyville, IL, and has met Senator Simon, who left, a couple of times.

And we need "mom and pop" shops to provide the means to talk to the rest of the world; otherwise, only those who can hire expensive code writers can have a World Wide Web Page anyone will want to read.

I have brought another exhibit of a "mom and pop" shop. Jolea Sampolesi is from Arkansas, and is now in Illinois, making Web Sites, public and private. She has met President Clinton a number of times, and it is she and her husband, Steve Weintz, who made the Declaration of Independence Web Page.

On the first point, this is the hard drive pack that we put in the first E-text on the Internet Web. It was from 1971. It is not big enough to put the complete works of Shakespeare on, or the Bible. It cost thousands of dollars, and it went inside another machine that cost about \$50,000, that went inside a machine that would fill this whole room and cost millions of dollars.

Today, this disk costs less than \$1,000, and you can put 1,000 copies of the complete works of Shakespeare or the Bible on this, and this is far from the biggest hard drive that would fit in the palm of my hand. In another 10 or 15 years, I will be able to hold

one of these in front of you that will hold terabytes of information. Megabytes are millions of characters, gigabytes are billions of characters, terabytes are trillions of characters. I would like to come back here someday and hold one of these that has the whole Library of Congress on it.

This all happened over a space of about 10 or 15 years. That is what a terabyte looks like now. In another year, it should be about one-sixth that size. If IBM stays on the ball, they have one they want to get out that will look just the same and will hold six times as much data. Each of those could hold about 1,000 books, and there are about 1,000 of them there.

But we will never find a million books that everybody will approve of. Even the greatest books ever listed in the Britannica Great Books Series have been censored, from Socrates, to Plato, to Aristotle, and from Chaucer, to Milton, to Shakespeare. Just one call to University of Illinois reference librarians revealed that all of these authors have been censored and banned, and more of them in this century than you could imagine.

There are about 500 million computers in the world, with perhaps an average of two people using each one. That makes about a billion people. But only 5 million of those computers are on the Internet. That is 1 percent. Even counting people and not computers, the total number of people subscribed to CompuServe, America Online, and Prodigy is still only a fraction of 1 percent of the total number of people using computers.

We need these little "mom and pop" Internet on-ramps, because nobody else is going to bring this stuff out to the cornfields.

The information superhighway must be a two-way street. Everybody should be able to speak. The World Wide Web is currently the way to be heard on the Internet, but less than 1 percent of the 1 percent of the people who are on the Internet would have any idea how to create a Web Page.

Jolea Sampolesi and her husband, Steve Weintz, have made personal Web Pages a reality for the masses, but they and Christina Heal cannot possibly stay in business, which they are just barely doing now, if they have to police all the content on their hardware and software for an indecency that is so ill-defined that Shakespeare's "Romeo and Juliet" could be labeled as child pornography simply because back in those days, people only lived 30 years, and 15 years old made them middle-aged. Can we really expect to have to rewrite history and Shakespeare to make them be 25 years old? I would rather see our history as it happened.

The telephone companies do not have to monitor for content, the corner grocery is not liable for what you pin up on their bulletin board, and none of these "mom and pop" shops could afford a first amendment lawyer to read over everything that is posed.

Project Gutenberg, which I founded, publishes electronic text right now every other day. About half our time is spent doing copy-right searches. If we had to spend the other half reading for what anyone, anywhere, might deem "indecent," we would never have time to achieve our goal of putting 10,000 books on the Internet by the end of the year 2001.

That is the end of my written testimony.

Senator GRASSLEY. Thank you.

Mr. Berman?

STATEMENT OF JERRY BERMAN

Mr. BERMAN. Senator Grassley, members of the committee, I appreciate this opportunity to testify before you today on behalf of the Center for Democracy and Technology and the Interactive Working Group, which is really a broad coalition of public interest organizations, from right to left, and including the online companies, cable companies, telephone companies, all of whom have come together around the recognition that with the new interactive media, we need new policies to solve our problems. We cannot rely on the broadcast model.

You had a demo up here, and if you could show it again—the two computers.

Senator GRASSLEY. Yes, we will put that up.

Mr. BERMAN. Thank you. What is different about the Internet—for example, in your opening statement you talked about the chokeholds, the distributors of cocaine, that you go after then—the vision that you have comes from the broadcast media, Senator Grassley. It is that there are four networks—America Online, CompuServe, and Prodigy are like NBC, CBS, and ABC—and if you tell them not to do something, they will be able to police the net.

What has Mr. Hart in tears is the fact that this is not the way that the Internet and its promise are being brought to us. It is not just America Online, CompuServe and Prodigy. It is millions of people who can become content providers, access providers, who can put materials up and be publishers. And what they are worried about is where your statute stops.

We have to look at problems in terms of trying to find the right solution. When you start at the top line, you say the problem is the blue book and obscenity that Senator Exon showed on the floor. That is against current law, it is a violation of law, and the laws ought to be prosecuted.

Our Interactive Working Group has produced a study which shows that; the Justice Department has said that. When Mr. Crimmins talked about child pornography, that is illegal. It requires enforcement procedures, it requires resources. It does not require a new law.

But the issue of indecency, that is a slippery slope, because as the Speaker of the House said, you are talking about material which is constitutional for adults and which may even be constitutional for children, but you have to define the line and where you draw that line. And a bill that makes any access provider liable for putting material up, willfully, knowing that children have access to the Internet, the only way they can protect themselves is for everyone up and down the chain of electronic service providers to divide the net into adults and children and to then decide what is on the adult side and what is on the children's side, in order to protect them. And it is not even clear that it will protect them, because if Project Gutenberg puts "Lady Chatterly's Lover" not on the adult side, but on everybody's side, he faces liability. That is a chilling effect, and I believe that when the courts look at this, they will ask: Is that the least intrusive means you have for protecting children,

first, from child pornography, and second, from the Blue Book clear obscenity? I do not think that is where the court is going to come out.

Third, it is going to look at did you explore technologies or the alternatives for achieving the goal of protecting children.

The courts always look at different technologies, different media, and they always say we have got to apply the least intrusive means. The least intrusive means in this technology is parental blocking, institutional blocking, and industry self-help. They have come up and shown that they are making moves. SurfWatch—put it on your computer—free at America Online. WebTrack is available at institutions to block at schools—free, made available.

The courts are going to look at whether you have made that kind of analysis. Your legislation passes a bill which criminalizes making indecent material, whatever that means, available, and then asks for a technology study to look at whether technology is an offense. That is getting the least intrusive means on the wrong end. It is starting at the back end. You really need the study first, and the courts will ask whether Congress has studied this issue and have they really gone to the least intrusive means.

I think that we are all trying to find the solution, but there are much more effective tools to let parents decide what their kids see and interact with. I have a 14-year-old; I want to decide what is decency and indecency for that child.

Today we are just at the beginning of problems. The "Style" section has "Alcohol on the Net." Are we going to have the alcohol statute, the violence statute, the hate speech statute, the commercial speech statute, to protect different constituencies on the Net? That worked in broadcast, and maybe it was justified in broadcast, but in this technology we need new solutions that favor the market, that respect free speech, respect technology, and respect parents and individuals.

Thank you very much.

[The prepared statement of Mr. Berman follows:]

PREPARED STATEMENT OF JERRY BERMAN

Mr. Chairman and members of the subcommittee, my name is Jerry Berman, Executive Director of the Center for Democracy and Technology. The Center is pleased to have the opportunity to address the subcommittee on one of the critical civil liberties issues of our day: the question of the most effective and constitutional means of protecting children from inappropriate material on the Internet. We are pleased, therefore, to have the opportunity to offer our views on the proposed "Protection of Children from Computer Pornography Act of 1995." (S. 892)

The Center for Democracy and Technology (CDT) is an independent, non-profit public interest policy organization in Washington, DC. The Center's mission is to develop and implement public policies to protect and advance individual liberty and democratic values in new digital media. The Center achieves its goals through policy development, public education, and coalition building.

The Center is also the coordinator of the Interactive Working Group (IWG), an ad hoc working group of over 85 organizations from the computer and communications industries, and the public interest community. Since January 1995, the IWG has been working to address the question of how to protect children from inappropriate material online in a manner which is consistent with Constitutional values and continued innovation in interactive media.

I. BROAD REACH AND SWEEPING IMPACT OF THE "PROTECTION OF CHILDREN FROM COMPUTER PORNOGRAPHY ACT OF 1995"

The "Protection of Children from Computer Pornography Act of 1995" (S. 892) has been presented as a narrowly drawn statute, designed to target the "bad actors." Unfortunately, based on CDT's analysis, the proposed statute is in fact strikingly broad. In some senses, it is even more sweeping than the Communications Decency Act.¹

A. *The Grassley bill creates broad criminal liability for online services providers, video dialtone network operators, full service network providers, schools, libraries, private businesses, and many content providers*

Notwithstanding the intent of the drafters, the Grassley bill sweeps a number of commercial and noncommercial entities into its ambit. Covered entities include:

- Commercial online service providers,
- schools,
- libraries,
- universities which offer access to the Internet,
- other public information resources,
- small and large businesses which provide their employees with access to the Internet.

In addition, since the bill covers all "electronic communications service" providers (see §2(b)1(B)), S. 892 also threatens criminal liability for:

- Video dialtone networks operated by local telephone companies, and
- full service networks operated by cable television companies.

Included as well would be any commercial or noncommercial provider of content which operates its own computer to distribute that content. As a result, all of the individuals and institutions which publish through the World Wide Web and operate their own computers attached to the Internet would face liability under this bill. To the extent that a content provider—whether an individual or a large publishing company—operates a computer which makes information available to others, that publisher would be subject to the provisions of S. 892.

B. *Broad scienter requirements in S. 892 would force the segregation of the Internet into a children's network and a separate adult network*

The scienter requirements in the proposed statute appear to have been designed in order to limit the scope of the statute. However, as drafted, the statute is subject to broad, sweeping interpretation when applied by criminal courts. These overly broad scienter requirements would force all who provide access to the Internet or other online services to create, in effect, separate networks for children and for adults. Such a stark separation would likely be the only way to for online service providers and system operators to avoid liability under S. 892.

The new proposed §(b)(2) of 18 U.S.C. §1464 would criminalize the "knowing" transmission of indecent material to minors by any electronic communication service provider. According to one interpretation, the application of this knowledge requirement could apply to any provider who knows that a specific individual is a minor, and then transmits indecent material to that individual. Or, another interpretation could hold that service providers know that minors are on their service and that there is indecent material on the Internet. Thus, service providers—including schools, libraries and private businesses—would be criminally liable for merely providing minors with access to the Internet. Nothing in the statute or relevant case law suggests that courts applying this law would be compelled to adopt the former, more narrow, interpretation. Rather, it is perfectly plausible to read the proposed §(b)(2) as a punishment for any service provider or system operator who makes indecent material publicly available to an audience that may include minors.

The threat of a broad interpretation of this new statute would compel all who provide access to the Internet to restrict all public discussion areas and public information sources from subscribers, unless they prove that they are over the age of eighteen. Under this statute, a service provider could not even provide Internet access

¹The Communications Decency Act (S. 314), was co-sponsored by Senators Exon and Coats and is now part of the telecommunications reform bill passed by the United States Senate (S. 652).

to a minor *with the approval* of the child's parent. Since every online service provider would have to similarly restrict access to minors, this proposed statute would create two separate Internets, one for children and one for adults. Access by a child to the adult network would create criminal liability for the service provider.

II. THE VAGUENESS OF THE "PROTECTION OF CHILDREN FROM COMPUTER PORNOGRAPHY ACT OF 1995" WILL CREATE A CHILLING EFFECT ON ALL FORMS OF SPEECH ON THE INTERNET AND GREAT CONFUSION AMONG SCHOOLS, LIBRARIES, BUSINESSES, AND ONLINE SERVICE PROVIDERS WHO OFFER ACCESS TO THE INTERNET

A. Application of "willful" standard is unclear in the bill as drafted and will lead to confusion among service providers and users

The "willful" standard also creates the possibility for significant confusion, given the widely divergent readings of the "willful" requirement. In some instances, "willful" is read as a so-called "tax standard," implying that to be convicted one must manifest a voluntary and intentional act which is violation of a known legal duty. *Cheek v. United States*, 111 S.Ct 604 (1991). However, courts have also found that willfulness means nothing more than a person acted knowingly and deliberately. *United States v. Peltz*, 433 F.2d 48, 54-055 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971). The drafters of the Model Penal Code define willful as merely knowing action,² and do not require specific intent to violate a known legal duty.³ Recent Supreme Court jurisprudence in the area of money laundering, on the other hand, has required that the defendant's actions demonstrate knowledge that his or her conduct is, in fact, a violation of the law. *United States v. Ratzlaf*, 114 S.Ct 655 (1994).

A broad reading of "willful," requiring primarily purposive action leading to a minor's access to indecency, but not knowledge of the fact that such actions constituted violations of the law, would subject many service providers to liability under § 1464. A more narrow reading of this requirement, could diminish the overreaching impact of the statute, however, such an interpretation is by no means guaranteed. While *Ratzlaf* may offer some support in this regard, the Court also noted that "Willful,' * * * is a 'word of many meanings,' and 'its construction' [is] often * * * influenced by its content." *Id.* at 659 (citations omitted). The context was supplied, in part, by the statute in question, which had previously construed "willful" as knowing violation of a known legal duty. *Id.* No such context is available in 18 U.S.C. § 1464 to aid a court in interpretation.

Confusion as to providers legal duty will create a tremendous chilling effect on all online communications. In order to minimize their risk, service providers will be forced to adopt rules governing their users behavior that are likely to be highly restrictive.

B. Heavy-handed content regulation will squander the democratic potential of interactive media

As the popularity and accessibility of the Internet and commercial online services grows, and as the medium becomes easier to use, the political uses of the net have flourished. Political discourse is facilitated by a variety of different communications techniques possible online, including newsgroups, mailing list discussion groups, chat sessions, and a host of electronic publishing capabilities. Any regulation creating criminal penalties for communication of indecent material would have a substantial chilling effect on all who use interactive media. Such a chilling effect would severely inhibit the growth of the Internet as a political forum.

Political groups left,⁴ right,⁵ and center are using the Internet to communicate, to organize, and to advocate their own views. Advocacy organizations have found World Wide Web services are critical to political education activities, and an increasing number of grass roots and community groups are coming to rely on the Internet to keep in touch with members and constituents. In fact, even some Senators offices are using the World Wide Web to communicate with and solicit feedback from constituents.⁶ As a nation we should be encouraging political discourse in this new medium, because of its potential to raise the level of political discussion beyond the sound bite and to involve more citizens in the political process. One aspect of encouraging political discourse in interactive media is to assure all users that their First Amendment and privacy rights will be respected fully.

² Model Penal Code § 2.02(8).

³ See Simonoff, *Ratzlaf v. United States: The Meaning of "Willful" and the Demands of Due Process*, Colum. J.L. & Soc. Probs., 397 (Spring 1995).

⁴ Eg: The American Civil Liberties Union URL:gopher://aclu.org:6601/1/

⁵ Eg: The Right Side of the Web URL:http://www.clark.net/pub/jeffd/index.html

⁶ Eg: Sen. Leahy's Home Page: URL:ftp://ftp.senate.gov/member/vt/leahy/general/pjl.html

Indeed, the Internet and other online services are fast becoming a new public forum for political discourse for American citizens. In order to preserve the freedom and openness of this new political arena, it is critical to avoid creating a chilling effect on individual expression.

III. THE "PROTECTION OF CHILDREN FROM COMPUTER PORNOGRAPHY ACT OF 1995" IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT FOR FAILURE TO ADOPT THE LEAST RESTRICTIVE MEANS

The proposed statute extends indecency restrictions enacted to apply to the broadcast radio and television media to new interactive communications media such as the Internet, commercial online services, and electronic bulletin board systems. Though indecency restrictions have been applied to broadcasting for some time, reflexive extension of the same restrictions to new interactive communications media is simply unconstitutional. The Supreme Court has long held that "each medium of expression presents special First Amendment problems."⁷ In light of the substantial control that users and parents have over content that enters their homes via interactive media, government restrictions on indecency as proposed by the Grassley bill are unconstitutional.

A. *Censorship of indecent, but not obscene, communications for the purpose of protecting minors must employ the least restrictive means available to accomplish their goal*

Indecent communications are protected by the First Amendment, unlike obscenity which is altogether unprotected. *Sable Communications of California v. FCC*, 492 US 115; 109 S.Ct. 2829; 106 L.Ed. 2d 93 (1989). Indecent communications, which do not rise to the level of obscenity,⁸ can only be limited in order to serve a compelling state purpose and must be done using the least restrictive means possible. *Id.* at 125. The *Sable* court found that the protection of minors from access to indecent material is a compelling state purpose, but that "it is not enough that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.*⁹

As a threshold matter, the *Sable* court found that the constitutional basis for upholding indecency regulations in broadcast media articulated in *Pacifica Foundation v. FCC*, 438 US 726, 98 S.Ct. 3026, 57 L.Ed. 2d 1073 (1978), were inapplicable in any other media besides over-the-air broadcasting.¹⁰ 492 U.S. at 127. *Pacifica* accepted that the FCC had authority to enforce content regulation based on the dual finding that 1) radio was a "uniquely pervasive medium"¹¹ that intruded (dirty words and all) into peoples homes, and 2) the only way to protect children from exposure to objectionable content was to keep it off the air altogether.¹² *Sable* rejects this finding of "pervasiveness" as "emphatically narrow" and irrelevant to other media such as telephone audiotext services. 492 U.S. at 127.

Thus, the *Sable* "least restrictive means" standard became the test by which all regulations on access to constitutionally protected indecent material were judged. Nearly ten years of litigation along with adjustment of the statute and regulation were found before the current statute was found constitutional under this standard. See *Dial Information Services v. Thornburg*, 938 F.2d 1535 (2d Cir., 1991) (finding FCC regulations implementing § 223(b) constitutional). During the course of the dispute over the application of § 223 to audiotext services, courts considered and rejected a number of means by which carriers were required to shield minors from access to indecent information. First, time channeling rules, requiring that services only be accessible during hours when children were asleep, were found to violate the First Amendment because they had the effect of denying access to adults as well as children. *Carlin Communications v. FCC*, 749 F.2d 113, 121 (2d Cir. 1984) (Carlin I). Next, the courts rejected a requirement that carriers provide access to indecent services only once customers entered access codes or passwords, which were to

⁷ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503 (1945).

⁸ Given the national and international reach of new interactive media, determinations of obscenity based on traditional "community standards" doctrine also raises a whole host of questions.

⁹ See also *Carlin Communications v. FCC*, 837 F.2d 546, 555 (2d Cir. 1988).

¹⁰ *Pacifica* upheld an FCC rule which barred the comedian George Carlin and others from repeating the "seven dirty words" in over-the-air radio broadcasts.

¹¹ *Id.* at 748.

¹² *Id.* at 749-50. The *Pacifica* court recognized that the radio station (WBAI in New York City) had actually broadcast a warning as to the possibly objectionable content, but that this warning failed to protect those who tuned in after it was given. *Id.* at 731.

be issued after verification that the customer was over 18. *Carlin Communications v. FCC*, 787 F.2d 846 (2d Cir. 1986) (Carlin II).

The finding of the *Dial* court, approving the constitutionality of § 223 and associated regulations depended on the legislative determination that the telephone company blocking of service pending age verification or use of a credit card are the *only means to enable parents to restrict their children from access to indecent audiotext services*.¹³

B. Background on dial-a-porn rules: lack of user control leads to indecency restrictions

As was the case for broadcast indecency restrictions considered in *Pacifica*, the dial-a-porn restrictions were only found constitutional because of the uniquely intrusive and uncontrollable nature of the audiotext services. A key legislative motivation for imposing these rules during the 1980's was that indecent information available through audiotext services in the telephone system were openly available to children in such a way that it was difficult for parents to control access by their children. The views of Congressman Bliley recounts the prevailing view of the need for the legislation: "It constitutes an *attractive nuisance* in every home in America where children are present. There is no completely effective way to prevent children from being exposed to "indecent" or "obscene" dial-a-porn so long as it is lawfully and commercially marketed. * * *" Bliley continues:

Telephones are precisely like radio and television because of their easy accessibility to children and the virtual impossibility for parents to monitor their use. * * * [D]ial-a-porn is presently in the home whether the homeowner wants it or not. Today one cannot have telephone service in the privacy of one's family environment without being required to have dial-a-porn with it. Families with children must give up telephone service to be "left alone" from exposure of their children to this intruder.¹⁴

The current statute and Federal Communications Commission regulations promulgated thereunder were found constitutional only after nearly ten years of litigation and efforts by Congress and the Commission to bring the statute within constitutionally acceptable bounds. Indecency restrictions applied to interactive media would require a wholesale review of the constitutionality as applied to new media such as online services and the Internet. Interactive media operates in such a different manner that the constitutional issues must be considered afresh given the new factual backdrop.

C. Reliance on government censorship to restrict access to indecency fails to take into account the fact that interactive media offers parents a much greater degree of control than broadcast services or 900 number services

Indecency restrictions in interactive media would presumably be motivated by the same goal of protecting minors as the existing statute. However, the means adopted for achieving the goal are impermissible under the First Amendment because they are not the least restrictive means of accomplishing the legitimate government purpose. Interactive media is materially different than analog telephone and audiotext technology in that it offers users the ability to exercise control over precisely what information one accesses. Given the dramatic difference between telephone technology and interactive services such as the Internet and other interactive media, we believe that blocking by the carrier as demanded by § 223 would not meet the "least restrictive means" test.

Just as the *Sable* court found broadcast indecency regulations inapplicable to the telephone system because of differences in the medium, regulations designed for audiotext services in the telephone system are constitutionally inapplicable to new interactive media. Indeed, indecency restrictions on material transport by US Mail have also been struck down by the Supreme Court precisely because "the receipt of mail is far less intrusive and uncontrollable"¹⁵ than broadcast information that was the subject of the *Pacifica* case.

¹³ Rep. Bliley asserts as much in his comments on the legislation. He states, " * * * It became clear that there was not a technological solution that would adequately and effectively protect our children from the effects of this material. We looked for effective alternatives to a ban—there were none." 134 Cong. Rec. H1691.

¹⁴ 134 Cong. Rec. H1693-4 (daily ed. April 19, 1988) (statement of Rep. Bliley) (emphasis added).

¹⁵ *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983). The Court in *Bolger* struck down a statute regulating the mailing of birth control material, despite the fact that proponents of the law asserted that its purpose was to protect children from exposure to sexually explicit, offensive material.

Technologies already exist that enable users to access certain information based on a variety of characteristics, or, to exclude certain types of information from access.¹⁶ With such filtering technology, users, instead of the government or network operators, can exercise control over the information content that they receive in an interactive network environment. User control could be exercised in two ways. First, one could screen out all messages or programs based on information in the header. If a parent wanted to prevent a child from seeing a particular movie or from participating in a particular online discussion group, then the computer or other information appliance used by the child could be set by the parent to screen out the objectionable content. Such features can often be protected with passwords which would be assigned, for example, by the responsible adults in the house. Second, the same systems can be used to enable blocking of content based on third-party rating systems.

Given the flexibility of interactive technology, we need not rely on just one rating system. In fact, a single rating system or a single set of filters would merely replace a single government censor with a single private censor, with no real gain for the free flow of information. Properly implemented, interactive media can accommodate multiple filtering systems, giving users and parents the opportunity to select and block information based on a true diversity of criteria. The national Parent Teachers Association or different religious organizations could set up rating systems which would be available on the network to those who desired them. Rather than relying on the judgment of the government, or of the service provider, viewers can limit access to content based on the judgment of a group whose values they share.

Interactive media can enable individuals and parents to prevent themselves or their children from using their PC's or TV's to access certain kinds of content. With such control mechanisms within the practical reach of parents, the governmental purpose generally cited for indecency regulations—the protection of children—could be accomplished without government content restrictions. In particular, the reasoning of *Pacifica* (intrusion of the indecent message into homes) and *Sable* (inability of parents to exercise control) would no longer justify most content regulation.

To date, Congress has made no finding that a law such as that proposed by Senator Grassley is the "least restrictive means" to protect children from indecent material. Indeed, we believe that parental empowerment technology and public education would be far more effective and far less restrictive of adult's right to receive indecent material. The very fact that the Grassley bill proposes that the Justice Department study blocking and filtering technology¹⁷ suggests that the issue should be investigated further before Congress can be said to have concluded that it has found the "least restrictive means" to protect children.

IV. CRIMINALIZING BEHAVIOR OF SERVICE PROVIDERS IS NOT AN EFFECTIVE MEANS OF PROTECTING CHILDREN FROM INDECENT MATERIAL

A. *Regulating decentralized interactive media following the pattern of old-style, centralized communications media such as broadcasting is impractical*

The Internet and other interactive communications media are fundamentally decentralized media. Unlike centralized broadcast radio and television services, there are no central control points through which either a single network operator or government censors can control particular content. On the Internet there are literally millions of speakers and publishers. This proliferation of individual speakers stands in sharp contrast to broadcast television or even cable television, where one may count five, ten, or perhaps one hundred speakers, each of whom controls a channel. Federal broadcast content regulators can direct their regulations at the operators of a particular channel in order to enforce their regulations. However, content control on the Internet would have to be targeted at each and every one of the millions of US and international citizens that speak daily online. Any attempt to impose centralized content control in a bureaucratic manner on this fundamentally decentralized medium is bound to stifle the growth of the medium, squander the democratic potential of the Internet, and may even cut the United States off from the growing global information infrastructure.

As a decentralized medium, the Internet and other interactive services have flourished in a largely unregulated environment. Indeed, recent Congressional decisions to commercialize the Internet have lead to a tremendous increase in the number of users who have access to the Internet and great innovations such as the World Wide

¹⁶ For more information on blocking and filtering technologies available to parents today, see the Interactive Working Group Report to Senator Leahy, "Parental Empowerment, Child Protection & Free Speech in Interactive Media," July 24, 1995.

¹⁷ See § 4.

Web. Indeed, the innovative, entrepreneurial Internet marketplace has even produced a variety of software and services that help protect children from inappropriate material online. Imposition of content regulations would seriously retard the growth of the Internet marketplace. What's more, content control is unlikely to be effective in protecting children.

B. The global nature of the Internet makes control by the user or parent the only effective means of restricting access to indecent material

While the vast majority of content on the Internet is intended for legitimate educational, cultural, political, or entertainment value, some material on the Internet may not be appropriate for children. Moreover, much of this material is accessible from the United States but transmitted from other countries, beyond the practical reach of U.S. law. In order to protect children we must rely on powerful blocking and filtering technology to empower parents to make choices about the material which their children can access.

Entrepreneurial effort has already produced blocking and filtering products for families and schools. The vast majority of the content on the Internet is labeled or identified in some manner. If information is not labeled, intended users cannot find it. Therefore, the inherent power of computer software allows the creation of computer programs which enable parents to block material from the reach of their children automatically, without the need for constant parental supervision. Affordable software such as SurfWatch and NetNanny already enable parents to allow their children to "surf the net" freely, but keep them away from objectionable material. The Netscape Proxy Server, WEBTrack, and the Apple Communications Server can be installed in schools or other institutions to open their institutions to the Internet without allowing their students to have access to objectionable sites.

The global and decentralized nature of interactive media requires new approaches to child protection. Censorship of centralized media such as radio and television may be effective at keeping the "seven dirty words" off the airwaves. However, on the Internet, with hundreds of thousands of content creators all over the world, US law, no matter how tough, will never be able to keep offensive material out of the reach of kids.

Industry-wide initiatives are developing standard label and blocking conventions to increase the effectiveness of blocking. Microsoft, Netscape and Progressive Networks have announced efforts to develop blocking and label conventions. The Internet technical standards developers are now considering a proposal called "KidCode", which would establish voluntary labeling systems that identify Internet information which is inappropriate for children. The flexibility of interactive media allows multiple rating systems to co-exist so that individuals and families can choose a rating system that best reflects their own values.

Parental choice assures full respect for the free speech rights in interactive media. Relying on parents, not the government, to make choices about the content that they and their families receive assures maximum respect for First Amendment rights of adults to receive and transmit constitutionally-protected material, and allows families, not federal bureaucrats, to determine what information is most consistent with their own moral values.

V. CONCLUSION

Again, I thank the committee for the opportunity to appear and offer the views of the Center for Democracy and Technology on this very important issue. We look forward to working with you toward a resolution of this issue which empowers parents, protects children, and preserves full First Amendment freedoms in new, interactive communications media.

Senator GRASSLEY. Thank you, Mr. Berman.

Before I ask my first question, I want to make a general comment. We have all got to be concerned about works of art being negatively impacted, and all I can do is tell you what my intent is, and that is, first of all, that this statute does not give any regulatory authority to the FCC. But within what the FCC does, I think it is important to remember that when it comes to literary works, the way the FCC currently interprets and enforces the law does not affect serious works of art. Now, I suppose that statement can be debated, but I cannot do any more than tell you what my intent is.

Dee, in your opinion, are purely technical solutions, without congressional action, a truly effective way of protecting children from access to cyberporn?

Ms. JEPSEN. No, I do not think it is adequate. I think it is a step in the right direction. I think we need everyone working together. We need well-informed parents. We need legislation where it is necessary. We need aggressive law enforcement, which frankly we have not had. All of these things combined, I think will bring some solutions.

I do not think there is a perfect solution, and in all actuality, we are not going to ever be able to get rid of all pornography. That is just a fact of life. But we have to do, I believe, as a responsible society and citizenry, everything we can to eliminate as much of it as possible, because once these kids have had these images engraved in their minds, you cannot push "delete" and remove it; it will play in the theater of their minds for the rest of their lives. It will affect the way they look at women, their own sexuality and family. I think it could have dire effects, especially since we have talked here in broader terms—we have talked about obscenity today, too—some of the stuff that is available is absolutely beyond description, and I think most of you in the Senate are aware of the extremes this goes to. What does that do in a child's mind when he is at a formative, vulnerable stage of his development, as he views other human beings and as he views life? It is not good.

Senator GRASSLEY. I think you were here and heard testimony from at least one parent who terminated online services because of what they discovered. Do you think that my legislation would ease the worries of anxious parents? That is just an example. I suppose that through your advocacy and the group that you are a director of, you become aware of a lot more than a few instances.

Ms. JEPSEN. I think it would help, Senator. This is a wonderful technology, and it is wonderful for children, and it is expanding every day. And I think it is very important that everyone work together so that not only are the children protected, but the technology is protected. And what some people are doing is what I heard a couple people say here today—they are just getting out of it. They are canceling their subscription. And that is sad, too.

Senator GRASSLEY. Mr. Berman, is it your position that so-called blocking software is 100 percent effective, so that there would be no problem for Congress to remedy?

Mr. BERMAN. I am not saying that it is absolutely foolproof. There is no foolproof means. All I am saying is that judged against a statute which raises considerable constitutional and enforcement problems on the World Wide Web, I think it is a more effective solution.

For example, I do not know how you clean up the 40 percent of the material that is overseas. It is very simple to move a Web Site overseas. You cannot tell the difference between getting to Senator Leahy's Web Page and getting to something in Sweden. It is transparent. You are looking at the same thing. It is the same network.

So you may be making indecent materials illegal in the United States, and let us say you pass constitutional muster after 10 years, like the dial-a-porn statute, you still have the overseas problem. It does not ease myself as a parent that you have passed this

legislation. In fact, I think what it does is give the public a false sense of security that Congress again has stepped in to do something.

I notice that you mention that the FCC does not include literary works, but your statute does not involve the FCC. It involves prosecutors all around the country, deciding what is decent and what is indecent. And in many communities, I think "Catcher in the Rye" is indecent, and "Huckleberry Finn" is indecent, and Shakespeare is indecent. I do not think we want that kind of balkanization of the Internet.

Senator GRASSLEY. Well, we use the FCC definition.

Mr. HART. Senator, you asked both of them that question; may I put in a comment?

Senator GRASSLEY. Yes, you can comment, of course. Let me just simply say that I would agree with you, and I think Ms. Jepsen made the point better than I could—I do not believe that my legislation is the total solution to this. You mentioned that if I pass my bill, there is another problem overseas and so on. I just think that mine is one small step in the direction of solving this problem, and it does not preclude any of the others that have been suggested.

Mr. Hart, I should give you the courtesy of responding.

Mr. HART. Thank you. I want to point out that for those of us who have been on the Internet for 24 or 25 years that programming has gotten just as much more sophisticated as this hardware has, and that this little chip, that I bought at a garage sale for \$10 last month, does just as much as this chip, that is still worth a quarter of a million dollars, and was current to run an IBM 360 mainframe 10 years ago.

The programming that you have available now can analyze a picture and tell your eyes from his eyes and decide not to put eyes on the picture; they can fuzz them out the same way they do witnesses on the talk shows and stuff like that. And to do it with words is infinitely easier than to do it with pictures.

So if you get people who are in the Internet to try to solve the problem—I can guarantee you I can get a couple thousand people working on the problem, and they probably will not charge you anything.

Senator GRASSLEY. Thank you.

Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

Before I start, I want to thank Mr. Berman and the others in the Interactive Working Group for their report, and I would ask consent that the report, which was delivered to me along with a covering letter, be made part of this hearing record.

Senator GRASSLEY. Yes, it will be included.

[Documents follow:]

INTERACTIVE WORKING GROUP,
Washington, DC, July 24, 1995.

Hon. PATRICK J. LEAHY,
Washington, DC.

DEAR SENATOR LEAHY, on March 15, 1995, you asked the Interactive Working Group to investigate a number of issues regarding the appropriate regulatory model for new, interactive communications media, the problem of children's access to sexually explicit material online, and the current state of criminal and constitutional law in this area. We are pleased, now, to provide you with a report entitled, "Parental

Empowerment, Child Protection, & Free Speech in Interactive Media.” Based on the research and discussions within the Interactive Working Group, our report reaches the following conclusions:

- Extending FCC content regulation to the Internet would have a devastating impact on the development of interactive media, squelching technological innovation and squandering the democratic potential of the new medium;
- Current law is adequate to enable the prosecution and punishment of obscenity, child pornography, and harassment online;
- Technologies exist today to enable parents to prevent their children from accessing inappropriate material on the Internet. Voluntary, private sector efforts to empower parents are proliferating, with the promise of greater control for parents and kill respect for First Amendment values;
- Efforts to ban or restrict indecency in interactive media would be subject to grave constitutional infirmities.

Throughout the public discussion of this issue, your strong voice in support of technological innovation, constitutional values, and the protection of our nation’s children has been invaluable. We hope that this report helps you in your continued efforts. We are pleased to have the opportunity to present this report to you and look forward to your continued leadership on this critical issue.

Sincerely Yours,

(Signed) Jerry Berman

(Typed) JERRY BERMAN,
*Coordinator,
Interactive Working Group.*

PARENTAL EMPOWERMENT, CHILD PROTECTION, AND FREE SPEECH IN INTERACTIVE MEDIA

INTERACTIVE WORKING GROUP REPORT TO SENATOR LEAHY, July 24, 1995

[This report was written by Jill Lesser, People for the American Way; Ronald Plessner, Piper & Marbury; Daniel J. Weitzner, Center for Democracy and Technology; and edited by The Center for Democracy and Technology, with detailed comments from a number of working group members.]

Overview

The Internet and other interactive services are a new medium, and a new array of markets, different from any means of communication that has come before. This new medium raises fundamental questions about the appropriate balance between the needs of the market, of American families, and basic constitutional free speech and privacy guarantees that Americans value so deeply. In order to protect families and children in this open, global network, we should first rely on the entrepreneurial spirit of the interactive services market to build parental empowerment tools, and encourage the industry to work together to ensure that such solutions are widely available. The interactive media market must not be regulated like telegraphs, broadcast radio and television, and telephones, thereby stifling the development of an important new communications medium with burdensome regulations. Rather, we should identify policies that enable the interactive media market to flourish like the personal computer industry, and provide parents the ability to protect their children from inappropriate material that is internationally-available.

In answer to questions posed to the Interactive Working Group by Senator Patrick Leahy earlier this year, this report contains an assessment of:

- (1) General policy issues at stake in the regulation of content on the National Information Infrastructure;
- (2) software and services available today that enable parents to restrict their children from access to inappropriate material online;
- (3) the current state of criminal law regarding obscenity, child pornography, and harassment online;
- (4) threats to free speech, free press and individual privacy raised by proposed regulation of indecency in interactive media.

We begin with a brief overview of the contents of the report:

A. A NEW REGULATORY MODEL FOR INTERACTIVE MEDIA IS NEEDED TO ENSURE FREE SPEECH AND CONTINUED INNOVATION IN THE NATIONAL AND INTERNATIONAL INFORMATION INFRASTRUCTURE

The Internet is a global information and communications system which is becoming a critical resource for organizations and individuals around the world. Businesses, schools, libraries, researchers, community groups, and individuals are all coming to rely on the Internet as a vital communications system and information resource. The Internet and other interactive media include electronic mail, the World Wide Web, online discussion groups, and other multimedia information resources. Providers of interactive media services range from large and small online services and bulletin boards, to those who provide services for their own use such as schools, libraries, and large and small businesses.

To ensure the continued growth of the new interactive media market, national policy for the Internet must:

- (1) Preserve the vibrant free market in interactive media, free from regulation of constitutionally-protected communications and information;
- (2) preserve full constitutional free speech and privacy protections in new interactive media;
- (3) encourage the industry to work together to develop blocking and filtering technologies that empower parents to restrict their children's access to offensive material;
- (4) ensure emerging media not be used for criminal activity such as stalking, trafficking in obscenity, and the creation of child pornography.

B. CURRENTLY AVAILABLE BLOCKING AND FILTERING TECHNOLOGY, COMBINED WITH PUBLIC EDUCATION, CAN EMPOWER PARENTS TO PROTECT THEIR CHILDREN FROM INAPPROPRIATE MATERIAL ONLINE

While the vast majority of content on the Internet is intended for legitimate educational, cultural, political, or entertainment value. Some material on the Internet, however, may not be appropriate for children. Moreover, much of this material is accessible from the United States but transmitted from other countries, beyond the practical reach of U.S. law. In order to protect children we must rely on powerful new blocking and filtering technology to empower parents to make choices about the material which their children can access.

- *Entrepreneurial effort has already produced blocking and filtering products for families and schools:* The inherent power of computer software allows the creation of computer programs which enable parents to block material from the reach of their children automatically, without the need for constant parental supervision. Such software can be easily installed by parents, even those who are not computer experts.
- *The global and decentralized nature of interactive media requires new approaches to child protection:* Censorship of centralized media such as radio and television may be effective at keeping the "seven dirty words" off the airwaves. However, on the Internet, with tens of millions of content creators all over the world, US law, no matter how tough, will never be able to keep offensive material out of the reach of kids.
- *Industry-wide initiatives are developing standard label and blocking conventions to increase the effectiveness of blocking:* The flexibility of interactive media allows multiple rating systems to co-exist so that individuals and families can choose a rating system that best reflects their own values. No single government-mandated system could be as comprehensive or flexible as voluntary private sector alternatives.
- *Individual and parental choice assures full respect for the free speech rights in interactive media:* Relying on individuals and parents, not the government, to make choices about the content that they and their families receive assures maximum respect for First Amendment rights of adults to receive and transmit constitutionally-protected material, and allows families, not federal bureaucrats, to determine what information is most consistent with their own moral values.

Any changes in federal law should seek to remove the Hobson's choice faced by all who provide access to the Internet. In order to protect children, legal disincentives facing those who would create "child safe" areas should be removed.

- *Recent case law discourages online providers from screening material that is inappropriate for children:* In the recent *Stratton Oakmont, Inc. v. Prodigy Services Company*, No. 31063/94 (N.Y. Sup. Ct. May 24, 1995) case, Prodigy was found to be a "publisher" of libelous statements made by a subscriber on one of its online bulletin boards. Such added exposure to legal liability is a substantial disincentive to the creation of "child safe" interactive services.
- *Neither federal nor state law should punish service providers for creating child-safe services.* The marketplace should be free to create a variety of online forums, some that provide only material appropriate for children, and others that are more open and designed for a wider audience.

C. THERE IS NO ANARCHY IN INTERACTIVE MEDIA: VIGOROUS ENFORCEMENT OF CURRENT CRIMINAL LAWS WILL PROTECT ALL USERS FROM OBSCENITY, CHILD PORNOGRAPHY, AND HARASSMENT ONLINE

Law enforcement agencies and some prominent pro-family groups agree current laws already enable prosecutions of online obscenity violations. More vigorous enforcement of existing criminal laws may, however, be necessary. Following this logic, it is unnecessary to amend federal law to prohibit distribution of obscenity by computer, since existing law already criminalizes such conduct, as well as threats and harassment by computer.

- *The Department of Justice and American Family Association state that existing laws already criminalize obscenity online.*
- *Tough obscenity child pornography and harassment laws are already in the federal criminal code:* Under existing Federal law trafficking in obscenity (18 U.S.C. §§ 1462, 1464, 1466), child pornography (18 U.S.C. § 2252), harassment (18 U.S.C. § 875(c)), illegal solicitation or luring of minors (18 U.S.C. § 2423(b)), and threatening to injure someone (18 U.S.C. § 875(c)) have already been successfully applied to punish conduct on computer networks.
- *Online obscenity and child pornography crimes are being prosecuted around the country:* These laws are being enforced, as is evident by numerous prosecutions around the country.
- *The Senate-passed legislative proposals fail to add any protections against online stalking and child solicitation:* Everyone is concerned about protecting children from threats online and off. Ironically, the Senate-passed Communications Decency Amendment only punishes indecency and obscenity, not stalking or solicitation. Neither prosecutors nor police receive any additional help in the prevention or prosecution of online crimes against children.

D. BANS ON INDECENT COMMUNICATIONS ONLINE ARE UNCONSTITUTIONAL

The unique nature of interactive media demands that policy makers carefully evaluate the application of the First Amendment in a new light. Essential to the Court's approval of indecency restrictions in the broadcast media was the fact that listeners had insufficient control over programming to which they were exposed. Any effort to impose similar indecency restrictions on interactive media, however, will not pass constitutional scrutiny given the high degree of user control in this new medium.

- *To assure the First Amendment free flow of information and protect individual privacy rights liability for online service providers must be carefully limited:* If online system and service providers are held criminally liable for obscene or indecent material created by their users, and not intentionally purveyed by the provider, then public service providers and private system operators will be forced to become private censors in order to limit their own legal risk. Just as current law limits the liability of phone companies, mail services, and other carriers for the content of material which the carrier merely transports, online service provider liability should be limited in order to assure the free flow of information on the National Information Infrastructure.
- *Ability of users and parents to control the material to which they have access places constitutional limits on the degree to which the government can censor material based on its content:* The First Amendment has been interpreted to allow restrictions on indecent speech only if such government restrictions are the "least restrictive means" of protecting children or accomplishing other important government goals. Given that parents are able to protect their children

from unwanted material using screening tools, government restrictions are unnecessary and therefore unconstitutional.

- *Online service providers should not be forced to become private censors:* If online services or individual system operators are held liable for all of their users' communications, the services will be forced to impose stringent censorship rules on their users in order to limit the corporate liability of the service provider. Such rules would create a chilling effect on users of interactive media.
- *There are great constitutional difficulties in defining "indecenty":* Neither the Congress nor the Supreme Court have ever established a single definition for what constitutes "indecent" material. The FCC has offered different definitions for indecency depending on the communications medium. Embarking on such a process for interactive media would be fraught with Constitutional disputes and challenges in court. Efforts to ban indecency on dial-a-porn services lead to ten years of constitutional litigation, thus delaying the enforcement of those regulations considerably.
- *The Federal Communications Commission should not be given power to regulate content in interactive media:* The inherent complexity and constitutional difficulties of regulating indecency would involve the FCC in lengthy and burdensome rulemaking to implement any indecency ban. Such extension of FCC control over new media will create unnecessary bureaucratic intrusions that hinder the development of new interactive media and private sector screening options.

I. Public Policy Reflecting Unique Nature of Interactive Media is Essential to Ensure the Potential of the National Information Infrastructure and Protect Children

The Internet and other interactive communications media are fundamentally decentralized media. Unlike centralized broadcast radio and television services, there are no central control points through which either a single network operator or government censors can control particular content. On the Internet there are literally millions of speakers and publishers. This proliferation of individual speakers stands in sharp contrast to broadcast television or even cable television, where one may count five, ten or perhaps one hundred speakers, each of whom controls a channel. Federal broadcast content regulators can direct their regulations at the operators of a particular channel in order to enforce their regulations. However, content control on the Internet would have to be targeted at each and every one of the millions of US citizens and international users that speak daily online. Any attempt to impose centralized content control in a bureaucratic manner on this fundamentally decentralized medium is bound to stifle the growth of the medium, squander the democratic potential of the Internet, and may even cut the United States off from the growing global information infrastructure.

A. ATTEMPTS AT "COMMAND AND CONTROL" REGULATION OF CONTENT ONLINE WILL STIFLE INNOVATION IN INTERACTIVE MEDIA

As a decentralized medium, the Internet and other interactive services have flourished in a largely unregulated environment. Indeed, recent Congressional decisions to commercialize the Internet has led to a tremendous increase in the number of users who have access to the Internet and great innovations such as the World Wide Web. Indeed, the innovative, entrepreneurial Internet marketplace has even produced a variety of software and services that help protect children from inappropriate material online. Imposition of content regulations and extension of Federal Communications Commission jurisdiction over standards and technologies would seriously retard the growth of the Internet marketplace. What's more, FCC content control is unlikely to be effective in protecting children.

B. HEAVY-HANDED CONTENT REGULATION WILL SQUANDER THE DEMOCRATIC POTENTIAL OF INTERACTIVE MEDIA

As the popularity and accessibility of the Internet and commercial online services grows, and as the medium becomes easier to use, the political uses of the net have flourished. Political discourse is facilitated by a variety of different communications techniques possible online, including newsgroups, mailing list discussion groups, chat sessions, and a host of electronic publishing capabilities. Any regulation creating criminal penalties for communication of indecent material would have a substantial chilling effect on all who use interactive media. Such a chilling effect would severely inhibit the growth of the Internet as a political forum.

Political groups¹ left,² right,³ and center are using the Internet to communicate, to organize, and to advocate their own views. Advocacy organizations have found World Wide Web services are critical to political education activities, and an increasing number of grass roots and community groups are coming to rely on the Internet to keep in touch with members and constituents. In fact, even some Senators offices are using the World Wide Web to communicate with and solicit feedback from constituents.⁴ As a nation we should be encouraging political discourse in this new medium, because of its potential to raise the level of political discussion beyond the sound bite and to involve more citizens in the political process. Encouraging political discourse in interactive media requires that all users are assured that their First Amendment and privacy rights will be respected fully.

Indeed, the Internet and other online services are fast becoming a new public forum for political discourse for American citizens. In order to preserve the freedom and openness of this new political arena, it is critical to avoid creating a chilling effect on individual expression.

II. Parental and User Control Technologies Available Today To Screen Unwanted Content

OVERVIEW—DEALING WITH INAPPROPRIATE MATERIAL IN CYBERSPACE THROUGH TECHNOLOGY

Interactive media such as the Internet and commercial online services such as America Online and Prodigy offer users tremendous control over the information that they and their children receive. Unlike traditional mass media which "assaults" viewers with content, interactive media requires users to seek out information from any number of the millions of available World Wide Web sites, online file archives (ftp, and gopher), and from any of the more than 3,000 Usenet newsgroups.

The vast majority of the content available on interactive media is related to normal every day topics such as politics, educational resources, sports, consumer information, shopping, to name just a few. In addition, millions of people use the Internet every day to conduct business, socialize, organize political activities, and communicate on issues of interest to them. However, just like in the terrestrial world, there are areas of cyberspace which may contain materials that are not appropriate for children.

Preventing children from successfully gaining access to such material is an important issue which must be addressed. However, because cyberspace is a global network with millions of users, active policing of content by governments, besides the obvious implications for free speech and privacy rights, is simply not a practical or effective solution.

There is a growing market for applications that empower users and parents to control their children's access to inappropriate materials on the Internet and commercial online services. This document provides an extensive (though by no means exhaustive) overview of some of the technologies currently available. All but two of the tools mentioned here are currently available to consumers across the country.

Four categories of technological options are examined here, each provides a slightly different, but equally effective, point of intervention.

1. Commercial online services parental control features

The Parental Control Feature of three of the most popular commercial online services (America Online, Prodigy, and Compuserve) are illustrated. These features are embedded in the service and are available to all subscribers of these services at no additional charge.

2. Features for the home PC and direct Internet access

For families that do not subscribe to one of the commercial online services but instead receive direct access to the Internet, there are a variety of products that run right on the home PC (SurfWatch, NET NANNY, and CYBERsitter). Some of these products are also compatible with and can run in addition to the parental control features available on the commercial services.

¹ Eg: The American Civil Liberties Union URL:gopher://aclu.org:6601/1/

² Eg: The Left Side of the Web URL:<http://paul.spu.edu/~sinnfein/progressive.html>

³ Eg: The Right Side of the Web URL:<http://www.clark.net/pub/jeffd/index.html>

⁴ Eg: Sen. Leahys Home Page: <ftp://ftp.senate.gov/member/vt/leahy/general/pjl.html>

3. Applications for schools and businesses

Schools and corporations can employ server based technologies such as the Netscape Proxy Server and WEBTrack to prevent users from accessing inappropriate content while in the classroom or at the office.

4. Proposals for the future

In addition to these examples of products currently on the market, there is an innovative proposal being offered by Nathaniel Borenstein and Darren New. KidCode, a proposed Internet protocol, is a voluntary rating system that can prevent children from accessing content that may not be appropriate.

A. CHILD PROTECTION IN COMMERCIAL ONLINE SERVICES

Commercial online services such as America Online, Compuserve, and Prodigy offer technologies that allow parents to block their children's access to certain online forums where children might be exposed to inappropriate content. Other services run filtering software which automatically screens messages posted to public forums that contain language inappropriate to children.

1. America Online parental control features

America Online (AOL), one of the large commercial online service providers, contains a feature which allows parents to prevent their children from accessing interactive discussion forums (a.k.a. "Chat Rooms"). A small minority of these forums, which are areas provided by America Online and are accessible only to AOL's subscribers, sometimes contain language and other discussion which may not be suitable for children. Parents are empowered to prevent their children from accessing these areas simply by selecting a menu option and entering a password. The block out function cannot be de-activated without the password.

America Online also offers parents the ability to block access to Usenet newsgroups based on keywords, subject matter, or specific newsgroups. For example, it is possible for parents to configure their system to block access to newsgroups containing the word "sex", or can block access to specific news groups such as "alt.sex.binaries.pictures". This mechanism is not exclusive to sexually explicit materials—the software can be configured to block access to groups based on any keyword. Configuring this system is as simple as clicking a button and describing the keywords or groups to be blocked.

Concerned parents, even if they are less computer literate than their children, have easy access to these control features. AOL provides telephone help, detailed instructions and advice for parents. There is no additional cost for this service, and, like the other parental control features on AOL, the feature cannot be turned off without a password known only to the parent.

Finally, on July 17, 1995, America Online announced that they had entered a partnership with SurfWatch Software (described below). Starting in the fall of 1995 AOL will provide SurfWatch as part of its regular service, preventing children from accessing sites on the Internet known to contain sexually explicit material. SurfWatch will run continuously, unless disabled by the parent, and will provide a further layer of protection for children who use America Online.

2. Prodigy Internet access restrictions

Prodigy runs special screening software that monitors messages posted to public bulletin boards and chat rooms on the Prodigy network, and automatically blocks messages which contain language (such as the "seven dirty words"), and other content deemed inappropriate for children.

Like all the major commercial online services, Prodigy offers users access to the Internet. Prodigy will not provide customers access to the Internet without the authorization by the head of the household (the principal account holder). The authorization is made at the time of the account setup and requires credit card verification. This additional child protection feature is designed to ensure that parents are aware that their child has access to the Internet where Prodigy cannot control the content.

Finally, Prodigy offers parents the ability to monitor which sites their child has visited on the World Wide Web. Each time a site is visited, the Prodigy software records that site in a log which can be displayed at a later time. Parents can keep track of where their children have gone in cyberspace, and can instruct their children not to visit sites which may contain inappropriate materials (based on their own personal values).

3. Compuserve: Internet in a box for kids

Compuserve, another of the large commercial online services, recently announced a partnership with SPRY Inc. (makers of the popular "Internet in a Box") and is currently developing two child protection features: Internet In a Box for Kids, and KidNet.

Internet In a Box for Kids contains a program called Crossing Guard, which will allow parents to control their children's access to the by blocking access to sites that may contain inappropriate materials. Crossing Guard will also allow parents to monitor their children's online activities and set timers to control when and how long their children can surf the net.

Parents who purchase Internet In a Box for Kids will automatically become subscribers to KidNet, an electronic community designed specifically for kids. The site will allow members to congregate, chat, exchange information, shop, and play interactive games. All content on KidNet will be closely monitored to ensure that it is appropriate for children. The area will also be designed to offer teachers and adults access to educational sites, school networks and other resources for education and information geared to kids. KidNet will also include a home page builder that will allow kids to develop their own Internet resources.

The product will begin shipping in the Fall of 1995. Information is currently available at the Compuserve/Spry Home Page: <http://www.spry.com>

B. PARENTAL EMPOWERMENT APPLICATIONS FOR THE HOME PC AND DIRECT INTERNET ACCESS

Although many parents subscribe to commercial online services such as those mentioned above, access to the global information highway is not limited to commercial online services. Many parents, educational institutions, and corporations choose to access the directly through an Internet Access Provider. Unlike commercial online services, access providers generally do not provide any of their own content. Because of this, parental control features must be initiated on the Home PC.

There are a variety of software developers working on parental control features for this market. Some of these applications can be used in conjunction with commercial online services, over and above the parental control features provided by commercial services, while others are designed specifically for direct access.

1. "Surf Watch"

Surf Watch Software is designed to provide parental control for families who do not subscribe to commercial online services. SurfWatch allows parents to block their children's access to Usenet newsgroups, World Wide Web sites, gopher and file archives (ftp sites) which are known to contain sexually explicit material. When activated with a private password held only by a parent, Surf Watch completely prevents any user from accessing these areas. The program is launched when the computer is started up, and operates when the parent is not present.

SurfWatch employs a group of professional "net.surfers" to find out and log sites on the where sexually explicit material is located. Sites are reviewed by a group of concerned parents and educators to determine the nature of the content, and those sites which meet specific criteria are added to a list which is embedded in the program.

SurfWatch software resides on the home PC. When activated, the program cross-checks every attempt to access Usenet newsgroups, world wide web, gopher, and ftp sites. Sites which are included on the list are blocked automatically. Because the new sites are constantly appearing on the net, SurfWatch provides a subscription service that *automatically* updates the list of sites to be blocked, without any intervention required from the user. Subscribers can receive updates as frequently as they choose.

Surf Watch Software maintains the list of sites the program will block, and will make custom lists available if requested. SurfWatch will also soon provide users the ability to add and delete sites to their own custom lists.

SurfWatch is available now for under \$50.00. Information on SurfWatch is available on the world wide web: <http://www.surfwatch.com/>

2. NET NANNY

NET NANNY, developed by Net Nanny Ltd. of Vancouver BC Canada, is designed to prevent children from accessing areas on the Internet that a parent deems inappropriate, prevent children from giving their name, address, telephone number, credit card, or other personal information to strangers via email or chat rooms, and

can log off an online service or shut down the computer when the child attempts any of these activities.

The program contains a dictionary in which the parent can enter the names of sites known to contain sexually explicit or other⁵ material (e.g., the Usenet newsgroup "alt.sex" hierarchy, or the web site <http://www.playboy.com>). Parents may also enter phrases such as "what's your name?", "what's your phone number", "where do you live", or "are your parents home?". If anyone attempts to ask these questions, NET NANNY will automatically log off the network or shut down the computer.

NET NANNY can also be configured to block access to files on the PC's hard drive, floppy drive and CD-ROM, to prevent a child from accessing and altering the parent's financial records, work related files, and programs and files intended only for adults.

Finally, the program keeps a log of all activity that occurs on the computer, allowing parents to monitor their children's use of the computer. By using this feature, parents can determine if their children are using the computer to access inappropriate material, and can then augment the Dictionary to prevent further access.

NET NANNY is compatible with commercial online services and direct Internet access providers. The program is launched when the computer is started up, and operates when the parent is not present.

Net Nanny is available for Windows users for \$49.95. More information can be found on the World Wide Web: <http://www.netnanny.com/netnanny>

3. "CYBERSitter"

CYBERSitter, developed by Solid Oak Software in Santa Barbara California, allows parents to monitor their children's computer activity and can prevent a child from downloading image, sound, and video files. It will also prevent children from accessing files on the home PC hard drive such as financial information, business related files, CD-ROM titles, and anything else a parent determines their children should not have access to. The program is launched when the computer is started up, and operates when the parent is not present.

CYBERSitter keeps a log of all activity on the computer, including access to the, commercial online services, and local files on the hard drive, CD-ROM's and floppy disks, enabling parents to monitor their children's use of the computer.

CYBERSitter is available for \$29.95. More information, and a free demonstration version of the product (for Windows) is available on the world wide web: <http://www.solidaok.com/~solidaok>

C. SOLUTIONS IN THE SCHOOLS AND BUSINESSES—SERVER BASED APPLICATIONS

In addition to the commercial online services and home access environments, many schools (from k-12 to universities) and corporations are beginning to provide access to the Internet. Many of these organizations are becoming increasingly concerned about the availability of not only sexually explicit materials, but also games, sports information, gambling sites, and other areas which may not be appropriate for access during school and work hours.

Products such as the Netscape Proxy Server and WEBTrack provide schools and businesses the ability to block specific sites from access by all users on the network, and to track and monitor use of the Internet.

1. Netscape Proxy Server

The Netscape Proxy Server, developed by Netscape Communications Corporation (the developer of the popular World Wide Web browser), allows schools and business to block access to specific sites on the Internet, individual computers (IP addresses) and other information. The Server operates in the background and does not require teachers or employees to have sophisticated programming knowledge or configure any feature. The systems administrator is responsible for operating the server and for maintaining the list of sites to be blocked.

The Server can be configured to block access to specified World Wide Web, file archives (ftp), and Gopher sites on the for users on the network on which the server is deployed. In other words, a school or business which runs the Netscape proxy server can prevent students or employees from accessing sites known to contain sex-

⁵Note: The list of blocked sites is entirely determined by the parent. The parent can block access to sites that contain any materials they do not wish their children to access, including but not limited to games, drugs, rap music, violence, or guns. A Net Nanny spokesman indicated that pre-programmed lists will be available from the company soon.

ually explicit materials, information about drugs, gambling, sports, games, and anything else determined to be inappropriate for users on the network.

2. *WEBTrack*

WEBTrack, developed by Webster Network Strategies in Naples Florida, allows businesses to block access to certain pre-determined sites on the Internet. The product gives businesses the capability to restrict access to 15 categories of World Wide Web, Gopher, and ftp sites (including sexually explicit material, games, gambling, job search information, drugs, online merchandising, sports, humor, and others), while allowing full access to a wide variety of resources. The product is designed to promote the use of the Internet for business purposes while restricting recreational use.

On July 17, 1995, Webster Network Strategies announced that it would provide its software free to K-12 schools, ensuring that all of America's children who access the Internet from the classroom will not be able to stumble upon inappropriate material.

WEBTrack also allows corporate systems administrators to monitor employee use of the network in order to determine if an employee is using the to access materials which violate stated corporate policy.

WEBTrack is available for most major network servers, and costs approximately \$7,500. Updates of the site list are available on a subscription basis for \$1,500 per year.

D. FUTURE APPLICATIONS AND PROTOCOL SOLUTIONS

1. *Information Highway Parental Empowerment Group*

A consortium assembled by Microsoft, Netscape Communications, and Progressive Networks recently announced plans to develop technical standards to enable voluntary rating of a variety of content available through the Internet and other online services. These standards would enable content creators to voluntarily label their own content so that individuals and families can block the material, if they chose. In addition, the Information Highway Parental Empowerment Group (IHPEG) will create standards to allow "third-party" rating of content online. Much as TV Guide rates TV shows on broadcast television, IHPEG would enable multiple third-party rating of content available online.

2. *KidCode*

Among the more innovative of proposals on the drawing boards is KidCode, currently being developed by Nathaniel Borenstein and Darren New. KidCode, a proposal for an Internet protocol designed to block access to sites based on a common voluntary rating system, is in the early stages of development, but would be compatible with all of the parental control applications currently on the market.

KidCode is a proposed convention for labeling World Wide Web and other sites on the Internet as containing material which may not be suitable for children. There are an infinite number of possible categories (e.g., sexually explicit material, violent material, drug related material, etc.).

Content providers and individuals who create web "Home Pages" could voluntarily incorporate a standardized KidCode tag in the address of the site. Browser applications would be configured to read these tags and determine if the content on the site is appropriate for the viewing.

In addition, KidCode can accommodate third party ratings, age verification, and other factors. Finally, because KidCode is a voluntary rating system that may not be employed by every content provider on the, it can be configured to block access to sites that do not contain KidCode tags. In other words, if a site chooses not to use KidCode, a child using a KidCode enabled program would not be able to access that site regardless of the content it contains.

The Borenstein-New KidCode proposal is still in the early stages of development and has not yet been deployed. Further information can be obtained automatically by sending email to <nsb+faq@nsb.fv.com>.

PROSPECTS FOR THE FUTURE

The products described here represent only a fraction of what is currently available to empower parents to protect their children from inappropriate material on the Internet. Moreover, these are only the beginning, as the industry is committed to developing more and better solutions, and the open nature of the Internet provides a wealth of possibilities for parental empowerment tools that may not yet have been imagined.

The availability of material on the Internet which may be inappropriate for children is a serious issue and one of legitimate concern. However, because the Internet is a global network with millions of users, top-down, command and control content restrictions simply cannot effectively control the availability of such materials. The only effective way to protect children from inappropriate material on the Internet is to encourage the continued development and deployment of tools that empower parents to control their children's online activities based on their own individual tastes and preferences. The products described here provide parents these tools, and can do so without the need for burdensome legislation or government imposed content restrictions.

III. Prosecution of Obscenity, Child Pornography, and Other Violations of Criminal Law in Interactive Media Proceeding Under Current Law

As the Internet and other interactive media become more fully integrated into the fabric of our society it is sad, but not surprising, that criminal behavior has begun to appear online. Already cases of consumer fraud and theft of intellectual property have been reported and prosecuted. Traffickers in obscenity and child pornography, too, have begun to use the Internet to facilitate their criminal behavior. Notwithstanding the recent appearance of crime online, cyberspace is not left in a state of anarchy. Federal criminal laws against transportation of obscenity, child pornography, and harassment have all been used successfully to prosecute criminal behavior online.

More vigorous enforcement of existing criminal laws may be necessary, but law enforcement agencies and some prominent pro-family groups agree current laws already enable prosecutions of online obscenity violations. The Justice Department has repeatedly stated that there are no gaps in current federal criminal laws prohibiting the distribution by computer of obscenity and child pornography. Following this logic, it is unnecessary to amend federal law to prohibit distribution of obscenity by computer, since existing law already criminalizes such conduct, as well as threats made by computer.

A. THERE IS NO ANARCHY IN CYBERSPACE: FEDERAL AND STATE CRIMINAL LAWS ALREADY ARE USED TO PROSECUTE CRIMINAL CONDUCT IN INTERACTIVE MEDIA

Tough obscenity, child pornography and harassment laws are already in the federal criminal code. Under existing Federal law trafficking in *obscenity* (18 U.S.C. §§ 1462, 1464, 1466), *child pornography* (18 U.S.C. § 2252), *harassment* (18 U.S.C. § 875(c)), *illegal solicitation or luring of minors* (18 U.S.C. § 2423(b)), and *threatening to injure someone* (18 U.S.C. § 875(c)) have already been successfully applied to punish conduct on computer networks. Notwithstanding all of the concern in the popular media and the United States Senate about this issue, all indications are that these and other laws fully cover all serious criminal behavior that may be perpetrated in cyberspace.

The Department of Justice and the American Family Association agree that existing laws already criminalize obscenity online. The American Family Association, a prominent pro-family, anti-pornography group lead by a former federal prosecutor from the Reagan and Bush administrations wrote to Chairman Thomas Bliley:

[T]he federal criminal code currently prohibits distribution of both child pornography and obscenity by computer.⁶

In a communication to Senator Leahy, the Justice Department agrees with this assessment:

[W]e have applied current law to this emerging problem. * * * The Department's Criminal Division has, indeed, successfully prosecuted violations of federal child pornography and obscenity laws which were perpetrated with computer technology.⁷

Thus, while more enforcement resources may or may not be required, no case has been made that any new criminal laws are needed in this area.

⁶ American Family Association, Letter to Rep. Thomas Bliley (May 16, 1995) from Patrick A. Trueman, Section Chief during Bush and Reagan Administrations, Child Exploitation and Obscenity Section, Criminal Division, U.S. Department of Justice.

⁷ U.S. Department of Justice, Letter to Sen. Patrick Leahy (May 3, 1995) from Kent Markus, Acting Assistant Attorney General, Office of Legislative Affairs.

B. VIOLATIONS OF OBSCENITY, CHILD PORNOGRAPHY, AND OTHER CRIMINAL LAW ONLINE ARE BEING PROSECUTED

Even as the Congress rushes to enact new criminal laws, online obscenity and child pornography crimes are being prosecuted around the country under existing law. According to the Justice Department:

The Criminal Division's Child Exploitation and Obscenity Section is aggressively investigating and prosecuting the distribution of child pornography and obscenity through computer networks, and the use of computers to locate minors for the purpose of sexual exploitation.⁸

To the extent that any obstacles arise, Congress should examine whether there is a need for additional training and resources for enforcement. The Justice Department, the agency responsible for investigating and prosecuting these crimes, sees no urgent need for legislation and instead has urged—prior to any congressional action—"in-depth analysis" of the "number of complex legal and policy issues" raised by the need to protect children while respecting the First Amendment and privacy rights of computer users. The precise constitutional parameters, for example, of criminal obscenity laws and the application of community standards doctrine to interactive media are currently being decided by the courts. If Congressional investigation determines that there are actual gaps in current law, it may, then, be appropriate to investigate modernization or clarification of existing law.

Ironically, the Communications Decency Act as passed by the United States Senate as part of the telecommunications reform bill, fails to add any protections against online stalking and child solicitation. Everyone is concerned about protecting children from threats online and off. The Senate-passed Communications Decency Act, however, only punishes indecency and obscenity, not stalking or solicitation. It offers no help to prosecutors or police in prevention of prosecution of online crimes against children.

IV. *Censorship of Indecent Communications in Interactive Media Suffers Fundamental Constitutional Infirmity*

Indecency restrictions have the acknowledged important purpose of protecting minors from access to controversial and inappropriate sexually explicit material. However, such restrictions, especially if imposed on new interactive media, would be subject to serious constitutional challenge. This section of the report will demonstrate five key constitutional points:

- (1) *Censorship of indecent communications prohibited*: General bans on indecent material are unconstitutional.
- (2) *Impermissibly intrusive means of achieving legitimate goal*: First Amendment jurisprudence requires that restrictions on speech adopt the "least restrictive means" available for achieving a compelling purpose. Due to the availability of programs such as Surf Watch and the parental control features on America Online and other commercial services, blanket indecency restrictions are clearly not the "least restrictive means", and are unconstitutional on their face.
- (3) *Invasion of privacy*: By criminalizing the content of private, non-obscene messages, the Senate-passed Communications Decency Act would force an invasion of the realm of private electronic communications and end the individual's ability to control the content of information he or she chooses to access in private.
- (4) *Creation of private censors*: Holding service providers criminally-liable for the content of all messages that they carry will force providers to become private censors and prescreen all communications traveling across their system.

Most importantly, statist, bureaucratic command and control regulation of indecent material online fails to take advantage of the empowering aspects of new interactive media, which can allow parents and other users to exercise control over the information that to which they and their children have access.

Legislating about new interactive media requires a careful understanding of the unique attributes of this new medium. First and foremost, interactive media enable users (including parents) to exercise choice over the information to which they and

⁸Department of Justice, Letter to Sen. Patrick Leahy (May 3, 1995) from Assistant Attorney General, Kent Markus.

their children have access. In sharp contrast to older media, government content regulation is simply not necessary in order to shield children from possibly inappropriate information. Furthermore, given the heavily fact-based determination required to justify regulation of indecency, legislative findings based on open hearings and a public record are essential before any legislation could pass constitutional muster.

Indecency restrictions for interactive media would enshrine in statute a sharp distinction between the print medium and new interactive media. For example, though an individual is allowed to go into a bookstore and buy a sexually-explicit magazine or a "lewd" work of art, one would not be able to access the identical information over the Internet. Both the interactive media and the print media are arenas in which individuals and organizations exercise core First Amendment free speech rights. Before Congress elects to diminish the First Amendment protections available in this new medium, we believe that careful, public consideration is required.

A. GENERAL PROHIBITIONS AGAINST INDECENT COMMUNICATIONS ARE UNCONSTITUTIONAL

A general prohibition against indecent communications in interactive media would violate the First Amendment to the Constitution of the United States. The principle that each person should decide for him or herself the "ideas and beliefs deserving of expression, consideration and adherence" lies at the heart of the First Amendment. *Turner Broadcasting v. FCC* 114 U.S. 2445 (1994) This principle has been interpreted to mean that individuals should be able to speak freely and frankly about issues of their choosing, without fear of reprisal because many people may not agree with or appreciate the nature and content of their messages. At the same time, the Supreme Court has recognized that despite this fundamental guarantee, there are certain kinds of speech that fall into a category of unprotected speech—obscenity is one such category, indecency is not.⁹

Because of the difficulty in defining obscenity in the context of the First Amendment, it took numerous attempts for the Supreme Court to find five justices to agree on defining principles.¹⁰ Finally, in 1973 the Supreme Court in *Miller v. California*,¹¹ established the definition of obscenity and the narrow area of sexually explicit speech that is unprotected by the Constitution.¹² Since that time, the definition has not been expanded or changed.

By contrast, indecent speech which may include important political views, even if crudely stated, is protected by the First Amendment. As such, government cannot enact a ban on such speech without illustrating a compelling governmental interest, and any restrictions on such speech must be accomplished in the least restrictive manner.¹³

B. RESTRICTIONS ON INDECENT COMMUNICATIONS ARE UNCONSTITUTIONAL FOR FAILURE TO ADOPT LEAST RESTRICTIVE MEANS

1. *Censorship of indecent, but not obscene, communications for the purpose of protecting minors must employ the least restrictive means available to accomplish their goal*

Indecent communications are protected by the First Amendment, unlike obscenity which is altogether unprotected. *Sable Communications of California v. FCC* 492 US 115; 109 S.Ct. 2829; 106 L.Ed. 2d 93 (1989). Indecent communications, which do not rise to the level of obscenity, can only be limited in order to serve a compelling state purpose and must be done using the least restrictive means possible. *Id.* at 125. The *Sable* court found that the protection of minors from access to indecent material is

⁹ In very limited circumstances, the Supreme Court has found indecency to be "unprotected" speech. See *Ginsberg v. New York*, 390 U.S. 629 (1969) (holding indecency unprotected where distributed to minors). See the discussion of proposed Section 223(b) below.

¹⁰ See, e.g., *Roth v. United States*, 354 U.S. 476 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

¹¹ 413 U.S. 15 (1973) (adopting standards that were later rejected by the Supreme Court). Given the national and international reach of new interactive media, determinations of obscenity based on traditional "community standards" doctrine also raises a whole host of questions.

¹² The Court in *Miller* held that the guidelines for determining obscenity are as follows: "(a) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct defined by the applicable state law; and (c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value." (citations omitted).

¹³ *Sable Communications of California v. FCC*, 492 U.S. 115 (1989).

a compelling state purpose, but that "it is not enough that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.*¹⁴

As a threshold matter, the *Sable* court found that the constitutional basis for upholding indecency regulations in broadcast media articulated in *Pacifica Foundation v. FCC* 438 US 726, 98 S.Ct. 3026, 57 L.Ed. 2d 1073 (1978), were inapplicable in any other media besides over-the-air broadcasting.¹⁵ 492 U.S. at 127. *Pacifica* upheld the FCC content regulation based on the dual finding that 1) radio was a "uniquely pervasive medium"¹⁶ that intruded (dirty words and all) into peoples homes, and 2) the only way to protect children from exposure to objectionable content was to keep it off the air altogether.¹⁷ *Sable* rejects this finding of "pervasiveness" as "emphatically narrow" and irrelevant to other media such as telephone audiotext services. 492 U.S. at 127.

Thus, the *Sable* "least restrictive means" standard became the test by which all regulations on access to indecent, but constitutional-protected, material were judged. Nearly ten years of litigation along with adjustment of the statute and regulation were required before the current statute was found constitutional under this standard. See *Dial Information Services v. Thornburg*, 938 F.2d 1535 (2d Cir., 1991) (finding FCC regulations implementing §223(b) constitutional). During the course of the dispute over the application of §223 to audiotext services, courts considered and rejected a number of means by which carriers were required to shield minors from access to indecent information. First, time channeling rules, requiring that services only be accessible during hours when children were asleep, were found to violate the First Amendment because they had the effect of denying access to adults as well as children. *Carlin Communications v. FCC* 749 F.2d 113, 121 (2d Cir. 1984) (Carlin I). Next, the courts rejected a requirement that carriers provide access to indecent services only once customers entered access codes or passwords, which were to be issued after verification that the customer was over 18. *Carlin Communications v. FCC* 787 F.2d 846 (2d Cir. 1986) (Carlin II).

The finding of the *Dial* court, approving the constitutionality of §223 and associated regulations depended on the legislative determination that the telephone company blocking of service pending age verification or use of a credit card are the only means to enable parents to restrict their children from access to indecent audiotext services.¹⁸

2. Background on dial-a-porn rules

As was the case for broadcast indecency restrictions considered in *Pacifica*, the dial-a-porn restrictions were only found constitutional because of the uniquely intrusive and uncontrollable nature of the audiotext services. A key legislative motivation for imposing these rules during the 1980's was that indecent information available through audiotext services in the telephone system were openly available to children in such a way that it was difficult for parents to control access by their children. The views of Congressman Bliley recounts the prevailing view of the need for the legislation: "It constitutes an attractive nuisance in every home in America where children are present. There is no completely effective way to prevent children from being exposed to "indecent" or "obscene" dial-a-porn so long as it is lawfully and commercially marketed. * * *" Bliley continues:

Telephones are precisely like radio and television because of their easy accessibility to children and the virtual impossibility for parents to monitor their use. * * * [D]ial-a-porn is presently in the home whether the homeowner wants it or not. Today one cannot have telephone service in the privacy of one's family environment without being required to [have] dial-a-

¹⁴ See also *Carlin Communications v. FCC*, 837 F.2d 546, 555 (2d Cir. 1988).

¹⁵ *Pacifica* held that the FCC had authority to enforce a rule which barred the comedian George Carlin and others from repeating the "seven dirty words" in over-the-air radio broadcasts. *Pacifica* did not, however, specifically approve the substance of the indecency rule promulgated by the Commission.

¹⁶ *Id.* at 748

¹⁷ *Id.* at 749-50. The *Pacifica* court recognized that the radio station (WBAI in New York City) had actually broadcast a warning as to the possibly objectionable content, but that this warning failed to protect those who tuned in after it was given. *Id.* at 731.

¹⁸ Rep. Bliley asserts as much in his comments on the legislation. He states, " * * * It became clear that there was not a technological solution that would adequately and effectively protect our children from the effects of this material. We looked for effective alternatives to a ban—there were none." 134 Cong. Rec. H1691.

porn with it. Families with children must give up telephone service to be "left alone" from exposure of their children to this intruder."¹⁹

The current statute and Federal Communications Commission regulations promulgated thereunder were found constitutional after nearly ten years of litigation and efforts by Congress and the Commission to bring the statute within constitutionally acceptable bounds. Indecency restrictions applied to interactive media would require a wholesale review of the constitutionality as applied to new media such as online services and the Internet. Interactive media operates in such a different manner, that the constitutional issues must be considered afresh given the new factual backdrop. Mere extension of the current dial-a-porn rules to new media would be found unconstitutional in interactive media given the standards set out by the courts reviewing the § 223 rules as they applied to older telephone technology.

3. *Reliance on government censorship to restrict access to indecency fails to take into account the fact that interactive media offers parents a much greater degree of control than broadcast services or 900 number services.*

Indecency restrictions in interactive media would presumably be motivated by the same goal of protecting minors as the existing statute. However, the means adopted for achieving the goal are impermissible under the First Amendment because they are not the least restrictive means of accomplishing the legitimate government purpose. Interactive media is materially different from analog telephone and audiotext technology in that it offers users the ability to exercise control over precisely what information one accesses. Given the dramatic difference between telephone technology and interactive services such as the Internet and other interactive media, we believe that blocking by the carrier as demanded by § 223 would not meet the "least restrictive means" test. Just as the *Sable* court found broadcast indecency regulations inapplicable to the telephone system because of differences in the medium, regulations designed for audiotext services in the telephone system are constitutionally inapplicable to new interactive media. Indeed, indecency restrictions on material transport by US Mail have also been struck down by the Supreme Court precisely because "the receipt of mail is far less intrusive and uncontrollable"²⁰ than broadcast information that was the subject of the *Pacifica* case.

Technologies already exist that enable users to access certain information based on a variety of characteristics, or, to exclude certain types of information from access.²¹ With such filtering technology, users, instead of the government or network operators, can exercise control over the information content that they receive in an interactive network environment. User control could be exercised in two ways. First, one could screen out all messages or programs based on information in the header. If a parent wanted to prevent a child from seeing a particular movie or from participating in a particular online discussion group, then the computer or other information appliance used by the child could be set by the parent to screen out the objectionable content. Such features can often be protected with passwords which would be assigned, for example, by the responsible adults in the house. Second, the same systems can be used to enable blocking of content based on third-party rating systems.

Given the flexibility of interactive technology, we need not rely on just one rating system. In fact, a single rating system or a single set of filters would merely replace a single government censor with a single private censor, with no real gain for the free flow of information. Properly implemented, interactive media can accommodate multiple filtering systems, giving users and parents the opportunity to select and block information based on a true diversity of criteria. The national Parent Teachers Association or different religious organizations could set up rating systems which would be available on the network to those who desired them. Rather than relying on the judgment of the government, or of the service provider, viewers can limit access to content based on the judgment of a group whose values they share.

Interactive media can enable individuals and parents to prevent themselves or their children from using their PC's or TV's (in particular, their children) from accessing certain kinds of content. With such control mechanisms within the practical reach of parents, the governmental purpose generally cited for indecency regulations—the protection of children—could be accomplished without government con-

¹⁹ 134 Cong. Rec. H1693-4 (daily ed. April 19, 1988) (statement of Rep. Bliley) (emphasis added).

²⁰ *Bolger v. Youngs Drug Products Corp.* 463 U.S. 60, 71 (1983). The Court in *Bolger* struck down a statute regulating the mailing of birth control material, despite the fact that proponents of the law asserted that its purpose was to protect children from exposure to sexually explicit, offensive material.

²¹ For a complete discussion of blocking or filtering technologies, see Section II of this Report.

tent restrictions. In particular, the reasoning of *Pacifica* (unsought intrusion of the indecent message into homes) and *Sable* (inability of parents to exercise control) would no longer justify most content regulation in new interactive media.

C. FORCING ONLINE SERVICE PROVIDERS TO BECOME PRIVATE CENSORS IMPAIRS FIRST AMENDMENT VALUES BY RESTRICTING THE FREE FLOW OF INFORMATION

Holding carriers responsible for the content of all information and communication on their systems is a grave policy error which will restrict the free flow of information and is contrary to First Amendment and personal privacy values. If service providers are held liable for all of the content on their networks, then they will be forced to attempt to screen all content before it is allowed to enter the system. In many cases, this would simply be impossible. But even where it is possible, such prescreening can severely limit the diversity and free flow of information in the online world. To be sure, some system operators will want to offer services that prescreen content. However, if all systems were forced to do so, the usefulness of digital media as communication and information dissemination systems would be drastically limited. Where possible, we must avoid legal structures that force those who merely carry messages to screen their content.

Relying on user control is a real alternative to the draconian approach now being considered and sure to be proposed again and again. A media environment in which parents—or anyone else who has particular preferences about the content of information to which he or she is exposed—would give users the control that courts have determined they lack in the mass media, without involving the government in content control which we believe would not survive appropriate First Amendment scrutiny in this new medium.

D. BANNING PRIVATE, SEXUALLY-EXPLICIT COMMUNICATIONS VIOLATES CONSTITUTIONAL PRIVACY RIGHTS

Regulation of private, indecent communications between individuals raises constitutional privacy concerns. The Supreme Court has made clear that absolute restrictions on indecency cannot pass constitutional muster under the Fourth Amendment's guarantee of personal privacy. Though the Court has explicitly recognized that while the government may have an interest in protecting in public, *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973) or in a place that caters to the public, *Schad v. Mt Ephraim* 452 U.S. 61 (1981); *California v. LaRue*, 409 U.S. 109 (1972). It does not have a right to ban information maintained in private. *Stanley v. Georgia* 394 U.S. 557 (1969). "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch." *Id.* at 598. If enacted, the Senate-passed Communications Decency Act would empower federal authorities to intrude on the private communications and information used by individuals, in clear violation of *Stanley*.

As reflected in passage of the Video Privacy and Library Protection Act of 1988 (protecting records of video rentals), and the Electronic Communications Privacy Act (ECPA) of 1986 (18 U.S.C. §2510), Congress has long recognized the privacy interest in information that we read and otherwise use. A number of surveys have confirmed that Americans care deeply about their privacy. In a 1983 analysis of their survey results, Louis Harris & Associates concluded:

Particularly striking is the pervasiveness of support for tough new [privacy protection] ground rules governing computers and other information technology. * * * This support permeates all subgroups in society and represents a mandate for initiatives in public policy. (L. Harris, *The Road after 1984: A Nationwide Survey of the Public and its Leader on the New Technology and its Consequence for American Life*, December, 1983).

Enforcement of indecency restrictions by online service providers would require that online service providers violate the privacy rights, and statutory protections established by the Electronic Communications Privacy Act, in order to assure that criminal violations do not occur. ECPA established that users of online communications systems have a substantial privacy interest in the communications that they transmit over computer networks. ECPA also set out clear conditions under which law enforcement agencies, and, in narrow cases, system operators, could access these private communications. Holding system operators liable would presume a dramatic change in the privacy protected established in ECPA, thereby forcing service providers and system operators to invade the privacy of user communications. While there may be some justification for regulation of communication and information made public, there must be no intrusion on private or closed group communications unless there is evidence of criminal wrongdoing.

E. CONSTITUTIONAL ALTERNATIVES TO THE COMMUNICATIONS DECENCY ACT
CENSORSHIP REGIME

Alternative means of achieving the goal of protecting minors from access to material considered inappropriate by their parents would include:

- *Maximum reliance on technology to empower parents:* Interactive media offers parents and other users the ability to filter certain kinds of content. Instead of relying on government content restrictions, or even government-imposed rating systems, parents should be able to block the delivery of certain information to their children.
- *Clear protection for constitutionally-permissible speech:* Any alternative legislation must provide affirmative protection for constitutionally-permissible speech, even if it is lewd or filthy. Controversial speech must be treated separately than that which is clearly obscene and unprotected.
- *Emphasis on enforcement of existing statutes:* Federal and state law already prohibits transportation of obscenity, child pornography, as well as, in many instances threats, stalking and harassment. To the extent that there are obstacles to enforcing these laws in the new on-line environment, Congress should examine whether or not more resources for enforcement are required, including training for law enforcement in interactive services and cooperative efforts with the industry.

The regulation of speech, commerce, and privacy rights in new interactive communications systems raises many difficult issues of public policy and constitutional law. Before proceeding with legislation, Congress must provide the opportunity for public hearings to identify clearly the problems that exist, and to identify solutions that are appropriate to the new technology. Failure to do so will result in ineffective policy, years of constitutional litigation, and a disastrous chilling effect on the development and growth of a very promising new communications medium.

DISCLAIMER

This report represents general principles discussed by the Interactive Working Group. The report is not a specific policy statement on behalf of the group or of any individual organization.

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 National Cable Television Association
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 National Center for Missing and Exploited Children
 National Newspaper Association
 National Public Telecomputing Network
 National Retail Federation
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 Showtime
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 Sun Microsystems
 SurfWatch Software
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 Telecommunications Industry Association
 The Internet Company
 Time Warner, Inc.
 Times Mirror
 U.S. Telephone Association
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Senator LEAHY. I am worried when we start talking about the fact that we have FCC standards on indecency, and that somehow those standards are going to be applied to the Internet. Mr. Berman, you spoke about the difference between when we are talking about broadcasts and talking about the Internet. The FCC has grappled enough with what is indecent. I can just see what might happen when somebody gets into an active, heated conversation on the Internet and lets slip a four-letter word—I mean, it might be in a town meeting, where somebody tells me what he thinks about a vote that I cast. Do we then put the service off the air? Do we close down the Internet? Do we prosecute me for having the town meeting? Do we prosecute them? Do we prosecute the schools in Vermont that log on and may watch these town meetings because of their obvious instructional value? Often when I am in Vermont for a month, I might have a town meeting at a school, and the school kids come there.

I know one recent decision by the FCC that fined a radio station for reading over the air, in a serious, newsworthy manner, an interview with Jessica Hahn about being raped by Jim Baker, the televangelist. The rape occurred, and they get fined for reading about it. The decision said the newsworthy nature of broadcast ma-

terial and its presentation in a serious, newsworthy manner would be relevant contextual considerations in an indecency determination but are not by themselves dispositive factors.

So if serious news might fall, what happens if you are just having casual conversation?

Mr. BERMAN. What if Mr. Crimmins created a Web Page to share with other people concerned about child pornography around the country what is being distributed, and he is organizing; he is trying to organize adults. He is not trying to reach kids, but he is saying we have got to organize. And he does not have at his Web Page the ability to lock out children, because it is not possible, it is not technically possible for him. He could be in trouble.

The Web Page of Planned Parenthood—let us say there was a safe sex discussion—and I think someone mentioned that—it could be pretty graphic. Do we want America Online and Prodigy to sort out who is on which side? In other words, are we going to let Jerry's kid watch that. Do they make that decision, or do I make that decision?

Senator LEAHY. And the suicide hotline.

Mr. BERMAN. The suicide hotline. Let us say America Online makes the decision, to avoid liability, that they have to take down the suicide hotline, but then there is Senator Leahy's Web Page which is also accessed by America Online, and I go to the Web Page, and you have linked your page to the suicide hotline or to the AIDS discussion, because you think it is in the interest of Vermonters, and so you become the transmitter of indecent material, and then you are subject to being thrown off of America Online, or you have to decide what can be on your Web Page.

It is not a slippery slope; it is a downhill slide, when you get into this gray area of what is indecent. And particularly it becomes a very serious problem when you are trying to deal with indecency when all of the examples that Senator Exon gives and Senator Grassley and the witnesses go to something else.

Nothing in here deals with stalking. The stalking example, all you do after you pass the indecency statute, if you wanted to stalk my kid, you would just use fishing lures. You would just say, "Here is fishing stuff." You do not have to use indecent materials.

Senator LEAHY. That raises another point, and let me just follow up on this in the time I have with Mr. Hart. Professor Hart, as I understand, the Bill of Rights was one of the first things you put online.

Mr. HART. The Bill of Rights was third. We did the Declaration of Independence first, July 4th, 1776.

Senator LEAHY. The Bill of Rights was very important to my family, especially the first amendment. My father was a self-taught historian. After my grandfather died in the stone sheds of Vermont, my father as a teenager had to leave school to support the family and became one of the best-read people I ever knew. He had very strong feelings about the first amendment and the diversity that it guarantees this country, and he felt that diversity guaranteed democracy.

Let me just ask you one question. You talk about putting these books online with volunteers. Could you afford the legal help to en-

sure that you do not violate the statute by placing a book online, even a classic book, that some may consider indecent?

Mr. HART. We could only afford it if it were something like Caller I.D., which is an analogy to the firewall that I mentioned at the beginning. We cannot even afford our copyright lawyers; they are all volunteers, too. I have never paid anybody more than a piece of pizza or putting money in the parking meter for them. We have about 500 or 1,000 volunteers, and if they come, I will feed them.

Senator LEAHY. Thank you.

Thank you, Mr. Chairman.

Senator GRASSLEY. Thank you, Senator Leahy.

Senator DeWine?

Senator DEWINE. Let me address this to any of our witnesses who want to jump in, but I will start with you, Mr. Berman. I am trying to understand—maybe I could get a perspective on your understanding of this proposed legislation and how it would actually work in the real world. Let me read a section to you.

Any remote computer facility operator, electronic communications service provider or electronic bulletin board service provider who willfully permits a person to use a remote computing service, electronic communications service, or electronic bulletin board service that is under the control of that remote computer facility operator, electronic communications service provider or electronic bulletin board service provider to knowingly or recklessly transmit indecent material from another remote computing service, electronic communications service, or electronic bulletin board to a person under 18 shall be * * *

and so on.

I am trying to understand and to get a feeling for your understanding of how this would work in the real world, and let me just start with a question. What is the duty under this section for the operator or provider to inspect or to look for the information posted—is there any?

Mr. BERMAN. I think the drafters of the statute do not intend that you have to inspect. I think that is a very important point. But let me point out that Senator Leahy, who was one of the prime authors of the Electronic Communications Privacy Act, which the definitions in this statute pick up and defines electronic communications private. Your definition covers everyone from Compu-Serve to a library to a corporation to the U.S. Congress to my organization. They are all providing a computer connection to the Internet, and all of them could be told at some point that, by the way, there is some indecent material on your board, or my lawyer tells me you had better be careful because you are transmitting indecent material. And when you transmit on the Net, you put it up, and you download it anywhere in the country. So I am worrying, when he has "Catcher in the Rye" on his Gutenberg Web Page, whether it is being downloaded in California, where it is a good book, or it is being downloaded in some small town in the South where it is indecent, and it is going to be prosecuted.

So there is a whole series of institutions who are going to say we had all better divide into adults and children, Kids Net and Adult Net, and to be safe, or to just lock kids off the Internet, which would be a mistake, since in terms of our children, this is the first electronic technology that has some worth for my children. It is interactive. They get to do things. There are libraries on the

Internet; there are pictures; there are paintings; there are schools; there is discussion.

There is one tiny percent called pornography which we have got to screen out, and I think we can find a solution, and industry is coming to find that solution. But this is the first noncouch potato technology we have gotten, and it is exciting, and we are urging you to just be the deliberative body, step back, think about it, give some time to the Internet to develop—it has only been let loose in the last year, and it was Congress that took the reins off—and let us see what industry does.

Senator DEWINE. Any other comments on that comment?

Ms. JEPSEN. Yes; Senator DeWine, this brings up something that is not necessarily pertinent just exclusively to this bill, but because of this new technology, the fact that it is all over the country and all over the world, the old way of prosecuting pornography was based upon community standards; now the question is what is the community. And there are some who propose we should take a look at perhaps drawing up some kind of per se legislation that says this and this and this is illegal—you know that, just like you now know that child pornography is illegal—and then everything else could fall under the Miller standard. That is not necessarily pertinent just to this bill, but it is something that Mr. Berman did raise.

Mr. BERMAN. Well, if you will permit me, one of the reasons why on the Senate side, we were so supportive of Senator Leahy's study was that all of these questions are up in the air. No one knows the answer to them. Yes—what community standard applies, and can Congress create a community standard, or is that a Supreme Court doctrine? Does it apply the new technology? Which community standard?

Those are important questions. Now, we can either go about it deliberatively, like we did with the Electronic Communications Privacy Act, and try to find real solutions, or we can take a guess and a leap into the dark and invite 10 years of litigation and the whole telecommunications industry piling around the FCC or in some court trying to untangle this, without providing any solution.

Senator DEWINE. Ms. Jepsen, do you agree with Mr. Berman's definition of who this would apply to?

Ms. JEPSEN. Well, I do not agree with his analysis of this. Would there be some problems? Yes. Would there be some problems with any piece of legislation? Yes. This is not an easy thing to deal with. I agree with him on that.

I think this, however, is a very reasonable way to go about it, and frankly, worrying about unnecessary prosecutions is something I wish were a real problem. We worry about no prosecutions in many cases. I do not agree with him completely, no.

Senator DEWINE. Mr. Hart, my time is up, but go ahead.

Mr. HART. Well, you invited comments from all three of us, as I recall.

Senator DEWINE. Absolutely; go right ahead.

Mr. HART. Thank you. I do not know how to point some of this out without sounding a little egotistical, and I am sorry about that. But volunteers built most of what you are talking about. It was not the people who spent millions of dollars to create the Internet. The

Internet would have been worthless if they were still doing with it what we did in 1971. All the messages on it were: "My program needs debugging." "My computer is crashing." It was just mainframe operators yakking to each other, and it was boring if you were not a mainframe operator. That is one of the reasons why I started to put stuff out there for everybody, and now I feel like I am getting run over by a steamroller, because now everybody is interested.

I do not want to see NBC, CBS, MCI, AOL, take over everything on the Internet, especially since they did not think of this; they were not the people who said we ought to be typing in "Alice in Wonderland" or Milton or Chaucer or whatever, so that everybody in the world can have a copy for one penny. That is what it costs to put one of those plays on one of those little disks that you have in your office; it costs about a penny to put one on there. And between copyright issues—and it looks like copyright is going to be permanent now, so we are never going to be able to publish anything that is newer than 1920, which means we will never get to publish "Lady Chatterly" because that is 1928, so you have already wiped that one out—but the people who wrote FTP, X-Modem, Y-Modem, Z-Modem, the World Wide Web, Mosaic—they were all volunteers. Sure, many of them got snapped up and offered a million dollars by some big company to put out shares and sell stock and stuff like that, and we have had at least one of those offers ourselves, so I could show you a million dollars if I took it.

Just one or two other things. I like the Kid Net idea. Somebody said you could spell "porno" wrong. It is just like the WordPerfect dictionary. If you get a word it does not recognize, and you want to put it in, you just hit F-3, and bingo, it is in the dictionary from then on.

And finally, mostly because it is chronological, I got an e-mail from NASA last week, and they want to take the Gutenberg Project up. It is not going to be in the United States; it is going to be in outer space, so I do not know whose country's laws are going to decide whether or not the stuff on here is obscene, but the next shuttle is supposed to have one of these on it.

Thank you very much.

Senator DEWINE. Thank you.

Thank you, Mr. Chairman.

Senator GRASSLEY. I would emphasize once again, because we keep coming back to it so often in questions about what this legislation might do or not do, that under current law, noncommercial computer obscenity is not covered by any Federal statute. And I would also say that my bill uses the definition of indecency that is in 18 U.S.C. 1464, and that is our underlying statute. It requires repeated use of indecent material, so that any isolated incident would not create a liability.

Mr. Berman, my last question would be to you because you talked about downhill slide. Did the Supreme Court agree with your concern and your analogy in the *Pacifica* case and the *Sable* case, and did the District of Columbia Circuit agree a month ago in the *Act III* case?

Mr. BERMAN. May I submit for the record a Yale Law Review article which we just had published at Yale, which points out that

the Supreme Court will not go from one media to another and say they are the same thing; they make distinctions.

The *Pacifica* case dealt with radio, which is widely available, and it just comes into your home. They made some rules on indecency there.

The *Sable* case dealt with dial-a-porn, a different kind of analysis. The Court is going to have to make a very different analysis for the Internet, which is widely available, with abundant content, widely available to third parties, and unbelievable amounts of user control over where they go. It is not a captured audience. And I think the Court will look very, very skeptically on a legislative scheme which does not explore the least intrusive means.

And I understand that you have lawyers, and I respect their judgment. They make a judgment on the Constitution. Lawyers make different judgments on the Constitution. And I would say that your legislation is unconstitutional.

Senator GRASSLEY. Well, I would hope you would say that the Supreme Court does not share your view about the downhill slide.

Mr. BERMAN. I think the Supreme Court would share the view. I wish I could quote Supreme Court cases, but they do care about whether Congress has created a record that this is the least intrusive means.

You are to be commended for holding a hearing on this and that we are beginning to start a record here. But I have Internet mail in my box which says there are engineers who want to testify, there are other people in the industry who are not here. I do not represent them. There are many, many participants out there, and they are part of the Internet, and they ought to be heard. And MCI does not speak for them, and CDT does not speak for them. This requires a lot of study and a lot of deliberation, particularly when you are dealing in the area of free speech, and you are talking about a new medium.

Senator GRASSLEY. Senator Leahy, and then I think when you have concluded, we will quit, if that is OK.

Senator LEAHY. Thank you. I will make it very brief.

I might say, Mr. Chairman, on the question of the Internet, just on this issue, I have had so much come in to me over the Internet at my address that I could not possibly answer all of it. I have tried to use the obvious methods to determine those that come from Vermont and answer those, and some just at random from around the country. So regarding what Mr. Berman has said about the number of people who would like to testify and would like to have their views heard, they are very, very extensive.

I would note that it is very hard to draw a corollary between FCC decisions or court decisions on radio or television. In fact, it would be impossible to find a case that you could say was on all fours with an issue involving the Internet. The FCC has ruled there are seven dirty words, for example. If I were to pick up the telephone and call Mr. Berman and, in a heated argument, express my views in perhaps more prosaic colloquialisms than I might otherwise use, and somehow I utilized all seven of those words, he might get angry and say, "You are one, too," but there is no law violated in that. If I were to go on a radio talk show and refer to

him or anybody else and use those words, then the radio station at least has itself a problem.

We then can go to the question of the Internet. If I do the same thing back and forth to him—and I am not suggesting I do; our relationship is a lot different than that—but again, we are in an entirely different situation than on the radio.

So I only mention that, Mr. Chairman, to point out that there are some very, very difficult legal issues involved here, and I do commend you for holding this hearing, because as I said at the outset, this is the first time we have had a hearing on something that is of major importance. The Internet, the Internet is I think just a forerunner of what will become more and more the communication system as we go into the next century. Before we go and dramatically change it or dramatically use government interference to stop what has probably been one of the greatest grassroots communications medium for use by private individuals, business enterprises, and others, that this country has seen in generations, we should have hearings like this and step very, very carefully.

Senator GRASSLEY. Senator Leahy, before you go, Senator Exon has asked for the floor.

Senator EXON. Mr. Chairman, thank you very much. I have been listening with great interest, and I want to thank the witnesses who are here and the previous panel.

I would just like to make a comment or two, if I might, generally about the proposition that we are faced with here. First, I would like to make sure we have corrected the record. I was advised that earlier on, Senator Leahy indicated that the 84-16 vote in support of the Exon-Coats amendment was as a result of the Rimm study that appeared—

Senator LEAHY. I corrected the record sometime earlier, Senator.

Senator EXON. You did correct that?

Senator LEAHY. Yes, and I made it very clear that I was referring to references to the Rimm study and subsequent statements of support by others, not by the Senator from Nebraska, but subsequent words of support. I made that very clear earlier on.

Senator EXON. I just wanted to make it clear that that study came out after the vote.

Senator LEAHY. Yes.

Senator EXON. I want to make clear what I believe Dee Jepsen said and what I believe all members of the panel here feel, and that is that we certainly are very much concerned about the overall situation, and different people are taking different approaches.

Any of us who bring these things up, though, other than a study, are viciously attacked; our motives are suspect; all kinds of ridiculous claims are being made about it. I thought the article a week ago Sunday in The Washington Post was pretty indicative of how vociferous and I think ill-informed those who do not happen to agree are. We have learned in the Senate that although we do not always agree on things, we try to rationally and objectively discuss things.

I would simply say that the Exon-Coats bill, when I started talking about it, when I first introduced it nearly 2 years ago and in all instances since, I have said that we do not want to create a false sense of security, and I think that is a point that you make,

which is a good one, Mr. Berman. But I hope you will agree that—and at least this Senator has recognized and has so stated—even if Exon-Coats were to become law, we would not have a “pristine” Internet from the concerns that are being expressed here.

I simply say that indeed, we are on a slippery slope, or we are on something worse than that—a crash to the bottom on that slope.

I think it all comes back to the situation, though, where I happen to believe that we have a responsibility, which was expressed very well I thought by Dee Jepsen, and which is a major concern of mine. And you can play down all that you want the fact that all of these different systems are different—and I agree that they are—certainly, as one who was on the first Internet, who did it on an amateur radio network when I was a kid, I have had some experience in talking to people around the country—but in those days, we never envisioned that amateur radio would reach the depths of depravity that anyone who has been on the Internet and seen what is available on that could ever have imagined.

I happen to think that if we can work constructively together, without trying to question the motives of others and saying that others simply do not know what they are talking about—sometimes, I get the idea that the intellectual elite of this country know all about everything. I happen to feel that there is a way, whether people agree or not, that we can apply the same laws against obscenity and against indecency that we have done in the U.S. mail. We have applied it to the telephone system. And we recognize that it is more difficult to do it on the Internet, for the reason that you and others have expressed, Mr. Berman, that it is an international situation. But just because it is an international situation, I for one am not going to turn my back and say there is nothing we can do about this.

I applaud the recent efforts by the industry to come up with some blocking devices. I think that is an important step in the right direction. However, people who know the technicalities of this far better than I believe that for every block, there is a way around that block with something as effective as the Internet.

And of course, if I block it in my home for my children and grandchildren, what happens when they go across the street to the neighbors that they go to school with, where it has not been blocked by that parent for one reason or another?

So I happen to think we are on a slippery slope indeed. I believe what we are trying to do here is to recognize the constitutional problems. I think Senator Grassley in his bill recognizes the constitutional problems and tries to satisfy that. I certainly agree with the statements that you have made, Mr. Berman, and others, that the courts have continually held that the least intrusive method should be used. The least intrusive method has never been defined by the courts with this new Internet system that we have.

So I simply say that I applaud that finally, at long last, for whatever reason, the concerns for our children have been brought to bear. And I would simply say that I think Senator Grassley and his research on his bill has shown, and the in-depth research for over 2 years that we have done on the Exon-Coats Decency Act, recognize the possible problems with the courts. We leaned over backward by using the court decisions on other measures. Whether

or not that will hold up in the courts on the Internet, I do not know, you do not know, no one knows. It will be up to the courts to decide.

I will simply say that I am glad that we are moving ahead. I am not for just a study. A study is punting; that is what Nebraska does, their national championship football team—

Senator LEAHY. I wondered when that was going to come in. [Laughter.]

Senator EXON [continuing]. When they are on their own 3-yard line, and they have fourth down and 27 yards to go, they always punt. I do not think this is time to punt. I think it is time to take action.

Mr. Chairman, I thank you for the opportunity to appear here. That does not mean that I am going to give Iowa any football players.

Thank you very much.

Senator GRASSLEY. I thank you, Senator Exon, and I thank everybody for participating.

I would conclude for just 30 seconds by first of all saying that—and I will only speak in conclusion for myself, not for anybody else on the committee, as we know that this is a very contentious issue we are dealing with.

First of all, I need to thank the last panel as I thanked the two previous panels, because obviously, from each one of you, I think even from the previous panels, everybody has very strong and emotional attachment to this issue, one way or the other—

Mr. HART. Without being too intrusive, could I answer his question with one line?

Senator GRASSLEY. Yes, for one line, if you will.

Mr. HART. You mentioned blockers going around, and the person who makes the last move is the one who gets the tackle or makes the touchdown. You have not seen the Internet brought down by a virus lately. They put out a virus on Tuesday, and we have a cure on Thursday. And I would be perfectly happy to put that to work on your blocking system.

Thank you.

Senator GRASSLEY. Well, that comment tells us that, as I have said at this meeting, there are a lot of involvements with I hope we agree is a problem.

We have been here for 3½ hours; I did not think I would be here for 3½ hours today. There has been a suggestion that other people should be called to testify. That could be. I did not anticipate another hearing. There may be a need to have another hearing. But in lieu of having another hearing, we anticipated that there was much more interest than the 9 or 10 people we were able to put on the program this afternoon, and we did take testimony from people who wanted to submit it, and that will be printed in the record.

This really is too important to rush. My concluding observation for myself would be that I think the testimony that we have heard today shows that, at least for the time being, technology is not perfect as an answer. I think there remains a role for congressional involvement. I think we have seen in the need for congressional in-

volvement that existing laws are just not adequate to deal with the issue.

I think the first panel, which described the stalker who is still operating his BBS, and Mr. Crimmins' experience, show that there are evil people who seek out children online, and you could go on and on. So I think there is a legitimacy for my legislation. Of course, the final determinant of that is whether or not you get the votes in the House and Senate to pass it.

I thank everybody for participating as we try to make a record, and I think we have, to show the least intrusive government interest.

Thank you all very much.

[Whereupon, at 5:31 p.m., the committee was adjourned.]

APPENDIX

PROPOSED LEGISLATION

104TH CONGRESS
1ST SESSION

S. 892

11

To amend section 1464 of title 18, United States Code, to punish transmission by computer of indecent material to minors.

IN THE SENATE OF THE UNITED STATES

JUNE 7 (legislative day, JUNE 5), 1995

Mr. GRASSLEY (for himself, Mr. DOLE, Mr. COATS, Mr. MCCONNELL, Mr. SHELBY, and Mr. NICKLES) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend section 1464 of title 18, United States Code, to punish transmission by computer of indecent material to minors.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Protection of Children
5 From Computer Pornography Act of 1995".

6 **SEC. 2. TRANSMISSION BY COMPUTER OF INDECENT MATE-**

7 **RIAL TO MINORS.**

8 (a) OFFENSES.—Section 1464 of title 18, United
9 States Code, is amended—

(155)

1 (1) in the heading by striking "**Broadcast-**
 2 **ing obscene language**" and inserting "**Utter-**
 3 **ance of indecent or profane language by**
 4 **radio communication; transmission to**
 5 **minor of indecent material from remote**
 6 **computer facility, electronic communica-**
 7 **tions service, or electronic bulletin board**
 8 **service**";

9 (2) by striking "Whoever" and inserting "(a)
 10 UTTERANCE OF INDECENT OR PROFANE LANGUAGE
 11 BY RADIO COMMUNICATION.—A person who"; and

12 (3) by adding at the end the following:
 13 "(b) TRANSMISSION TO MINOR OF INDECENT MATE-
 14 RIAL FROM REMOTE COMPUTER FACILITY, ELECTRONIC
 15 COMMUNICATIONS SERVICE, OR ELECTRONIC BULLETIN
 16 BOARD SERVICE PROVIDER.—

17 "(1) DEFINITIONS.—As used in this sub-
 18 section—

19 "(A) the term 'remote computer facility'
 20 means a facility that—

21 "(i) provides to the public computer
 22 storage or processing services by means of
 23 an electronic communications system; and

1 “(ii) permits a computer user to
2 transfer electronic or digital material from
3 the facility to another computer;

4 “(B) the term ‘electronic communications
5 service’ means any wire, radio, electromagnetic,
6 photo optical, or photoelectronic system for the
7 transmission of electronic communications, and
8 any computer facility or related electronic
9 equipment for the electronic storage of such
10 communications, that permits a computer user
11 to transfer electronic or digital material from
12 the service to another computer; and

13 “(C) the term ‘electronic bulletin board
14 service’ means a computer system, regardless of
15 whether operated for commercial purposes, that
16 exists primarily to provide remote or on-site
17 users with digital images, or that exists pri-
18 marily to permit remote or on-site users to partici-
19 pate in or create on-line discussion groups or
20 conferences.

21 “(2) TRANSMISSION BY REMOTE COMPUTER FA-
22 CILITY OPERATOR, ELECTRONIC COMMUNICATIONS
23 SERVICE PROVIDER, OR ELECTRONIC BULLETIN
24 BOARD SERVICE PROVIDER.—A remote computer fa-
25 cility operator, electronic communications service

1 provider, electronic bulletin board service provider
2 who, with knowledge of the character of the mate-
3 rial, knowingly—

4 “(A) transmits or offers or attempts to
5 transmit from the remote computer facility,
6 electronic communications service, or electronic
7 bulletin board service provider a communication
8 that contains indecent material to a person
9 under 18 years of age; or

10 “(B) causes or allows to be transmitted
11 from the remote computer facility, electronic
12 communications service, or electronic bulletin
13 board a communication that contains indecent
14 material to a person under 18 years of age or
15 offers or attempts to do so,
16 shall be fined in accordance with this title, impris-
17 oned not more than 5 years, or both.

18 “(3) PERMITTING ACCESS TO TRANSMIT INDE-
19 CENT MATERIAL TO A MINOR.—Any remote com-
20 puter facility operator, electronic communications
21 service provider, or electronic bulletin board service
22 provider who willfully permits a person to use a re-
23 mote computing service, electronic communications
24 service, or electronic bulletin board service that is
25 under the control of that remote computer facility

1 operator, electronic communications service provider,
2 or electronic bulletin board service provider, to
3 knowingly or recklessly transmit indecent material
4 from another remote computing service, electronic
5 communications service, or electronic bulletin board
6 service, to a person under 18 years of age, shall be
7 fined not more than \$10,000, imprisoned not more
8 than 2 years, or both."

9 (b) TECHNICAL AMENDMENT.—The item for section
10 1464 in the chapter analysis for chapter 71 of title 18,
11 United States Code, is amended to read as follows:

"1464. Utterance of indecent or profane language by radio communication;
transmission to minor of indecent material from remote com-
puter facility."

○

QUESTIONS AND ANSWERS

**RESPONSES TO WRITTEN QUESTIONS OF SENATOR GRASSLEY FROM JERRY BERMAN,
EXECUTIVE DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY**

Over the past six months, the Center for Democracy and Technology and members of the Interactive Working Group have had numerous productive discussions with representatives of prominent concerned parents organizations and children's rights organizations, including:

- Ernie Allan, National Center for Missing and Exploited Children;
- Kathy Clever, Family Research Council;
- Deen Kaplan, The National Law Center for Children and Families;
- Bruce Taylor, The National Law Center for Children and Families.

These discussions have been extremely helpful in exploring the issues raised by congressional efforts to protect children from inappropriate material on the Internet. We have found these discussions productive and look forward to your help in facilitating further discussions with these and other organizations.

Question 1(a). Does the Cox/Wyden amendment weaken ECPA?

Answer. The "good samaritan" immunity for online service providers under the Cox/Wyden amendment may unintentionally create an enlargement of 18 USC §2511 (2)(a)(i), the "service provider exemption" of the Electronic Communications Privacy Act (ECPA). This is an issue of serious concern for CDT.

Section 2511 (2)(a)(i) provides:

It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service * * *

As we understand it, the Cox/Wyden amendment does not intend to expand this provision to allow service providers greater access to private communications on their networks. However, under this section could be read to grant such an expansion.

Question 1(b). How can providers limit indecent material without interfering with users privacy rights?

Answer. CDT believes that limiting service provider liability for taking good faith efforts to restrict or remove objectionable material can be accomplished under the Cox/Wyden amendment without interfering with users privacy rights in several ways.

First, the Cox/Wyden amendment should be modified to make explicit that interception, disclosure, or use of private e-mail without a user's consent is not immunized under the "good samaritan" provisions.

Second, an even more certain approach to protecting children and avoiding privacy violations is to rely on blocking and filtering technologies which run directly on a users home PC. Putting parents directly in control over what information comes into the home is preferable to putting such control solely in the hands of a service provider or a government agency. Products like SurfWatch, Net Nanny, and the parental control features on America Online are good examples of this. These and other products allow parents to make choices based on their own personal tastes and values.

Question 2(a). Are the Cox/Wyden and Exon/Coats proposals compatible?

Answer. The Cox/Wyden amendment and the Exon/Coats Communications Decency Act are diametrically opposite approaches and are completely incompatible.

The Exon/Coats Communications Decency Act would grant the Federal Communications Commission (FCC) broad new powers to regulate the content of online communications as well as to determine what specific parental control technologies are appropriate. CDT believes that command and control, top-down regulation of

interactive media, as are contemplated by the Exon/Coats Communications Decency Act, cannot be effective in a global, decentralized communications media such as the Internet. The Exon/Coats Communications Decency Act simply cannot effectively protect children from objectionable material on interactive media.

In addition, by putting the FCC in charge of interactive media, the Communications Decency Act would chill both the First Amendment rights of all users of interactive media, as well as the development and innovation of this important means of commerce and communication. If software developers had to wait for the FCC to determine whether a product was an appropriate "good faith measure" under the Exon/Coats bill, we would still be waiting for the world wide web, commercial online services, audio file transfers, voice communication on the Internet, and other technological innovations.

Finally, FCC content regulations would force content providers (which includes each and every user of interactive media) to evaluate whether each and every bit of information they made available online violates FCC indecency standards for interactive media. In many cases, the risk of liability for guessing incorrectly would force content providers to avoid publishing their material, thus squandering the potential of interactive media to provide a diversity of viewpoints and full respect of the First Amendment.

The Cox/Wyden amendment, on the other hand, recognizes the tremendous user control inherent in interactive media and relies on innovation in the market rather than Government regulation to protect children. In our opinion, empowering users and parents, rather than the federal government, to make determinations about what material they wish to receive is a far more appropriate and more effective solution to addressing the availability of objectionable material on interactive media. For additional information on this subject, please see the Interactive Working Group July 24, 1995, Report to Senator Patrick Leahy.

Question 2(b). If both the Cox/Wyden amendment and the Exon/Coats Communications Decency Act were to be enacted, what criminal liability would users and providers face?

Answer. Under Cox/Wyden users of online services would not face any additional liability than they do under current law. Users would still be liable for trafficking in obscenity, for example. If the Exon/Coats Communications Decency Act were enacted however, users would face substantial new criminal penalties for merely putting any indecent material online.

The Exon/Coats Communications Decency Act makes it a crime punishable by up to 2 years in prison and \$100,000 in fines to "make, transmit, or otherwise make available" any indecent comment, request, proposal, or image. This would include a user who merely places the text of *Catcher in the Rye*, or someone who uses one of the seven dirty words in a public discussion group.

Online service providers would also face liability under the Exon/Coats Communications Decency Act to the extent that they control the availability of indecent material. Although Exon/Coats contains a defense for service providers who "lack editorial control" over the content available on their network, it is not clear what would constitute control under this defense. For example, though a service provider has no control over the content of individual messages, an online service provider has "control" over the specific usenet newsgroups carried on its network (e.g., whether or not it carries a specific newsgroup. A provider could be held liable under the Exon/Coats merely for providing access to a newsgroup known to contain indecent materials because the provider has control over whether that group appears. Service providers would not face such liability under the Cox/Wyden amendment.

Question 3. Effect of imposing liability on providers for transmitting "indecency"

Answer. Criminalizing the "knowing" transmission of material that may be considered to be "indecent", as is contemplated by the Grassley "Protection of Children from Computer Pornography Act" (S. 892), would result in a severe chilling effect on all online communications because the "knowing" standard is subject to broad interpretation.

The threat of a broad interpretation of the "knowing" standard would compel all who provide access to the Internet to restrict *all* public discussion areas and public information sources from subscribers, unless they prove that they are over the age of eighteen. Since a service provider "knows" that there is indecent material on the Internet, and "knows" that there are minors using the network, a service provider would be forced to create separate "adult" and "children" services. Access by a child to the adult network would create criminal liability for the service provider. Under S. 892, a service provider could not even provide Internet access to a minor *with the approval* of the child's parent.

In addition, S. 892 would place service providers in the position of private censor. Because of the definition of what is "indecent" is not entirely clear (and depends largely on the nature of the medium by which that material is made available), service providers would have to use the broadest possible interpretation of the term, or face substantial criminal penalties for leniency. Using the broadest possible definition of indecency would deny children access to famous works of art, literature, and important political and social information (including AIDS and sex education information, anti-choice materials, and other examples).

Question 4. Would providers have to restrict access to kids if they are liable for knowingly transmitting indecent material?

Answer. Yes. See answer No. 3 above.

Question 5(a). What does a provider have to "know" to be liable under S. 892?

Answer. The knowing standard in S. 892 is subject to a broad interpretation. Under the Model Penal Code, a "knowingly" standard simply requires that if an actor is aware that it is practically certain that his or her conduct will cause the proscribed result.

Since an online service provider or BBS operator *knows* that indecent material can be accessed via the Internet, and *knows* that children have access to the network, an online service provider or BBS operator would be subject to substantial criminal penalties merely for allowing minors to have access to his network.

Question 5(b). Would a provider be liable for providing access to a household with a minor?

Answer. If an online service provided a minor access to the Internet, it could be held liable under S. 892 for "knowingly" providing a minor access to indecent material, even if that material does not actually reside locally on the service provider's network or computer server.

Question 5(c). Would a provider be liable for continuing to provide service to a minor after being informed the minor had accessed indecent material?

Answer. Yes. If a service provider received notice from a parent, or anyone else, that indecent material could be accessed through their network, the service provider would face liability under S. 892 unless the provider removed the indecent material or discontinuing service to that household. In most cases, an online service provider would be forced to discontinue service to the household, because the provider cannot control the material available on another network, particularly if that network is outside the jurisdiction of US law (e.g., the material physically resides on a computer in Sweden). The only other alternative available to a service provider in this case would be to restrict access for all their subscribers, both children and adults, to such material.

Question 5(d). Would a provider be liable for continuing service to a subscriber about whom the provider had received information had sent indecent material to a minor?

Answer. Yes. Under S. 892, a service provider or BBS operator would be forced to discontinue service to any subscriber that the service provider had received information was making indecent material available to a minor. Moreover, because of the vagueness of the indecency standard, service providers would have to rely on the most inclusive interpretation of indecency. Under S. 892, a service provider might be forced to close the account of an individual who places the text of *Catcher in the Rye*, Rap Lyrics, certain Safe Sex or Anti-Abortion literature, or other materials on a world wide web site or other public forum.

Question 6(a). Does Federal law prohibit the distribution of obscenity via computer?

Answer. Under existing Federal Law trafficking in obscenity (18 USC §§ 1462, 1464, 1466), via computer network would be illegal.

Question 6(b). Does this provision apply to the distribution of obscenity for non-commercial purposes?

Answer. 18 USC § 1465 has only been applied to the distribution of obscenity for commercial purposes. CDT believes that there are significant constitutional problems with criminalizing the distribution of non-commercial obscenity, particularly with regard to forth amendment privacy protections. Prosecuting the distribution of obscenity for non-commercial purposes would empower federal authorities to intrude

on private communications and information used by individuals, in direct violation of *Stanley v. Georgia*.

Question 7(a). Does 18 USC § 1462, cover the distribution of obscenity via computer networks?

Answer. 18 USC § 1462 has been used successfully to prosecute those who use computers or computer networks to transmit obscene material.

Question 7(b). Does this provision apply to distribution for commercial and non-commercial purposes?

Answer. 18 USC § 1462 has been used successfully to prosecute the distribution of obscene material for commercial purposes. Application of this section for non-commercial distribution raises similar constitutional concerns as are discussed in answer 6(b) above.

Question 8. Does federal law prohibit online stalking?

Answer. As Senator Leahy pointed out during testimony at the July 24 hearing, state laws prohibiting online stalking have been successfully prosecuted in Florida and other states. CDT believes that defendants should not be able to evade the law simply by conducting activities online. Current law prohibiting stalking and harassment should apply to such conduct accomplished via computer networks. However, great care must be taken when applying these laws to ensure that they do not interfere with constitutionally protected activities.

WRITTEN QUESTIONS OF SENATOR LEAHY TO DEE JEPSEN, EXECUTIVE DIRECTOR,
"ENOUGH IS ENOUGH"

Question 1. S. 892 would subject to five years' imprisonment any BBS operator or online service provider who "knowingly transmits * * * or causes * * * to be transmitted" indecent material to a minor. The Model Penal Code makes clear that an actor may be held liable under a "knowingly" standard if the actor is aware that it is practically certain that his or her conduct will cause the proscribed result. A high probability, rather than actual knowledge, of result is all that is required to satisfy the "knowingly" requirement in criminal law, unless the actor actually believes that the fact does not exist.

- (a) In practice, what does an online provider have to know to be liable under this bill?
- (b) Would an Internet access provider face liability under S. 892 by "knowingly" providing Internet access to a household with a minor, who could then access indecent material from the Internet?
- (c) Would an Internet access provider serving a household with a minor face liability under S. 892 by "knowingly" continuing service, after notice that the minor had downloaded indecent material from the Internet?
- (d) Would an online service provider, BBS operator, or Internet access provider face liability for continuing service to any subscriber about whom the provider or operator had received information from the government, another subscriber, or an anonymous tip, that the subscriber had sent indecent material to a minor? To avoid prosecution, would the operator or provider have to close that subscriber's account?

Question 2. In your view, which alternative would be more effective in restricting access to Internet sites containing material inappropriate for children, including those sites in other countries: blocking technologies, such as Surfwatch and Net Nanny, or criminal laws restricting the transmission of indecent material?

Question 3. Federal criminal law currently penalizes anyone who "knowingly travels in interstate commerce, or uses a facility or means of interstate commerce for the purpose of transporting obscene material in interstate or foreign commerce * * *." 18 U.S.C. § 1465.

- (a) Does this provision apply to computer transmissions of obscene material?
- (b) Does this provision apply to the distribution of obscene material both for non-commercial purposes and for the purpose of sale?

Question 5. Federal criminal law currently penalizes anyone who "knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce" any obscene material. 18 U.S.C. § 1462.

- (a) Does this provision apply to computer transmissions of obscene material?
- (b) Does this provision apply to the distribution of obscene material both for non-commercial purposes and for the purpose of sale?

Question 6. Does federal law prohibit online stalking? What recommendations, if any, do you have about such a law?

RESPONSES TO WRITTEN QUESTIONS OF SENATOR LEAHY FROM DEE JEPSEN,
PRESIDENT, "ENOUGH IS ENOUGH"

Answer 1. Senator Leahy is correct that S. 892 would enact an offense the punishment for which is up to five years imprisonment for any computer BBS systems operator or online service provider who "knowingly transmits * * * or causes * * * to be transmitted" indecent material to a minor. Senator Leahy is also correct that the Model Penal Code defines "knowingly" as an awareness of a practical certainty that conduct will cause a certain result. However, this use by the Model Penal Code is not the usual standard of knowingly employed in the federal criminal laws codified in the United States Code. In some instances, District Judges may employ a variation of this type of "knowingly" definition to explain to a jury the requisite *mens rea* for a particular crime under the circumstances of a particular case. In general criminal prosecutions, federal trial and appeals courts employ the standard definition of "knowingly", as to conduct, that one acts knowingly when he acts "voluntarily and intentionally, not because of mistake or accident". See, generally: *Fifth Circuit Pattern Jury Instructions (Criminal)*, Instruction 1.35, p. 49 (1990); *Model Criminal Jury Instructions for the Ninth Circuit*, Section 5.06, p. 79 (1989). There may not be a significant difference, but the legal and factual analysis that follows would be less clear without this clarification.

In obscenity, indecency, and child pornography cases, however, the First Amendment requires an additional use of the word "knowingly" to mean the *scienter*, or guilty knowledge or awareness of the sexual character of the material. In this respect, the word "knowingly" as it is used in the federal obscenity laws (18 U.S.C. §§ 1460-1469), child exploitation statute (18 U.S.C. § 2252), and in the dial-porn statute (47 U.S.C. § 223 (b) and (c)), means *both* that an offender knows the sexually explicit overall character of the material and knows how that material is being shipped, transported, or transmitted.

In obscenity cases, this means a knowledge that it is hard-core pornography and that the material is being mailed (§ 1461), shipped by common carrier or imported (§ 1462), transported across state lines or out of the U.S. for sale or distribution (§ 1465), being sold at retail by an obscenity business after having been shipped in interstate or foreign commerce (§ 1466), or transmitted over cable, satellite, or subscription TV (§ 1468), offered commercially as obscene dial-porn messages (§ 223(b)(1)). See: *Hamling v. United States*, 418 U.S. 87, 119-23 (1974); *United States v. Thevis*, 490 F.2d 76, 77 (5th Cir. 1974); *United States v. Battista*, 664 F.2d 237, 242 (6th Cir. 1981); *Ripplinger v. Collins*, 868 F.2d 1043, 1055-57 (9th Cir. 1989).

In child pornography cases (§ 2252), this means a knowledge that the material depicts sexually explicit conduct involving a person the offender knows or has reason to know is a minor. In dial-porn cases for indecency which is available to minors (§ 223 (b)(2) and (c)), this means knowing the content of the message as depicting or describing a sexual or excretory activity or organ and knowing that it is being transmitted over the phone lines to minors, without taking good faith efforts to screen out minors by requiring a credit card or pin number access code. See: *United States v. X-Citement Video, Inc.*, ___ U.S. ___, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994); *Osborne v. Ohio*, 495 U.S. 103, 115 (1990); *New York v. Ferber*, 458 U.S. 747, 765 (1982).

Answer 1(a). The proposed law in the Grassley-Dole bill would have Congress require that any liability be only for those who act "knowingly", as to their own facility, and "willfully" as to another's facility. In the first offense defined in the act, (b)(2), the system operator must know the character of the indecent material AND they must knowingly allow the transmission of that particular indecent material from a user to a known minor. In the second offense, (b)(3), a relay system operator must know of the indecent material and willfully allow his system to be used to relay that indecent matter from another system through his own system to the minor. This is a strict burden for the Government to meet and would require facts sufficient to put a reasonable person on notice that a sender is using one's system to send a known piece of indecent pornography to a person the system operator knows or has reason to know is under age 18. If that were to occur, then the law

and the courts should certainly prosecute any such operator who thus knowingly (voluntarily and intentionally, not because of mistake or accident) assists a pedophile or callous adult to send patently offensive representations of sexual organs or acts to a child, when the system operator is proven to be aware that the child was in fact a minor. There is no excuse for such conduct by any bulletin board or access provider and we hope that none of the access providers we now know of would ever knowingly do such a thing. We can't so trust in the integrity of all BBS operators, and this law should deter any who would contemplate such intentional and unconscionable conduct.

Answer 1(b). No, not without more, as we read and have been told of the intent of S. 892. An access provider would not be prohibited by S. 892 from giving access to indecency by minors. This bill is not designed, stated, nor intended to act as a "display" law to prevent the availability of indecency by minors. It is stated and intended to operate as a direct transaction prohibition of one person knowingly providing indecent material to a person known to him to be a minor and prohibiting any system operator who knows of this act from assisting in this unlawful act.

Answer 1(c). No, not without more, again as we read and understand the intent of the act. Since this is not a dial-porn type availability in public prohibition against indecency which is available to minors generally, any offense would be specific to a particular transmission by someone through a computer system and then catching the system operator aiding in that transmission to a particular, known minor child. Mere access to indecency on the "Internet" is not proscribed and would have to be dealt with by another bill or by changing the language of S. 892.

Answer 1(d). That's a more difficult scenario to analyze for criminal responsibility. Such a general situation where a system operator has specific knowledge of an instance where a subscriber has sent a particular piece of indecency to a known minor would put that operator on notice that his system has been abused. He would be liable if he knew that this act was being repeated and he refused to stop it and knowingly and presently allowed it to happen again. In other words, if the proof were that a board, say the "ACL-EF" BBS, operator knew a certain pedophile in Oregon named Mike had sent a Hustler picture to a young boy or girl child in a grade school in Vermont and then the proof was that the "ACL-EF" system operator saw such a picture coming through his system from Mike to that child again and let it pass through, then I would hope Congress intended and the Government would prosecute and the courts would convict such a system operator for knowingly assisting such a heinous act. Likewise, if an access provider (such as CompuServe or NETCOM) knew of the "ACL-EF" BBS operator's prior situation with that subscriber, Mike the Molester, and the child, (or even if they had no prior knowledge of a prior occurrence but saw the scenario play out as it was happening) and then the access provider saw "ACL-EF" letting Mike send a porn picture through "ACL-EF" as it was on its way through the access provider's facility to the child in Vermont, and the access provider could have stopped the Mike to "ACL-EF" to child message and willfully chose not to, then both "ACL-EF" and the abetting access provider should be held responsible in court if this level of knowledge and participation were proven beyond reasonable doubt. This is, as we said, a severe test for the Government to meet, but when met, it should be applied to stop system operators from knowingly helping people corrupt young children.

Answer 2. In our view, there needs to be both. We parents and responsible adults, and society as a whole, deserves and demands that there be a law to prohibit unlawful conduct in giving indecency to minors (and we should also have a corresponding law to prohibit knowingly making indecency available to minors on generally accessible public boards and sites). We as parents must also do all we can to protect our children from those adults who would give such pornography to minors, regardless of whether it is illegal or not. Even with a good and comprehensive set of laws to protect minors (such as the "harmful to minors" sale and display laws in the States), there will be those, like Mike, who would be willing to break any law to have their perverse way with our children.

We need the law to punish those who prey on our kids, when we catch the perpetrators. We need the law to set an example and act as a deterrent. We need a law to cause the system operators to take responsible action when they see a crime being committed in their presence over a facility they control. We would hope that most BBS operators and access providers would try to prevent such conduct when they know about it, but present experience with the callous disregard for children who now have access to pornography, even when not sent to them under circumstances that would violate S. 892, shows that there are probably too many operators who know of such direct transactions and are doing nothing about it.

We are also given good cause for concern by seeing the fervor with which the Electronic Frontier Foundation and the Center for Democracy and Technology now oppose any reasonable efforts, no matter how limited or how helpful they would be to parents and children, just because those groups have an "anti-censorship", pornography should be available to adults so we shouldn't pass any laws against it type of attitude. It is also of serious concern that some access providers and too many board operators and users seem willing to join with those "free-porn speech" advocates. Their motivation may be a matter of philosophy, but their public opposition to any lawful contribution to our efforts to protect our children is a public concern. Common, public decency demands our best efforts to have laws that foster public responsibility and that we resist those who would open the doors to "adult" bookstores for instant exposure to children.

If I may, I would like to remind this Committee of the great role played by Congress and the state legislatures in passing obscenity and child protection laws over the past two centuries that this Nation has been a democratic republic. In this regard, I would like to offer two quotes from past Chief Justices of the United States Supreme Court, each from a very different political persuasion, but each recognizing the central role that decency laws play in maintaining our free and orderly society:

Chief Justice Earl Warren recognized, in *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964),

*** the right of the Nation and of the States to maintain a decent society,

and Chief Justice Warren Burger, in *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 57-58 (1973), stated for the Court,

In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests "other than those of the advocates are involved." *** These include the interests of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.

We would like to have Congress side with the children and families and not allow a *laissez faire* or "consenting adults" policy ruin the Internet and prevent it from fulfilling its potential for wonderful education, information, and public discourse. The Internet is, after all, dependent on the use of public interest common carrier phone lines and was developed in part with taxpayer funds provided by the United States Government. We all have a stake in this new computer network, it doesn't belong to the users for them to abuse as they see fit. Neither the computer companies nor the users have any Constitutional right to distribute obscenity over the phone lines and they have no right to use their computers to give pornography to children. We urge parents to take advantage of new software developments and screening programs, and to patronize those access providers who voluntarily decide to police their own systems and assist parents in exercising parental control to protect their children. Kids will get it if it is there, however, and we would like Congress to help us see to it that there is less of it there for kids to get.

As for foreign influences that would disregard the safety and well being of America's children, present law (18 U.S.C. § 1462) criminalizes the smuggling or bringing of any obscenity into the United States, even by a common carrier or access provider or an individual downloader. We may not be able to hold foreigners responsible for avoiding indecent communications with our children, but we can ask Americans to refrain from and avoid such indecent communications with our kids. If the system operators are prohibited from knowingly assisting a foreigner from sending such indecency to an American child through an American computer facility, then that is one big benefit that the Grassley-Dole bill would fulfill on behalf of our families. This is a big problem and no solution is right for solving all of it at once, but this is a good piece of the solution and we need it.

Answer 3(a). Yes, a present law, 18 U.S.C. § 1465, prohibits knowingly transporting or using a facility of interstate or foreign commerce to transport obscenity for sale or distribution. We are of the opinion that this law applies to a computer-modem using a phone line facility. This is the statute under which Robert and Carleen Thomas were convicted last year in U.S. District Court in Memphis in *U.S. v. Thomas*, W.D. Tenn. No. CR-94-20019-G, now on appeal to the U.S. Court of Appeals for the Sixth Circuit, Nos. 94-6648, 94-6649. Our organization, the "Enough is Enough!" Campaign, joined with the National Law Center for Children and Families in filing a brief *amicus curiae* in that appeal, along with several other

pro-family groups (National Coalition for the Protection of Children and Families, Family Research Council, Focus on the Family, Morality in Media, National Family Legal Foundation, American Family Association, and the Maryland Coalition Against Pornography). We and the Government were opposed by *amicus* briefs filed by the ACLU, the Electronic Frontier Foundation, the Interactive Services Association, Society for Electronic Access, and other advocacy and computer business interests. The Defendants' *amici* argue that the federal law does not or should not be applied to computer bulletin board or Internet transmissions of otherwise illegal obscenity. We don't agree, we know that Congress did not agree in amending Section 1465 in 1988, and we trust that the courts and Congress will not agree now.

The Defendants and their defenders also argue that the material is not obscene under what they want the courts to apply in these cases, a community standards of "cyberspace" consenting pornography customers. These bizarre and unreasonable positions will surely be rejected by the courts. We have every confidence in the excellent legal representation that the people of the United States are receiving from United States Attorney Veronica Coleman and her trial prosecutor, Senior Litigation Counsel Dan Newsom (Mr. Newsom is one of the finest, fairest, and most competent obscenity prosecutors ever to work for the Department of Justice) and we trust their interpretation of Section 1465 as applying to the sale of bestiality, torture, incest, rape, child pictures, and other hard-core obscenity by the Thomas board will prevail. We are also encouraged that the Sixth Circuit has twice before said national distributors who send obscenity into Memphis can be lawfully and rightfully convicted for violating federal law.

Answer 3(b). Section 1465 applies to interstate or foreign commerce transportation of obscenity "for sale or distribution". This obviously includes sale and it could and should include some forms of non-commercial (meaning for non-monetary consideration) distribution. The extent or type of public distribution that this statute applies to has not been established in the courts, however, and future prosecutions would have to establish the scope of the statute in this regard. Congress could also clarify that statute, or other statutes, or pass a new law such as the Senate's Communications Decency Amendment, to clearly and presently cover all such traffic in unprotected obscenity. We also urge this Congress to consider modernizing the federal obscenity and dial-a-porn laws to cover all forms of technology used to transport and transmit obscenity. The harm to children and the damage to American society from obscenity, even to so-called "consenting adult" men who are addicted to or who abuse obscene, hard-core pornography, is being done now and Congress should lead the way toward helping law enforcement contribute to the healing of America and the respectful treatment of women and children in sexual matters. To the extent that existing law is unclear or inadequate, this Congress has the obligation as our Nation's lawmakers, to remedy this situation and bring our federal laws into the computer age. We would ask bi-partisan, reasonable, and tough measures to deal with this form of sexual exploitation, which is not protected by the First Amendment and has no excuse existing in public streams of commerce and public communication.

Answer 4. (In answer to the fourth question, misnumbered "5" in the "Written Questions")

Answer 4(a). Yes, Section 1462 prohibits any importation by anyone of obscene material and also any use of a common carrier to transport obscenity in interstate or foreign commerce. We are of the opinion that this section clearly applies to the use of telephone carrier facilities to carry computer messages and images which are obscene within, into, and out of the United States. The Supreme Court has held that telephone companies are "communication common carriers", as stated in *United States v. RCA*, 358 U.S. 334, 348-49 (1959), and *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

Answer 4(b). Yes, we are also of the opinion that Section 1462 applies to private carriage of obscene material by common carrier for domestic or foreign travel within or out of the United States and forbids all importation of obscenity into the United States. The Supreme Court held that Section 1462 was violated by using a commercial airlines to transport obscenity from one state to another state, even for private purposes, in *United States v. Orito*, 413 U.S. 139, 141-44 (1973). This statute does not criminalize the acts of the common carrier for domestic carriage of obscenity, even if the carrier knows it is carrying obscenity for a customer. It is the use of the carrier, not being the carrier, that is prohibited. The statute could be clarified, however, to state its intended and lawful scope of prohibiting all domestic use of a common carrier, both interstate and intrastate, for commercial and non-commercial purposes and that telephone facilities are an included common carrier. This

would eliminate any doubt, give proper notice to the public, and bring the statute into the modern age, as well.

Answer 5. (Again, in answer to the fifth question, misnumbered "6")

Answer 5. Present law only prohibits "online stalking" when that means a communication by an adult to a child for purposes of threat or harassment or when obscene or indecent material is given to the child, under the present provisions and interpretation of 47 U.S.C. § 223 (a). Present federal law does not cover the purely seductive stalking of a child by a pedophile or would-be child molester. We would recommend that Congress pass a law that prohibited any completed or attempted communication with or to a minor for the purpose of facilitating or committing any act which is unlawful under federal or state law.

Such a "Stalking of a minor" law could read as follows:

Whoever knowingly—

- (a) uses the mails, or
- (b) transports any minor, or any tangible or intangible thing or object, in interstate or foreign commerce, or
- (c) travels in interstate or foreign commerce, or
- (d) uses any facility or means of or affecting interstate or foreign commerce, including any communications device, telephone, radio, television, cable, satellite, computer, or any other communications facility, in or affecting interstate or foreign commerce, or uses any common carrier—

with intent to engage in or facilitate the commission of any sexual or violent or other criminal act on or with any person under the age of 18 years that is unlawful under federal or state law and for which any person can be charged with a criminal offense.

Such a law would have some overlaps with the "Child Mann Act" and "Child Sex Tourism" provisions of 18 U.S.C. §§ 2421-2423, with the sexual abuse offenses in 18 U.S.C. §§ 2241-2244, the child sexual exploitation laws, 18 U.S.C. §§ 2251-2252, and the telephone obscenity and harassment statute, 47 U.S.C. § 223 (a). Federal laws do and should complement each other to offer solutions and sanctions to particular situations. This would not prevent nor obstruct the operation of a comprehensive "stalking" law that prohibited the use of any means of travel, shipment, or communication for purposes of abusing or committing any other criminal act on a child. The federal interest under the Commerce Clause in preventing the use of interstate and foreign commerce facilities for purposes which harm our children or contribute to unlawful conduct with them clearly empowers Congress to act in these regards. A single, complete statute would be a welcome addition to the federal criminal code and would be a worthy effort for this Congress to take during the present consideration of solutions to the modern problems facing us in the face of new technology and apparent disregard for law and human dignity or decency that seems to affect too many people in this day and age. Too many children are victims, Congress should help us stop the offenders from using public facilities of federal interest to accomplish such crimes. Thank you for bringing this matter up for discussion before this Committee and affording us the opportunity to propose a solution to a serious problem facing all of our children today.

Respectfully submitted,

(Signed) Dee Jepsen

(Typed) DEE JEPSEN,

President,

"Enough is Enough!" Campaign.

[With legal advice and assistance from: The National Law Center for Children and Families.]

ADDITIONAL SUBMISSIONS FOR THE RECORD

PREPARED STATEMENT OF SENATOR HERBERT KOHL

Thank you Mr. Chairman. I want to commend you for calling a hearing on this important issue and focussing attention on the need to protect our children.

We are all increasingly and distressingly aware of the dark back alleys along the information superhighway. Within the last month, the U.S. Attorney in Milwaukee accepted a plea bargain from a man who travelled those alleys. He was a convicted pedophile and was using the Internet to meet his victims. That man "met" someone he thought was a teenager over the Internet. He sent her lewd photos of himself. And then, he travelled to Milwaukee from his home in Las Vegas thinking he was going to meet her at a hotel. Instead, he met the FBI.

This story should serve as warning—the Internet can be used by sick people. And it should serve as a lesson—those people can be caught and prosecuted.

However, in dealing with this issue, we face two dangers. On the one hand, over-zealous defense of freedom of the Internet may lead us to ignore the real need to protect our children. On the other hand, our concern for our children should not provoke unthinking and reckless regulation of an important forum for free speech and vital business enterprise.

When the Internet first began expanding into the mainstream, we were inundated with stories about the wonders available through this system. In the last few months, however, horror stories have dominated the news. Yet no one—absolutely *no one*—has conducted a systematic and balanced study of the extent of obscenity, pornography or indecency on the Internet. And no one can quantify the presence of Internet predators. Anyone who tells you otherwise is wrong.

Despite the lack of hard evidence on this issue, no one can deny that there is a problem. And the problem is scaring parents and children away.

Defenders of the Internet rightly point out that it does not produce these perverted users any more than the U.S. mail system or the telephone created pornography and indecency. The Internet is simply a new means of communication and transmission that pornographers have begun using. It has unique qualities that make it slightly more dangerous for children.

The Internet is not just a breeding ground for perversion. It is a booming, entrepreneurial enterprise—and fantastic environment where ideas can be exchanged around the world in a matter of seconds. So we must be careful that the Internet's future is not sanitized beyond value.

I am pleased that in response to this problem, the computer industry is taking some initiative. Numerous companies are developing techniques for screening or filtering out inappropriate material, and some products are already available.

The video game industry should serve as a model for our approach to this problem. The video game industry has created a rating system for its games that help parents control what their children are exposed to. That approach has not yet been perfected. But we should move forward along these lines.

Those that profit from the Internet have a responsibility to ensure that graphic violence or sexually-explicit material does not find its way into children's hands. Many entertainment industries employ some level of self-policing—this industry should be no different. The Senate's vote earlier this year during the debate on the telecommunications bill indicated that lawmakers are serious about seeing this problem addressed. It was a signal, in effect, to those in the industry: either make certain that children cannot get easy access to pornography or we will do it for you.

On the Internet, preventing the problem and empowering parents through screening technology should be our top priority. Every parent in America would rest easier knowing that action is being taken to prevent a crime against their children, rather than simply devising a solid penalty after the fact.

Anyone who purposefully sets out to abuse, hurt or tamper with our children must be punished. No amount of "wonders" on the Internet can excuse a single person who uses it to go after a child. I am not yet entirely certain that Senator Grassley's approach works best, since it attempts to penalize not just pornography or obscenity but also "indecency." But some legislative action may be needed, as the stories you will hear today demonstrate.

Mr. Chairman, we have a careful balancing act to perform. We must protect the integrity of the Internet. We must resolve any practical and constitutional concerns before we enact legislation. But we also must protect our children. This hearing will help us achieve all these goals.

Thank you.

STATEMENT OF WILLIAM MORONEY, PRESIDENT, ELECTRONIC MESSAGING
ASSOCIATION

Mr. Chairman: I am pleased to present the testimony of the Electronic Messaging Association ("EMA") to this Committee. EMA represents almost 500 corporate members that are both users and providers of electronic messaging and electronic commerce products and services, including electronic mail (e-mail), computer facsimiles, page-enabled messaging, and voice mail. User members reflect the proliferation of electronic messaging into such diverse industries as petroleum, finance, health care, and aerospace. Provider members are involved in all phases of the technology, including software development, computer manufacturing, local area network (LAN) messaging products, and global public and private network services.

EMA represents hundreds of companies that have their own private computer networks, as well as the on-line service providers. Often these private systems are connected to the "Internet" and other similar public network services that span the globe. Consequently, EMA has a keen interest in any legislation that seeks to regulate public or private computer networks.

Let me hasten to say that EMA and its members regard "cyberspace" to use the Committee's term, as a business and educational opportunity of unparalleled dimensions for the next generation of Americans and those who will follow. It is difficult to overstate the value of this opportunity for America and for our nation's competitive position in the world.

At the same time we are concerned about protecting our children from pornography in this new medium. Although the magnitude of information on the cyberspace is vast, almost incomprehensible, there is also a significant amount of material that is also not appropriate for children. The key questions are: who will determine what is objectionable material for our children, and what is the best mechanism for limiting their exposure to it?

Ideally, parents should determine what is appropriate for their children. Until just recently, parents did not have the tools to do this on computers. We believe that the same ingenuity that created the Internet can complete the technology to enable parents and schools to filter what their children view. We anticipate that other witnesses will address these issues.

EMA would like to focus its testimony on the approach Senator Grassley has taken in his bill S. 892, The Protection of Children from Computer Pornography Act of 1995.

While we share the sponsors' concerns about the well-being of our children, EMA is gravely concerned about the potential inadvertent consequences this legislation could have on American business and its use of computer technology.

S. 892, as introduced, would appear to apply by its terms to the private computer networks of hundreds, probably thousands of American businesses. The definition of the terms "electronic communications service" and "electronic bulletin board," both would appear to cover these private networks. The definition of the term "remote computer facility" would cover private systems, depending on the meaning of the word "public" in the definition of that term, but no clear definition is provided.

These private computer networks are often connected to the Internet and to the on-line services that the legislation is clearly intended to cover. In other words, American business' computer networks are integrated with the Internet and other similar public data networks. They are connected by e-mail. We believe that S. 892 is so overly broad that for reasons I will discuss, it would put American business in legal jeopardy. If S. 892 is enacted as drafted, then business would have little choice. They would have to sever their connections with the Internet and other similar networks.

Coverage of private computer networks is a concern because S. 892 would appear to go well beyond stemming the flow of pornography to children. EMA is certainly not trying to defend the right of anyone to expose children to pornography. But this legislation does not even use the term "pornography." Instead, it prohibits "indecent material" from being transmitted to anyone under the age of 18. (I need not remind the Committee that there are a significant number of employees in the workplace under the age of 18, including many students engaged in vocational training.)

We will leave it to others, especially universities, to remind the Committee that the indecency standard could encompass accepted literature, such as *Ulysses* or *Catch 22*. We would rather focus on the fact that the Courts have held that indecent material can include profanity. Indeed, the statement that accompanied S. 892 when introduced cited the *Pacifica* case which held that a George Carlin monologue about seven dirty words was indecent material.

EMA is not condoning the use of profanity on computers in the workplace. At the same time, EMA does not believe that American business executives should face the

possibility of imprisonment if they fail to purify the discourse on corporate computer networks. Employers should not be forced into the role of profanity police.

Let's face the facts. There are rogue employees who might use profanity on the company's computer network, maybe more than once, and employees under the age of 18 might be exposed to it. Rogue employees might also bring material from the Internet and into the office's computers that is the cyber-equivalent of a "pin-up," or worse, and they might transmit such material to the Internet. A criminal sanction will make corporate general counsels advise their companies to steer a course well clear of what appears to be a violation.

Perhaps one safeguard would be to prevent anyone under the age of 18 from participating on the company's computer network. But that, of course, would reduce the availability of vocational training, summer job and intern programs, a consequence directly affecting American competitiveness abroad.

EMA hopes that any legislative effort to impose criminal penalties on system operators will draw clear lines as to what material is prohibited. It is difficult enough that system operators cannot possibly be aware of everything passing across their system anyway. The vague definition of "indecent material" would leave American business clueless as to what the law was requiring them to censor.

We recognize that the bill would impose sanctions only on those who have knowledge about the material in question and who is exposed to it. Again, the legislation and accompanying statement are, we respectfully submit, not sufficiently clear as to the threshold of knowledge that could trigger corporate liability. We have included a memorandum prepared for EMA by outside counsel that discusses these and other issues in S. 892 in more detail.

Moreover, despite these uncertainties, the bill offers no safe harbor or good faith defenses for those companies who do their level best to abide by the law. Again, under these circumstances, corporate general counsels will advise a course that minimizes exposure, even if it undermines the company's ability to use cyberspace.

If the Committee must legislate, what business really needs is a uniform national policy to avoid a patchwork of conflicting state regulation. Such a policy clearly delineating any corporate liability is essential given the lack of geographic boundaries in cyberspace.

In closing, EMA would be pleased to assist the Members of the Committee and their staff to achieve the objective we all share of limiting the exposure of children to pornography via computer. As a start, we urge the Committee to seriously consider the emerging technology that enables parents and schools to screen material on the Internet. Our concern with S. 892 is that it goes far beyond protecting children from pornography, and it fails to clearly delineate the liabilities of American businesses who rely on computers in the workplace. We fear that enactment of S. 892 would effectively sever American business from the Internet and from the cyberspace that now offers business such a rich potential.

Thank you, Mr. Chairman I ask that the Committee would please include in the record a copy of a legal analysis prepared for EMA by outside counsel entitled, "Analysis of S. 892."

MEMORANDUM FROM WILEY, REIN & FIELDING

TO: William R. Moroney, *President, Electronic Messaging Association*
 FROM: James T. Bruce and Richard T. Pfohl
 DATE: July 21, 1995
 RE: Analysis of S. 892

I. SUMMARY

On June 7, 1995, Senator Grassley (R-IA) introduced S. 892, *The Protection of Children From Computer Pornography Act of 1995*, co-sponsored by Senators Dole (R-KS), Coats (R-IN), McConnell (R-MO), Shelby (R-AL), and Nickles (R-OK). S. 892 would establish criminal liability for operators of electronic communications systems who knowingly transmit indecent material to anyone under 18 years of age. It would also create criminal liability for system operators who willfully permit a person to use the system to transmit indecent material from another system to anyone under 18 years of age. These offenses extend to private systems and would create uncertain liability for system operators whose systems may be used to send "indecent material," an unclearly defined concept that could even include the use of profanity.

The Senate Judiciary Committee is scheduled to hold a hearing on "Cyberporn and Children" on July 24.

II. ANALYSIS OF S. 892

Senator Grassley stated upon introduction that S. 892 is intended to "provide children with the strongest possible protection from computer pornography." 141 Cong. Rec. S7922 (June 7, 1995). He added, "Currently, child molesters and sexual predators use computer networks to locate children and try to entice them into eliciting sexual relationships." *Id.* According to Senator Grassley, S. 892 responds to this threat by criminalizing "knowingly or recklessly transmit[ing] indecent pornographic materials to children over computer networks."¹ *Id.* Indicating his unhappiness with access providers, Senator Grassley stated:

Some so-called access providers facilitate this by refusing to take action against child molesters, even after other computer users have complained. So, my bill would make it a crime for access providers who are aware of this sort of activity to permit it to continue.

Id.

S. 892 amends section 1464 of Title 18 of the United States Code, the U.S. criminal code provision which prohibits broadcasting obscene language. S. 892 applies to "remote computer facility operators," "electronic communication service providers," and "electronic bulletin board service providers," terms which are broadly defined to include computer systems. S. 892 would hold systems operators liable for "knowingly" transmitting indecent materials to minors or "willfully" permitting a person to use another computer facility "to knowingly or recklessly transmit indecent material" to a minor. S. 892 §2(b)(2) and (3)² Systems would be held liable regardless of any measures they may take to limit access, screen communications, or to screen content providers on their system.

A. Systems covered by S. 892

S. 892 applies to "remote computer facility operators," "electronic communications service providers," and "electronic bulletin board service providers." Each of these terms, as defined by S. 892, may include private systems and their operators.³ Specifically, a "remote computer facility" is defined as a facility that "provides to the public computer storage or processing services" and "permits a computer user to transfer * * * material from the facility to another computer." Sec. 2(b)(1)(A). "The public" is undefined; it is unclear whether this implies a service akin to a common carrier, or whether an employee, client, or customer might constitute "the public." If the latter is the case, the definition would reach private systems to the extent that they provide storage or processing services "to the public."

An "electronic communications service" is defined as a "system for the transmission of electronic communications" or a "computer facility or related electronic equipment for the electronic storage of such communications," "that permits a computer user to transfer electronic or digital material from the service to another computer." Sec. 2(b)(1)(B).

An "electronic bulletin board service" is defined as a "computer system, regardless of whether operated for commercial purposes, that exists primarily to provide remote or on-site users with digital images or exists primarily to permit remote or on-site users to participate in or create on-line discussion groups or conferences." Sec. 2(b)(1)(C).

B. Prohibition on transmitting indecent materials to minors

First, S. 892 prohibits a "remote computer operator, electronic communications service provider, [or an] electronic bulletin board service provider," "with knowledge of the character of the material" from knowingly transmitting, or offering or attempting to transmit, "a communication that contains indecent material to a person under 18 years of age." Sec. 2(b)(2). The bill further prohibits causing or allowing

¹The legislative analysis provided in the *Congressional Record* by Senator Grassley upon introduction of S. 892 notes that S. 892 deals exclusively with "indecent pornography" provided to children, because federal laws criminalizing obscenity already exist. (Citing 18 U.S.C. §2252 (Supp. 1994); 18 U.S.C. §1465 (Supp. 1995)) (References to the legislation analysis are to 141 Cong. Rec. S7922 (June 7, 1995)).

²References are to S. 892 unless otherwise noted.

³The use of the word "service" in the terms "electronic communications service" and "electronic bulletin board service" is misleading. Both are defined by S. 892 as "systems."

The legislative analysis provided upon introduction by Senator Grassley states that the definitions of "electronic communications service" and "remote computer facility," "are taken from existing sections of the criminal code." However, S. 892 ignores the definition of "electronic communications service" in the criminal code (which, naturally, is defined as a "service"), 18 U.S.C. §2510(16), and instead defines "electronic communications service" using the criminal code definition which exists for "electronic communications system," 18 U.S.C. §2510(14).

such a communication to be transmitted from such a facility, as well as offering or attempting to do so. *Id.* These offenses are punishable by up to 5 years in prison or a fine in accordance with title 18. *Id.*

This provision contains some limitations. First, it applies not to the author of the statement but solely to the system or system operator.⁴ Second, the actor must have "knowledge of the character of the material," presumably of its "indecent" character. Third, the actor must "knowingly" transmit or offer or attempt to transmit, or cause or allow to be transmitted or attempt to do so, the material to a person under 18 years of age.⁵

However, the level of knowledge necessary to trigger the first offense for "knowingly" allowing transmission of indecent material is undefined. Presumably the actor would have to know that the intended recipient is under 18 years of age,⁶ although the legislative history is unclear. The "knowingly" standard of the first offense would certainly set a lower standard of intent than the "willfully" standard of the second offense.

S. 892 also does not address the issue of liability of an employer for the actions of an employee. Whether the actions of the employee on a system can be held to constitute knowledge of the system operator is unspecified.

C. Permitting access to transmit indecent material to a minor

Second, S. 892 would prohibit any "remote computer facility operator, electronic communication service provider, or electronic bulletin board service provider" from "willfully permit[ing] a person to use" a system under the operator or provider's control, "to knowingly or recklessly transmit indecent material from another [system] to a person under 18 years of age." Sec. 2(b)(3). Such an offense would be punishable by up to 2 years in prison, up to \$10,000 in fines, or both. *Id.*

Like the first offense, this offense contains some limitations. Once again, it appears on its face to apply solely to the system or system operator. Second, the offender must "willfully permit[]" a person to use the facilities "to knowingly or recklessly" transmit indecent material from another facility to a person under 18 years of age. Although the second clause omits the "with knowledge of the character of the material" proviso of the first prohibition, the qualifier would presumably be read into the offense due to the use of the "willfully" qualifier. As is the case with the first offense, whether the actions of an employee would implicate the system of a private employer is unclear.

The legislative analysis of S. 892 notes that the "willful" standard "has a specific meaning which is uniquely suited to on-line access providers." (Citing *Manual of Modern Criminal Jury Instructions For The Ninth Circuit*). The legislative analysis notes that:

To prove a violation under the bill for permitting adults to transmit indecent material to children, the Justice Department would have to show that the access provider was *actually aware that the particular recipient was a child* and that the access provider's customers were using the on-line service to transmit indecent material to minors.

(Emphasis added).

Despite this assurance, however, the second offense criminalizes the act of willfully permitting someone to "knowingly or recklessly" transmit indecent material to a minor. The fact that mere recklessness will trigger the underlying act makes this actual awareness requirement for a "willful" infringement much less certain. As used in the criminal law, recklessness does not require actual intent; mere wanton behavior will suffice.

It is unclear what would constitute "recklessly" transmitting indecent material to a minor. The reckless standard may not require actual knowledge of the minor's age, or that a specific minor would access the message. Would posting such material to an electronic bulletin board to which minors have general access constitute such a transgression? Would permitting persons to post messages that one knows, or has

⁴Senate staff are reported to have said that Senator Grassley presumes that the Exon/Coats amendment to the Senate telecommunications legislation will pass and that it will provide penalties against the authors of indecent material.

⁵The legislative analysis of S. 892 notes that the bill criminalizes "knowingly or recklessly transmit[ing] indecent pornography to minors." However, this provision criminalizes only "knowingly" transmitting such material.

⁶See *United States v. X-Citement Video, Inc.*, 115 S.Ct. 464 (1994). ("knowingly" requirement of child pornography statute applies to each element of the offense, including knowledge that a performer is a minor).

reason to believe, might contain indecent language, constitute willfully permitting a person to recklessly transmit indecent material?

[Note: We have learned that Senator Grassley reportedly intends to amend S. 892 to delete the words "or recklessly." If this is true, it would appear to have, at least for this provision, a "willful" standard coupled with legislative history indicating that this requires actual knowledge that a particular recipient was a child.]

D. Implications for computer systems and system operators

The two offenses created by S. 892 raise a number of troubling potential liabilities for system operators. First, although the legislative analysis provided by Senator Grassley characterizes the two offenses created by S. 892 as "distinct," in practice the second offense appears to collapse into the first offense, leaving system operators subject to a lower threshold for culpability and higher potential liability. The headings in S. 892 indicate that the first offense is intended for "Transmission," Sec. 2(b)(2), and the second offense is intended for "Permitting Access to Transmit," Sec. 2(b)(3).⁷ S. 892's sponsors may envision the first offense as transmitting material that is stored or created on the sender's system, and the second offense as transmitting material stored or created on another system. S. 892 penalizes the former offense more severely than the latter offense.

This distinction, however, fundamentally misunderstands the nature of on-line communications. A system operator who "willfully permits a person to use" its facilities to transmit indecent material from another system (offense 2), intrinsically allows material to be transmitted from its own system (offense 1).⁸ In short, the second offense intrinsically entails the first offense. S. 892 appears to be attempting to legislate a distinction that is inconsistent with the way electronic communications work.

For systems and system operators, the lack of a real distinction between the two offenses is critical. It means that they may be prosecuted under the first offense, without the protection of the "willfully" standard vaunted by the legislative analysis, and face the prospect of a five-year prison term rather than a two-year term.

Second, S. 892 does not set a clear standard of care for a system in order to avoid liability. This problem is exacerbated by language in the legislative analysis which could be read to imply that system operators must monitor transmissions in order to avoid liability. The legislative analysis states with regard to the second offense:

A willfulness standard is more appropriate for on-line service providers because those services can only monitor customer communications in narrow circumstances, or face criminal prosecution for invasion of privacy.

Although this statement acknowledges the difficulty of monitoring subscriber communications, it acknowledges this difficulty only where such monitoring is prohibited by criminal law. This raises serious questions of system operator liability. In cases where it is legal (such as an employer monitoring its employees' communications in the ordinary course of business) but physically impossible for a system operator to monitor all such communications, does S. 892 intend to hold liable system operators for failing to monitor and prevent transmission of indecent material to a minor?⁹ Will monitoring be presumed and knowledge of the actions of subscribers, employees, or other system users be imputed in such cases? Since S. 892 provides for prosecution for a mere "knowingly," rather than a "willfully," standard for the first offense, does that entail that the sponsors consider monitoring in such cases (of transmissions) perfectly legal, proper, and necessary in order to avoid system operator liability?

The reason given for a willfulness standard for the second offense applies equally well to transmission of messages from a system, the first offense. Surely the sponsors of this bill do not envision that system operators type out each message that is sent from their system, like a Western Union telegraph operator of a century ago,

⁷The legislative analysis provided by Senator Grassley similarly describes the first offense as "transmit[ing] indecent pornography to minors," and the second offense as "permit[ing] users to access the Internet or [an] electronic bulletin board to willfully permit an [adult] to transmit indecent pornography to a minor."

⁸For example, if a user downloads and sends material from an electronic bulletin board on the Internet, he normally transmits it using his own system (whether by sending it, saving it, "cutting and pasting" it, etc.). Indeed, merely accessing material on another system may require the accessor to set up a "mirror site," essentially recreating the material on his own system. Transmitting material from another system thus, in actuality, normally requires transmitting the material from the users' own system.

⁹This would seem to go beyond the plain language meaning of only extending liability to communications "knowingly" or "willfully" transmitted. If so, why does the legislative analysis discuss monitoring?

or that the system operator can monitor each transmission from its system. Aside from the sheer impossibility of monitoring potentially thousands of real-time transmissions daily, such monitoring may subject the operator, as the legislative analysis acknowledges, whether a private system or an on-line service provider, to criminal prosecution for invasion of privacy.¹⁰ Nevertheless, the lack of an explicit definition of "knowingly," and the "negative pregnant" of refusing to subject the first offense to the same "willfully" standard that the legislative analysis claims is necessary for the second offense implies that systems may be liable under S. 892 for not taking affirmative steps such as monitoring all transmissions.

Finally, private systems face some intrinsic problems, which are exacerbated by the nebulous definition of "indecent material," which, as is noted below, could include mere profanity. Although S. 892 holds system operators liable only for "knowing" or "willful" transmissions, the bill does not address the issue of vicarious or imputed employer liability for such transmissions. If a "rogue" employee transmits "indecent material," which under the legal definition could consist of a few expletives, to a 17-year old, is the system or system operator (i.e., the employer) liable? If the company employs a 17-year old, can similarly gruff e-mail to or between employees create liability? S. 892, which appears to be based primarily on an on-line service provider model but which nonetheless covers all systems, is unclear on these points.

III. IMPLICATIONS OF S. 892 FOR COMPUTER COMMUNICATIONS

The basic premise of S. 892 is problematic. "Indecent material" is a poorly defined term that could encompass a wealth of material, ranging from great literature (e.g., *Ulysses*, *Lady Chatterly's Lover*, etc.), to health education (e.g., the sex education advice of Dr. Ruth Westheimer), to simple profanity.¹¹ Indeed, the legislative analysis of S. 892 provided by Senator Grassley relies upon the court case which defined the "seven dirty words" as "indecent" for its definition of "indecent material." (Citing *FCC v. Pacifica* 483 U.S. 726 (1978)). Although imprisoning someone for five years because they allowed someone else to use a swear word to a seventeen-year old might not pass constitutional muster, that is what S. 892, on its face, might do. Although the legislative analysis of S. 892 states that the bill purports not to regulate protected speech among adults, and acknowledges that "laws intended to protect children must not 'reduce the adult population * * * [to viewing] * * * only what is acceptable to children,'" (Quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)), it is not unreasonable to assume that a bill that criminalizes transmission of such speech to minors would have a chilling effect on speech in general.

The legislative analysis states that indecent speech may be regulated when sent by computer, because the Supreme Court has allowed such regulation of broadcasting, and computers constitute an equally "pervasive" medium which is similarly "accessible to children." (Citing *Pacifica*, 438 U.S. at 748-49). This conclusion misstates both of the rationales of *Pacifica*. First, the *Pacifica* court found that the broadcast media have a "uniquely pervasive presence, because, as a result of 'the broadcast audience * * * consistently tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.'" *Pacifica*, 438 U.S. at 748 (emphasis added). In contrast, because computer communications are an interactive medium that operates largely by gateways, such prior warnings are completely feasible and, indeed, common for features such as electronic bulletin boards.

The second rationale provided by *Pacifica* for regulating indecency in broadcasting was because "broadcasting is uniquely accessible to children, even those too young to read." *Pacifica*, 438 U.S. at 749 (emphasis added). The *Pacifica* court noted that by contrast, a written message might have been incomprehensible to a first grader. *Id.* However, merely accessing a computer, much less communicating with it, requires a written vocabulary.

Furthermore, the Supreme Court has repeatedly held that the Federal Communications Commission may not prohibit entire broadcasts of indecent material; such

¹⁰ The legislative analysis cites 18 U.S.C. §2510 (Supp. 1995) as a potential source of criminal prosecution for invasion of privacy. That provision, the Electronic Consumer Privacy Act, applies to employer interception of employee communications (other than in the ordinary course of business), as well as to interception of electronic communications in general.

¹¹ Although the Grassley legislative analysis refers repeatedly to "indecent pornography," the text of S. 892 prohibits transmission of "indecent material." Indecent material has been held in the context of some media to include mere profanity. See, e.g., *FCC v. Pacifica*, 438 U.S. 726 (1978) (finding the "seven dirty words" monologue indecent). Senator Grassley is presumably aware of this definition, and despite the legislative analysis's repeated reference to "indecent pornography," intends to regulate all indecent material, including mere profanity, since the legislative analysis relies upon the *Pacifica* opinion to justify regulating indecency transmitted over computers, and defines "indecent material" according to the *Pacifica* standard.

broadcasts may only be limited to certain hours of the day. In addition, such regulations have been narrowly limited to over-the-air broadcast media and not extended to similar media such as cable television. S. 892 would proscribe transmitting indecent material to minors by computer at any time. Whether this proscription is tailored sufficiently narrowly to accomplish its goal without having a constitutionally unacceptable chilling effect on communications between adults would be determined by the courts.

S. 892's prohibition of "indecent material" presents additional problems, because, in contrast to obscenity law, literary, artistic, political or scientific value does not preclude material from being judged indecent. As is noted above, works of literature, health education, and any number of other materials that are, in fact, *intended* to be transmitted to seventeen-year olds, as well as everyday profanity, may be considered indecent. Thus, S. 892 could criminalize a university library that transmitted works on-line to college freshmen or sophomores, some of whom are under eighteen, or a university health service that put frank sexual health discussions on-line. Depending upon the definition of "indecent material," university officials committing such acts could be subject under S. 892 to prison sentences of up to five years.

S. 892 would create a pariah status for communications made by computer. Material that would be perfectly acceptable to be carried in any public library, to be broadcast twenty-four hours a day on any cable network, to be shown in any movie theater that carries PG films, or to be shown on any television station after 10:00 p.m., would subject a system or system operator that transmitted the material by computer to a seventeen-year old to up to five years in prison. It is not hard to imagine that such an unequal standard would relegate communications made by computer to a second-class status and would chill computer communications in general.

STATEMENT OF MIKE GODWIN, STAFF COUNSEL, ELECTRONIC FRONTIER FOUNDATION

I. THE CHALLENGE OF THE NEW MEDIUM

My name is Mike Godwin, and I am staff counsel for the Electronic Frontier Foundation. I'd like to thank you, Mr. Chairman, on behalf of my organization, the Electronic Frontier Foundation, for allowing EFF to submit testimony concerning the important issues, and significant problems, we believe are raised by S. 892. One of our goals at EFF is to assist policymakers and legislators in developing a framework to understand the legal and social significance of what is, in effect, a wholly new medium—computer communications. EFF is dedicated to expanding and preserving the democratic potential of this new medium, whose social and political significance may ultimately exceed that of the very first mass medium, the printing press. The issues raised by computer communications transcend partisan politics and require of us all that we stretch our imaginations—the worst mistake we can make on the threshold of this revolution is to assume that this new medium is, so far as the Constitution and laws of the United States are concerned, essentially the same as broadcasting, or more or less similar to telephony. Computer communications—and especially those communications that depend on computer networks of national or global reach, raise new problems and questions for lawmakers. At the same time, this medium promises to be the fulfillment of our oldest First Amendment values.

But I come here not just as a lawyer who is concerned about the First Amendment. I'm also a father. My little girl will be the first person in my family to have grown up with the Internet. As a parent, I'm deeply concerned with protecting Ariel from bad material and from bad people. And this concern is the other reason for my being here—I want to help ensure that whatever legislation or policy comes from Congress regarding the Internet will help me as a parent in protecting my little girl, while at the same time ensuring that she's able to benefit fully from access to the Net.

While I do want to talk a bit about some of the Constitutional issues raised by S. 892, I don't want to duplicate the thoughtful, thorough analysis submitted to this committee by Jerry Berman of the Center for Democracy and Technology. Instead, I want to focus on giving you a better historical and technical understanding of why computer communications are fundamentally new and different from previous communications media.

Now, figuring out the proper legal framework for the Net is tricky. Even if you didn't know anything else about computer communications, you'd know it's tricky from one simple fact: you've got Rush Limbaugh and Newt Gingrich and the ACLU on one side of the issue, and Senators Robert Dole and Dianne Feinstein on the

other side. What this tells us, I think, is that one's approach to making policy about computer communications derives less from one's political affiliations than it does from how one sees it in relation to traditional communications media.

You see, the more you know about computer networks and the Internet, the clearer it becomes that these networks are different in several respects from traditional communications media such as print, broadcasting, and the telephone. And these differences, once grasped, entail that top-down, government-centered approaches to protecting children will be ineffective. They also entail that the "least restrictive means" test of First Amendment jurisprudence will lead to different results in this medium from those results we've seen in traditional media, such as telephony. (See, e.g., *Sable Communications v. FCC*, 1989). We begin with what I promise will be a short history of the Internet.

II. THE HUMBLE BEGINNINGS

In spirit, at least, the Internet—the global "network of networks" that is increasingly the link among commercial online providers, businesses, government, computer bulletin-board systems, and other modes of computer communications—was conceived 30 years ago by Paul Baran, a RAND Corporation researcher. In a highly theoretical paper, Baran addressed a quintessentially Cold War problem: How could U.S. authorities successfully communicate in the aftermath of a nuclear war?

The problem was that traditional communications network designs were vulnerable to strategic attacks. Hubs and main arteries could be destroyed, isolating whole sections of the country. And any central control authority would be a particularly enticing target for a surgical strike.

Baran developed a theory of a truly decentralized, "distributed" communications network, with no central authority, and no main hubs or arteries. Any given communication on the network was sliced into what later were called "packets," and each packet was separately addressed, then thrust by the network in the general direction of the communication's destination. Each packet might take a separate route across the network, and some of those routes might involve serious detours (a packet might travel from Chicago to Seattle by way of Texas, for example). If a particular route had been damaged by natural disaster or military attack, a given packet would simply continue trying new routes until it found one that worked. The recipient computer on the far end would collect each packet as it arrived and assemble it in the correct order. This kind of network design probably sounds highly inefficient. That's because it is—but it is also highly robust, and it turns out to be very difficult to guarantee that you've stopped a given message from reaching its destination.

Baran's theoretical design remained just that—theory—for several years. Then, in 1969, a group of engineers working for ARPA (the federal government's Advanced Research Projects Agency), actually planted the first seeds of what later became known as the Internet. Although these engineers had never heard of Paul Baran or his paper, they'd brought his theory to fruition anyway. And once the RAND Corporation and other early participants in this network recognized that ARPA had implemented a working version of Baran's concept, they lost no time in playing up the military value of the new network (which turned out to be a plus when seeking appropriations under the constraints of the Mansfield Amendment).

At first it was called the ARPAnet—only later was the term "Internet" coined. The new network grew quickly: in late 1969, there were only four computers on the network, but by 1972 there were 37 sites. By the 1990's, the number of computer sites on the Internet had grown exponentially—in 1992, Internet sites numbered in the hundreds of thousands; this year they number in the millions.

One reason the Internet grew so rapidly is that one doesn't have to construct special wires or conduits to connect to it—connectivity depend on software standards, and not on hardware. And connecting to the Internet cost the taxpayer little or nothing, since each node was independent, and had to handle its own financing and its own technical requirements. It is no wonder that communications traffic on the Internet has increased 1,000 times between January 1988 and October 1994.

Also fueling the explosive growth of the Internet was the increasing availability and decreasing price of desktop computers. Any one of the desktop (or even laptop) computers commonly sold today can become part of the Internet.

III. DEMOCRATIC AND ECONOMIC OPPORTUNITIES

But the cheapness of computing power these days tells only part of the story. The rest lies in the answer to the question of why so many people want to be connected to the Internet. While there are many uses of the Internet—e-mail, long-distance computing, file transfers, searches of remote databases—there is no doubt that one

of the most compelling reasons people are excited about the Internet is freedom of speech.

You see, unlike every other mass medium that has ever existed, the Internet (and similar computer networks) has no central authority. There is no person in charge of the "printing press," no "editor-in-chief," no holder of a broadcast license. Americans have discovered that one can reach a large audience on the Internet without having to assemble a lot of capital or seek the approval of an editor. In this the Internet is similar to the telephone (no one tries to edit your phone conversations while they're happening), but the potential scope of the communications are far greater. While it might take millions of dollars to start an urban newspaper or TV station, it takes only a few hundred dollars to reach large audiences. If, as A.J. Lieblich once commented, freedom of the press belongs to those who own one, the Internet suggests that we all may someday own one.

In short, the First Amendment's free-press clause, which many citizens still take to be a right reserved to the highly capitalized media establishment, has suddenly become a meaningful right for every individual American.

This kind of empowerment of individuals is something new under the sun, and it blurs traditional distinction between "content producers" and "consumers" (everyone on these computer networks can produce "content"). This may blur the line between reporter and reader—to take only the most recent example: it was an ad-hoc group of individual Internet users who assembled the material that demonstrated the flaws in the Martin Rimm/Carnegie Mellon pornography study that you may have heard about. And while the mainstream media might have taken months to discover the study's flaws, these individuals uncovered them in mere weeks.

To touch briefly on some other things that make this medium different: since computer hardware and software are ubiquitous and less expensive all the time, the medium cannot be considered a "scarce" resource in the way the Supreme Court characterized the broadcasting spectrum in *Red Lion*.

And since content is primarily "pulled" by user choices rather than "pushed" by content producers, the medium lacks the "pervasive" character of broadcasting that was central to the Court's decision in the *Pacific* case.

Finally, the relatively low cost of acquiring access to the Internet means that would-be entrepreneurs face relatively low barriers to entry into this new market. Now that the government no longer plays even a nominal role in administering the Internet, the international network of networks is becoming a playing field for pure capitalism. To start a successful business on the Internet, you don't need to be a millionaire, and you don't need venture capital—all you need is a good idea.

Ill-considered regulation, however, could thwart both the democratic and the economic promise of computer communications. S. 892, with its clear intent to impose new duties and broader legal risks for service providers, would simultaneously chill freedom of speech and distort the market for services by raising barriers to entry. What exacerbates this problem is that a provider's liability for content hinges not on legal obscenity, but on the far broader, far vaguer concept of "indecentcy," a term imported from the realm of broadcasting regulation whose meaning has never been defined by either Congress or the Supreme Court. And even if the term had been defined, it would be inapplicable to a medium that is neither "scarce" nor "pervasive" in the Constitutional senses of those terms. Our federal government's special role in regulating the content of the broadcast media and of the dial-a-porn services is grounded in particular factual findings about the characteristics of those media. There have been no such findings with regard to computer communications, and, given the nature of the medium as discussed above, it is difficult to see how there could be.

Compounding the "chilling effect" this legislation would have on lawful speech is the sheer ineffectiveness of the measure when it comes to willfully illegal communications. Because of the decentralized, "bomb-proof" nature of the Internet, an individual provider's decision to censor certain content may have no effect at all with regard to its general availability. This is especially true when one remembers that an increasing number of Internet sites are operated in foreign countries, and their owners, while theoretically extraditable and prosecutable in the United States, would rarely be meaningfully deterred—they know that only a very few foreign offenders will ever be pursued by a U.S. attorney. In general, a foreign criminal using computer networks to commit a crime in the United States can dodge both the providers' attempts at monitoring and the law-enforcement agencies' attempts at policing by originating message traffic offshore or by routing illegal information through a chain of intermediate sites that obscures its origin. S. 892 would not even pose a meaningful threat to those who prey on children—no limit on "indecentcy" prevents the solicitation of innocent children with nonobscene, nonindecent speech.

IV. A BETTER APPROACH

As a parent who happens to be a lawyer, I know that federal and state laws already define a framework for the prosecution of those trafficking in obscenity, those who possess or distribute child pornography, and those who prey on children. It is clear that the legal tools are in place, but Senator Grassley's instincts are right when he perceives that there is still a gap in the defense of children that needs to be filled. One thing we know about those who engage in child sexual abuse, for example, is that they are rarely deterred by legal risks—even in the face of likely prosecution they are driven by their sickness to continue preying on children. And as a parent I can assure you that it is little comfort to me to know that if such an offender harms my child, that person may be caught, prosecuted, and imprisoned at some point—the damage, which may last a lifetime, has already been done.

This is why I believe that the right role for Congress to play is to encourage the development of software filters that prevent my child and others from being harmed in the first place.

Recall that the basic technology we're talking about here is the computer—the most flexible, programmable, “intelligent” technology we build and market. Filtering software enables parents to screen certain language, certain kinds of content, certain people, or certain areas on the networks from their children.

Such an approach does no damage to First Amendment values (it does not for example, put a nonlawyer hobbyist who operates a tiny computer bulletin-board system in the position of having to determine what is “indecent”), yet it does solve the problems (e.g., solicitation through nonindecent communications, or offenders who conceal the origin of their harmful communications) that S. 892 has no hope of addressing.

Furthermore, since such tools are designed to be customizable, parents are empowered to set their own standards of what is acceptable for their children, rather than relying on what the nonelected officials at the FCC choose to include under the definition of “indecent.” For example, even if the FCC determines that detailed information about safe-sex techniques is not indecent, a parent who believes that her children should receive all their sexual information from her and not from the Internet could customize the family computer's “filters” to block that information.

V. CONCLUSIONS

We already have the laws in place. Federal and state laws prohibit the distribution of obscenity, every state I know of has laws prohibiting the exposure of children to inappropriate or harmful material. Federal and state laws prohibit child porn and child abuse, regardless of the medium used to facilitate it.

Speaking as a concerned parent and a lawyer, I believe the question isn't “Do we need more criminal laws?”—it's “What can we do to supplement the legal framework with policies and tools that empower parents to protect their children and preserve the values of their families?” And answering that question will require the Congress to draft laws and support policies that are grounded not in simplistic analogies to old media, but in a thorough understanding of this new medium and of what makes it different.

Members of the committee, you are at a crossroads. Down one road lies a future in which parental rights are supported by a Congress that has abandoned the outdated, big-government approach to solving social problems. Like the parents and children whose letters to you follow my statement here, we hope for a Congress that does not set the First Amendment and welfare of families against other, but that instead chooses policies that strengthen both.

LETTERS FROM MAMIE AND HOWARD RHEINGOLD

To the Members of the Committee,

I am Mamie Rheingold. I am ten years old, and I have been using e-mail since I was eight years old. I also use the World Wide Web sometimes to help with my homework.

When I started using e-mail, my dad told me to use good sense. Like when somebody calls my house on the telephone and asks me whether I am home alone, I know I don't have to answer that person. And my parents taught me that if somebody calls on the telephone and I don't know them, and I feel funny about something they say or ask, I should talk to my mom and dad and not say anything. The same thing with e-mail. If people ask me personal questions and I don't know them, I ask my dad. I like to send e-mail to my dad when he travels, and get e-mail from him. And I have a few penpals. It really isn't a problem.

Sometimes, I can use the World Wide Web for homework. My dad found a place where I can type in the name of what I am looking for and then I can click on what it finds and see pictures from outer space or other things. It's like having an encyclopedia that has movies, too.

I think kids need to learn how to use things and parents need to trust us to use them the right way and not use them the wrong way.

Mamie Rheingold
name@well.com

To the United States Senate and the Members of the Committee:

I am a parent, a PTA member, and an active volunteer in our daughter's public school. I believe very strongly that parents have an obligation to teach our children values, to give them the opportunity to make their own moral choices, and to help them understand the media such as television and internet that are so important in their lives today.

I would like to be able to have control over the information my daughter receives through the television or the internet, but I don't believe it is right to give the State the power to exercise that control. Parents and teachers, not the government, are the ones who ought to determine what information and values are appropriate in our homes and schools.

Democracy in America was founded upon freedom of expression. Communications technologies have made it possible to spread objectionable material. I know that tools for FILTERING information that comes into the home, rather than CENSORING it at the source, are much more practical, easier to administer, and most importantly, do not erode our liberties. I support filtering tools for parents, including rating systems.

Most importantly, I feel that parents need to understand that we have a responsibility to instill good sense in our children, to sit down with them in front of the television and in front of the computer screen, to ask them questions, and to answer their questions. Taking that responsibility out of the hands of parents is going to further weaken the family, and create a censorship bureaucracy that we might later come to regret.

I personally paid for an internet and WWW link to my daughter's 6th grade classroom. I spoke to the students and told them that there are indecent pictures out there on the net, and that I trust that they will use this tool responsibly. I said: "If you do anything that you wouldn't want your parents to know, then probably you will get caught at it and you won't have the Internet in your classroom any more. And there probably won't be Internet in any other classrooms around here. But if you are responsible pioneers, you will show the other classrooms and teachers in this school, and in this school district, that kids and teachers can use this new tool. I'm counting on you to be pioneers." That's what I told them, and they didn't fail me. If we don't give our kids the opportunity to make moral choices, and yes, the chance of failing, then how are they going to learn?

Howard Rheingold
hr@well.com

About Mamie Rheingold:

Age ten, student at Tam Valley elementary school, a public school in Mill Valley California. This year, Mamie was selected from all the students in Marin County to receive the Terwilliger Award for community service, because of her work in community recycling programs and in regularly entertaining seniors in local retirement and convalescent communities.

About Howard Rheingold:

Author of "Virtual Reality" (Simon & Schuster, 1985), "The Virtual Community," (Addison Wesley, 1993), founding executive editor of HotWired, Wired Magazines commercial publication on the World Wide Web, author of "Tomorrow," a newspaper column syndicated in 16 newspapers nationwide by King Features.

LETTERS FROM JENNIE BROWN AND PAT MCGREGOR

To the Members of the Committee,

I am 15, and a sophomore at Oak Ridge HS in Eldorado Hills, CA. Mom showed me how to do things on the net to do research on papers and things when I was

about 10; I've done papers on the Holocaust, plant growth under differing lights, absorbency of paper diapers, Hero symbolism in Indiana Jones, Nuclear waste and radiation's affect on the body, and looked for clip art to put on papers and charts.

My mom and dad are divorced, and I've used email to keep in touch with the one I'm not living with since 4th grade. I also talk to my cousins in England every day by email, and some of my aunts and uncles. Email is a really good thing.

This year I discovered Mudding, and it's really cool. I've met loads of people all over the world and have talked with them and worked with them. Mom has always been really firm that I shouldn't tell my phone number or address to people on the net, and I don't. It's like not giving it to people you meet at the Mall until you know them better. I feel like the Net's a pretty safe place if you take care of yourself and pay attention to what you're doing.

There's a lot of really cool stuff on the net. Restricting what people can put up isn't the way to go: parents and school should do what they do now: make rules and agreements, with consequences if you break them.

Jennie Brown (jbrown@spider.lloyd.com)

To the Members of the Committee,

I worried for a long time about letting Jen go "out" mudding by herself, but she seems to be paying attention to our basic ground rules and keeping herself safe from unwanted attention. I worry when she and her friends go out for a day to the local shopping strip, too. :-)

Jennie uses the Net like she uses other research tools—and sometimes she finds out weird and unusual stuff in the library at school, too. To our minds (her parents) the Net is an unparalleled communication tool, and it's helped us stay close to Jennie when she's been in the custody of one or the other of us.

The computer that Jennie uses is in the living room, and we all talk about what we find online. Jennie asked about porn on the net after the discussion erupted this spring; we talked about what sort of stuff was available and she said, and I quote, "Yuch."

Parents who set up sensible guidelines and communicate with their children are the best filtering technology for the Internet.

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Co-author, "Mastering the Internet," Sybex Books, Feb 1995
 Staff Writer, I/O Magazine (<http://www.mother.com/iomag>)

LETTER FROM BRAD NEUBERG

To the Members of the Committee,

Howdy. My name is Brad Neuberg. I am 19 and currently live in South Texas. I grew up using bulletin board systems and the internet. As a matter of fact, I learned how to read and do mathematics on an old Texas Instruments computer! In my high school, the Science Academy of South Texas, I communicated with professors, educators, and children from all over the world using internet access which my school provided. Currently, I use the internet to keep in touch with breaking news, congressional legislation using Thomas, and vast discussion groups on many different topics. My life has been very enriched due to computers and online networks.

Today you will probably hear convincing legislation that the internet is full of a massive amount of pornography. You will be told that a recent Carnegie Mellon research report, used by Time magazine in an article, documents that 85 percent of the internet is pornography. A large number of experts have disputed this article, and have shown, in fact, that there is an extremely small amount of pornography available on the internet, more around 0.5 percent.

Some people here today may not truly understand what the internet is. One important part of the internet, called newsgroups, is like a huge cork bulletin board, such as the bulletin board inside the entrance of a common super-market. People with their home computers call up, using their telephone line, onto this huge cork

bulletin board from all over the world, where they can put up messages. So just as at the super-market I can put up a message saying, "I lost my little dog; if you have seen it call 631-2142," someone on the internet can type a message on their keyboard and post it to this huge bulletin board, accessible by people from all over the world. Now, there can be millions of these huge bulletin boards on the internet, so instead of only having one bulletin board at the super-market, imagine if there were thousands in the store, and each bulletin board had a different topic. Let's say one bulletin board at the super-market had a sign on top with the word "Agriculture" on it, or another bulletin board with a sign saying "Movies." Well, on the "Movies" bulletin board people who are interested in movies could post message, or even sounds clips, because one of the special things about the internet is that you can post many different kinds of data, from text, to voice, to pictures. And so, all over the world, through the internet, communities are forming, where people are discussing, every imaginable topic, from scientists talking about lasers, to kindergarten teachers talking about the techniques they use to teach their class. So many people talking is truly a phenomenal thing (well, unless it's a talk show).

There are about ten-thousand of these "cork-bulletin" boards on the internet, filled with every imaginable topic, from kids talking about a particular video game to Chinese dissidents discussing how to create a democracy in China. What the Time magazine article was talking about was roughly about 15 of these=7F bulletin boards. These fifteen bulletin boards are discussing mostly sexual topics, such as pedophilia or homosexuality, and=7F are the "cork boards" where there are a great deal of dirty pictures. When the author of the Time magazine article wrote that 85 percent of the internet was filled with dirty pictures, what he=7F was really saying was that 85 percent of the messages on these fifteen sexual bulletin boards were actually pornographic pictures. Keep in mind that this is 85 percent of the ten sexual bulletin boards of the ten-thousand bulletin boards available on the internet. In other words, a very small amount. With other factors included this means that only one-half percent of the internet contains pornographic images! This is almost like the two dirty books at a library with tens of thousands of books.

A parent would still like to prevent their children from seeing these pictures, even if only 0.5 percent of the internet contains this pornography. In spite of the fact that it actually takes quite complex software to see these dirty images, there are already companies who see a need for software that can prevent children from seeing the bad 0.5 percent of the internet. These pieces of software scan for dirty words, block access to the sexual bulletin boards, record the locations children visit, or use other techniques to help parents monitor what their children are doing. This software, without government censorship, without government control, can help keep children from accessing the bad portions of the internet, and allow adults to continue to communicate their thoughts.

If one of the reasons for the Republican sweep of Congress was to help remove government from our lives, and to restore our free-market economy, then why should we allow the government to have more control over what we say by censoring our thoughts on the internet? We should empower parents by letting the free market provide solutions for the pornography problem; let's keep government out of our lives.

Thank you very much,
Brad Neuberger
McAllen, Tx

P.S.—Don't forget the oath you took at the beginning of your term to uphold the Constitution of the United States—as well as the Bill of Rights.

LETTERS FROM CHRISTOPHER O'CONNELL AND CHRISTINA O'CONNELL

To the Members of the Committee,

I am a seventeen year old who has been using BBS's, America Online, and the Internet for 7 years. It has been an educational and priceless experience for me. From the start on local Bulletin Board Systems I have made friends and learned skills that will help me when I enter the workplace. Because of my experiences online I was able to assist my fellow students at my high school with the library's computers and CD-Rom system. I have learned programming languages, computer skills, and played chess with a former Semi-Grand Master. In fact, many of my friends are in occupations and areas that I am considering studying in college, and much of my interest is due to their support and help. And their support went beyond that. During my parents divorce I had them to talk to, and it as an immeas-

urable aid during that trying time. During my seven years online, I have never felt anything but safe, and have never been made uncomfortable in any way. Sure, there is pornography available, but it is just as available in magazine or book form to my friends at school who are not online and don't even own computers.

Through the online discussion forums, I have been able to discuss everything from religion to politics to computers to science fiction to poetry. It has given me a chance to speak my mind, develop my thoughts, and be heard in a way that most teenagers never have. It has developed my thinking and reading skills, and has helped my writing ability in a way that no high school English class could hope to match, despite the very high quality of the local public school that I attend. I have also become a staff member of one of the online games I frequent, where I am learning the value of helping and aiding others.

All of this has also made me aware of the issues facing our nation today. In a day and age when legislators are stressing the value of putting religious education, and many other values and moral concerns, back in the hands of the family and not the government, why are the same legislators proposing to take away a clear right of the parents? The idea of laws to censor the Internet ignores not only the first amendment but the very basic rights of Americans to govern what their children see and raise them as they see fit. My mother, who is a single-parent to my sister and myself, has always governed what we see and read. From a young age she imposed limits on the amount of television viewing and what I was allowed to watch. This has made me an avid reader of books who would much rather take in a book of poetry or literature than a sitcom any day. This has not made me hate her or get angry, it has brought us closer together as a family. All of us spend evenings over dinner conversing about our reading, whether it be a science fiction book that I am reading, one of my mother's favorite mystery novels, or the books on horses that my 9 year old sister, soon to get her own Internet account, has begun to read. For that matter, we also spend hours discussing what I see on the Internet, ensuring that I understand and am not harmed by anything I see. The very idea that this would be taken away from us is not only abhorrent and disgusting, but insulting to myself, my mother, and every other American family. It says that you do not trust parents to do their jobs.

Christopher O'Connell
Rindge, New Hampshire
Vulpine@gold.mv.net

To the Members of the Committee,

I'm the mother of two children, a son 17 and a daughter 9. My son has been online via BBS's, AOL and the Internet from age 10. We have always discussed his time online, what he was doing, who he was talking with. His experiences have been overwhelmingly positive—he's had the chance to learn chess from a state champion, discuss authors with both friends from several online games and the rec.arts.* newsgroups he follows, debate politics with people of all ages, learn a new programming language, and more. But perhaps most importantly, he has found a genuine community of friends online, from many countries, backgrounds and age groups who have helped him through some rough times and who he has helped in return.

As parent, I am very angry at the attempts to censor the Internet in the guise of protecting children. I have seen firsthand the value of being online in my son's life. On the rare occasions when he has run into questionable material, he has not suddenly lost his good sense nor the morals he has been raised with—just as with tv, music, books, we discuss things which bother him. Just because material is on the Net, it does not somehow magically destroy the relationship we have built nor the strong inner sense of right and wrong he has developed over the years. And to those who somehow feel that the government must interfere here because "parents are too busy" let me just note that I am a divorced mother raising my children alone—I work long hours to support myself and my children, but that does not stop me from parenting them!

My daughter has had several internet penpals, an activity which is encouraging her writing skills. I have just gotten her first separate net account and she is joining a mail list for young riders. In fact, we are planning on using this list in September as part of the activities of our local 4H group.

From my experience, I'd say that the proponents of net censorship should learn more firsthand about what is available on the Net. I know that there is material online which does not fit my morality—but I'm not forced to look at it and neither are my children. I know that there are some sick people online as well—but there are sick people in my small rural town too—I've taught my children to take proper

precautions with strangers and that teaching stands online or at the local shopping center. And while I've seen a lot of scandal-sheet type headlines about kids and the net, in over 7 years of experience, as a mother and a net reader, I have yet to see anything that remotely reflects those over hyped headlines.

Christina O'Connell, parent [of Christopher O'Connell]
Rindge, New Hampshire
coco@gold.mv.net

LETTER FROM SHARON HENDERSON

To the Members of the Committee,

I felt it was important to tell you about my son, Brian.

Brian is 12 years old, almost thirteen. When he was a little tot, he as diagnosed as neo-autistic: "sort-of, kinda autistic, but not really, so we don't know what else to call him." Until he was almost four, he did not speak at all—only tears and laughter, with far more laughter. He was a bright, responsive baby and toddler, charming, funny, and fascinated by technology. When he finally learned to talk, he was entirely echolalic for almost three more years—a condition which essentially boils down to his ability to repeat back to you, verbatim and in your vocal intonation, anything you have said to him. Or anything he has heard on TV. Or anything he has heard * * * at all. This made him a fine mimic—and gave him, as a kind of compensation for his disability, a spectacular memory. He may not always pay attention—but when he does, you only need to tell him something once. He remembers it forever. His language is now age-appropriate—and then some; he expresses himself like the learned young man that he is.

His intro to technology came through the family's Atari game system and the TV. He comes of a long line of engineers on his Dad's side—folks who like to take things apart and put them back together. Computers have always fascinated him, and this remains the case to this day. Games, programming, email, the WorldWide Web, you name it, he loves it. Other people memorize mathematical theorems; Brian memorizes the Gopher and FTP sites where he can find information on history, maps, railroad trains, collectible card games, and metal gaming miniatures. His peers can name all the Power Rangers and their abilities; Brian can tell you which Web sites will grant you access to pictures from the American Civil War which ones will tell you about the re-enactment of Revolutionary War battles, and where you go to find out the history of armored vehicles as used in the armies of the world, since armored vehicles existed.

Does he know there is pornography on the Internet? Sure, he does. He can read as well as anyone else. But because he is an American citizen, and knows the Constitution better than many of our Congresspeople, he knows there is freedom of speech, expression, and pursuit of life, liberty, and happiness. He knows these things are (and I'm quoting him, here) "ucky, gross stuff for people with little imagination," and he knows how to stay away from them. If he did not know how, I would do my parental duty and teach him—and I would probably put software on our home computer that would keep him from involuntarily running across anything my husband and I didn't want him to see.

This child, who uses the local libraries to the hilt, realizes there are libraries and archives and universities all over the world to which he will probably never get in person. But he knows the Internet can reach them, and a lot faster and cheaper than an airplane flight could get him to the exact same place. So he comes to work with me on weekends, and helps beta-test software by using it. He looks to see what new card collectibles there are. He checks stock quotes on his Mom's work benefit stock plan. He looks at pictures of old trains. He reads the history of the great air, sea and armor battles of WW2. He goes to movie sites and checks to see whether "Braveheart" or "First Knight" would be a better choice. (he chose "First Knight," because: "Well yeah, the history stinks and nobody ever wore stuff like that, but it's got Sean Connery, Mom, and he played Indiana Jones' Dad!!") He has recently downloaded pictures of parts of England and Germany from which his ancestors came, and a really neat map of the Chicago railway transportation system that was found online. He has printed out PICT's and JPEG's of US Navy vessels, and old British steam trains. Do we supervise his use of the Net? Sure we do. That's the kind of parents we are. We try to live our religion and our belief in love, democracy, and learning.

A world has opened up to this terrific, intelligent child who, because of lingering bits of his "neo-autism," is shy among people his own age. He learns things that he can tell his friends about, and so seem less "different" and separate from them.

He can sit for hours in front of the computer, surfing the Net, having a grand exploration for himself—and then he goes out to play, excited, happy, his mind engaged in a way that television rarely affects him, and delighted to live in such a diverse, wonderful world. He lives daily with the InterNet, since I develop software for it, and he is a good citizen of the Net because he was first a good citizen of his country, and a good Virginia gentleman. Do you flame people in email or on the newsgroups, or use bad or nasty language? "Nope. That's really tacky manners." Do you mass-mail advertisements to newsgroups you've never read? "Uh-uh. That's invasion of privacy." Do you look at things your parents don't want you to? "No, that would be wrong." So should that stuff be there? "Yes, because not everybody likes what I like." You know what I like?

I like my kid. I like his style. I like his sense of history, his understanding of the laws of his democratic country, his tolerance of other people, and his love of learning. I like the fact that, when it comes my time to face St. Peter, I can do so with a mother's humble pride: I can say yessir, my life had one overwhelming worth, besides what I was able to accomplish on my own: my husband and myself worked together to create, raise, and teach the wonderful, marvelous, honest, honorable young Virginia Gentleman and American, Brian Henderson. He doesn't misuse the Net, because he doesn't misuse anything else. Good rearing, good manners, and proper adult supervision can, after all, produce some real, tangible results. I wish people would stop blaming the faceless entity known as the Internet, and start looking in their own mirrors. I wish the Powers that Be would wake up and realize that regulating the Internet won't change a single, solitary thing—because change is only effective when it is learned from home. For too long, we have all lived by the credo of "don't do as I do, do as I say." And our kids today are far too intelligent to swallow that old dog. If we raise them right—if we actually do the things we tell them they should do—they will be good people who love their country, understand and obey its laws, worship the deity of their choice, and behave the way they have been taught to, whether they are interacting with their friends at school, colleagues at work, or with computer systems all over the world on the Internet.

It's that simple. It always has been. It always will be.

So the legislatures need to wise up, no?

Thanks for letting me use your soapbox. Feel free to contact me:

Sharon Henderson
 Brian's Loving Mom
 Quality Control Engineer and Net Surfer
 Fairfax, VA

LETTER FROM BETTY HARRIS AND JIM GLOVER

To the Members of the Committee,

We have a 14 year old daughter, and over that last few months have encouraged her to use the World Wide Web to explore topics that interest her. When Christopher Reeve had his riding accident, we searched the web and found a frequently asked questions (FAQ) file on spinal cord injuries that contained some excellent information. We also found a graphic that illustrated the relationship between level of injury and loss of function. The web was also very useful for one of her school projects on UFO's where we searched and found information and graphics. She has also used the web to find information about her favorite music groups. We live in Oklahoma City and have also used the web for keeping current on information about the OKC bombing.

We keep hearing via the media how easy it is for children to find sexually related images and had discussed this with her (Quotes like "Your children probably already have found this information."). We discussed this with her and she told us that as a result of our conversation, she'd looked for over FOUR hours and had only found the Playboy magazine home page. We then initiated a discussion with her about how we believe the images she found tended to portray women as objects and why we object to this type of thing. Her difficulty in finding what she was looking for validates my experience (of six years) and my husband's experience (of 5 years) with the internet. Sexually related images do not just appear on your computer, you have to 1) know what you are looking for, 2) understand how the net is set up and know how to use the various tools (FTP, gopher, etc.) to find what you are looking for and 3) you have to spend time searching. If the child is spending this amount of time on the computer, the parent should be aware of it and should be participating and guiding the child's efforts in healthy directions. It is the parent's place to

control their children's access to the internet, just as they should in regards to other sources of information and entertainment (e.g., books, movies, radio, and television).

From what we've read on current legislation designed to address access to information on the net, we do NOT support the Communications Decency Act, or the Protection of Children from Computer Pornography Act. We DO support the Leahy study, because we believe that when making decisions that could have quite serious ramifications regarding freedom of speech on the internet, we need to consider carefully the possible alternatives and choose alternatives that provide the best outcomes (protecting children) with the fewest adverse effects (more restrictions on freedom of speech). Our local internet service providers (ISP) have already initiated procedures requiring proof of age (e.g., photo identification) prior to allowing access to clearly adult areas such as the adult Usenet news groups. We suspect that software developers and service providers will be able to come up with creative solutions to restrict children's net access to domains that their parents are comfortable with. For us, the combination of parental supervision and voluntary ISP cooperation is more than adequate to protect our daughter from any potentially adverse effects of the internet, while allowing her to reap great benefits from the diversity of information and people available on the internet. We use the internet, just like we use TV and the other media—we attempt to restrict access to age-appropriate content and use these sources to initiate discussions of what's right and wrong to help our daughter develop her own code of ethics.

Thanks for your time,

Betty Harris & Jim Glover
 PSYCHE@drycas.club.cc.cmu.edu
 Oklahoma City, Oklahoma

STATEMENT OF THE FAMILY RESEARCH COUNCIL TO PROTECT FAMILIES FROM PORN
 ON THE INTERNET

FOR IMMEDIATE RELEASE: JULY 24, 1995

WASHINGTON, DC—Family Research Council applauds efforts by Senator Charles Grassley and others to curb pornography distribution on the information superhighway. Family Research Council Director of Legal Studies Cathy Cleaver made the following statement Monday prior to the Senate Judiciary Committee's hearing on the issue:

Those charging censorship, overregulation, and "cybersensitivity" have done a grave disservice to this country by "smoke-screening" the pertinent issues from parents, concerned citizens, and lawmakers. Despite all the rhetoric and accusations, the debate boils down to two issues: the accessibility of pornography on the Internet and the constitutionality of the means of regulation. If there is a problem with pornography on the Internet, the need for regulation becomes a foregone conclusion and the question of the most effective and least restrictive constitutional means of regulation becomes central. *Opponents of regulation are engaging in scare tactics in an effort to "muddy the waters" of this debate. The dangers posed against our nation and especially our children are too high for this type of senseless politicking.*

There are several flaws to the approach of creating software to screen out the offensive material. First, it is wrong to shift the entire cost and burden of protecting children from this material to the parents. Moreover, it is an approach which favors restrictions upon the "good actors"—children and families—and free reign for the "bad actors"—those who would give porn to children. Second, it is naive to think that software "solutions" in a vacuum will truly solve the problem. We need regulation in place to discourage computer pornographers from circumventing software solutions with impunity. Without a law delineating wrongdoing from right, the protection of children will depend upon the "good character" of those who would exploit them.

Government regulation and parental responsibility are not mutually exclusive approaches to this problem. The opponents of regulation addressing distribution of pornography to minors fight virtually any regulation of pornography. To them, pornography of the most graphic form, accessible to everyone, is what freedom is all about. Others know that, to have a civilized society, we must recognize the difference between liberty and license, and

acknowledge the insidious effects of pornography on the formative minds and hearts of our children.

From 4-5 p.m. EST today, FRC is helping to get media exposure for 15-year-old Danelle Gruff, who is testifying today about her horrifying experience with pornography on the Internet. Call FRC for more information or interviews.

STATEMENT OF HEIDI H. STIRRUP, DIRECTOR, GOVERNMENTAL RELATIONS, CHRISTIAN COALITION

On behalf of the 1.6 million members and supporters of Christian Coalition and their families, we applaud Senator Charles Grassley for his leadership in introducing legislation designed to protect children from computer pornography and by holding hearings on this important family issue. Because pornography is freely available on the Internet to virtually anyone with a home computer, we strongly believe that certain restrictions are necessary to protect our children from such explicit, pornographic images.

In Christian Coalition's *Contract with the American Family*, we recommend ten legislative items that we believe would strengthen families and restore common-sense values. One of our *Contract's* suggestions calls for restrictions on pornography. Specifically, we recommend enacting legislation to amend criminal law to prohibit the distribution, or making available of, any pornography, soft core or hard, to children. We also support prohibiting distribution of obscenity to adults by computer.

There are laws already on the books which prohibit the transmission by other means of indecent material to children and obscene material to anyone. We hope Congress would close any loopholes in current law that might allow such materials to be transmitted by computer. We feel strongly that providing blocking-type software devices is not enough. Such devices are easily bypassed by those skilled in the use of computers, and further, are limited to the computers to which the software is installed. Christian Coalition maintains that once the law establishes that it is illegal to provide such material or to provide access to such material, much of the distribution of pornography on the Internet will cease. Criminal liability can be a very effective deterrent and thus we urge you to go as far as possible in legislating in this area.

Thank you for the opportunity to present these views. We appreciate your leadership on this important family issue and look forward to working with you and your staff as the legislative process moves forward.

STATEMENT OF LAWRENCE C. STEWART, CHIEF TECHNOLOGY OFFICER, OPEN MARKET, INC., CAMBRIDGE, MA

*"Empowering Parents and Professionals:
Looking at Solutions That Are More Than Mere Child's Play."*

Mr. Chairman, Senators, and guests, the results of this debate over how to control the flow of offensive and indecent material via an open network like the internet is of great import. At its basic level it is a debate over the boundaries (if there is to be any at all) of the freedom of speech guarantees provided for in the U.S. Constitution.

This nation's children, indeed the children of the world, have become the fulcrum of this debate. Arguments on one side assert that this emerging tool of communication must not be stifled by government involvement else our children's ability to gain access to a sea of learning will be delayed or derailed. Across the table comes the counter argument asserting that this technology must be controlled, or at least the content allowed to pass along its channels must be regulated in order to prevent the moral decay of the rising generation.

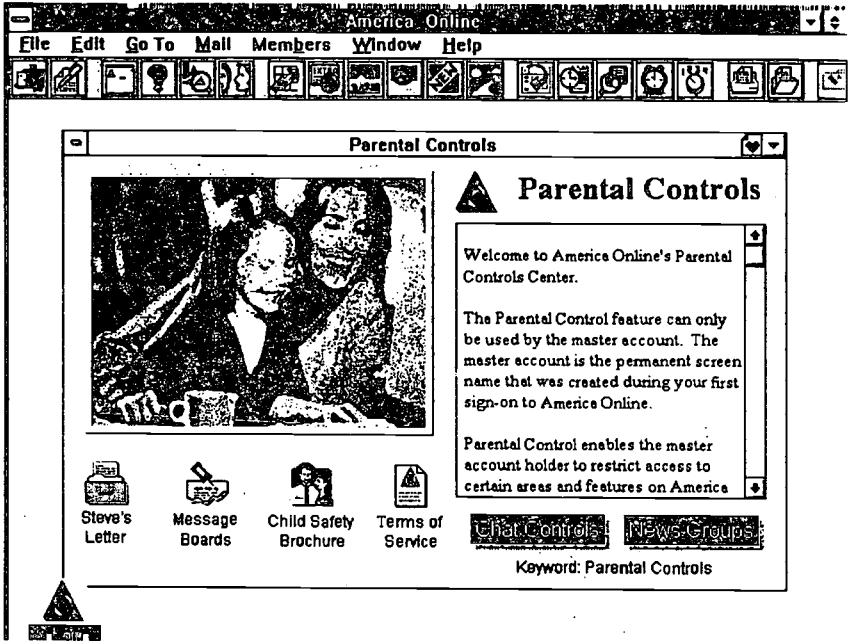
Thus the debate, as is characteristic of arguments that involve scarce resources, has become heated and has attached itself to the emotions. The result? There is no great momentum for change, and a propensity for adopting solutions—no matter the source or sustainability of the solution. Every party involved in this debate is eager to embrace something that says: "we care about our children."

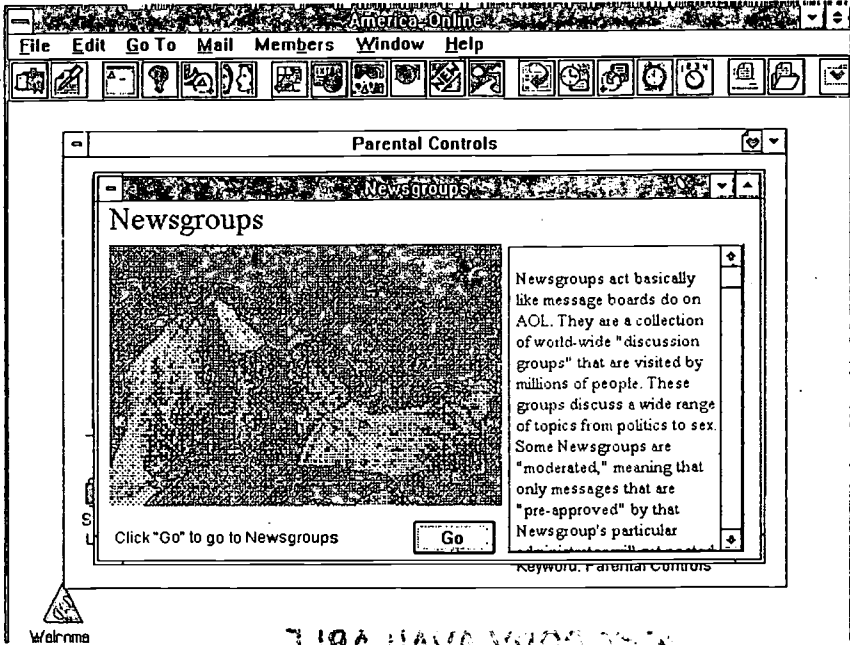
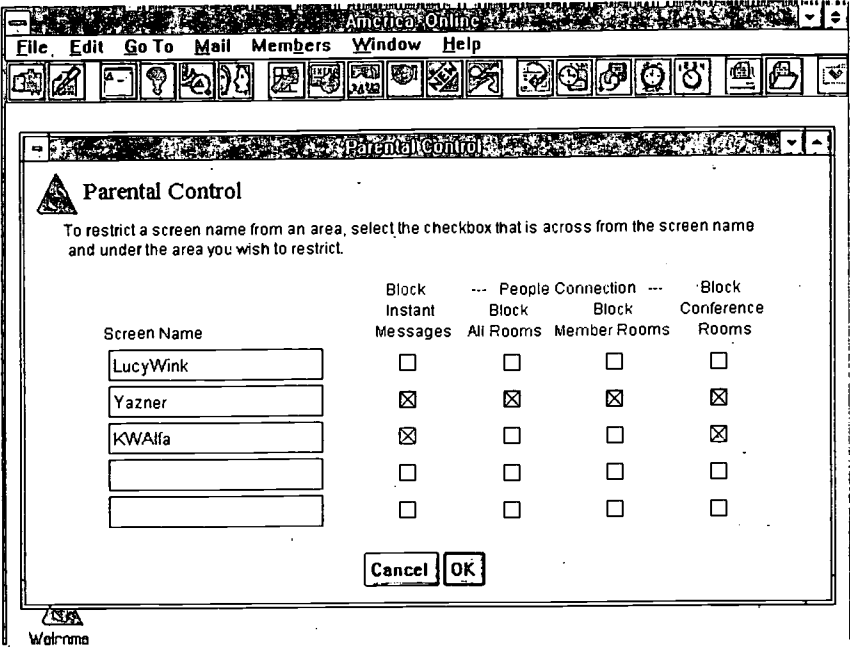
Mr. Chairman, Senators, and guests, while this body of lawmakers has sought in earnest to understand this issue and propose thoughtful solutions, your sister to the south has opened its chamber to traveling salesmen and provided a public, press-filled pulpit for opportune software developers to pedal their products. Some of the products perhaps offer a short-term solution to this problem, but all of the products presented to members of the House of Representatives are of limited value because

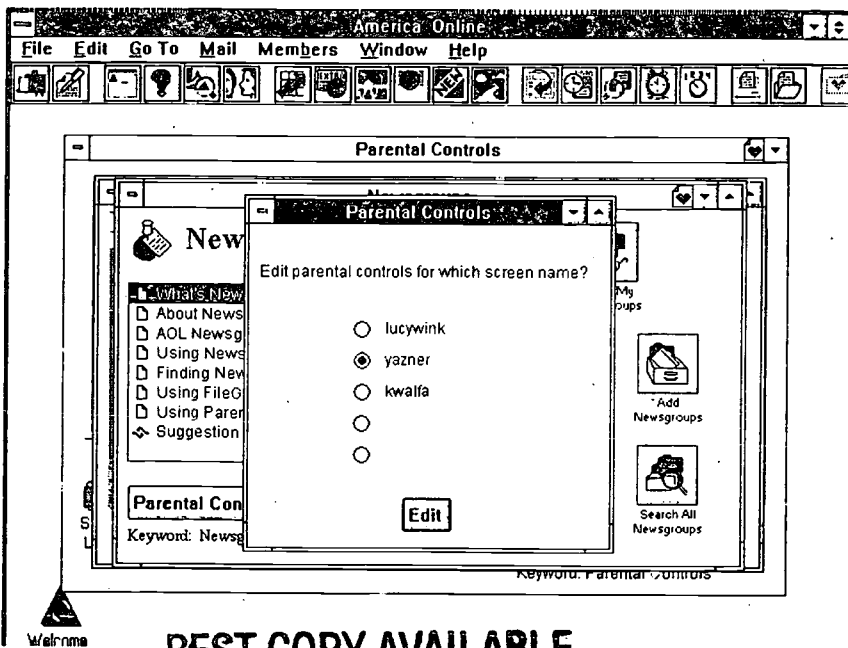
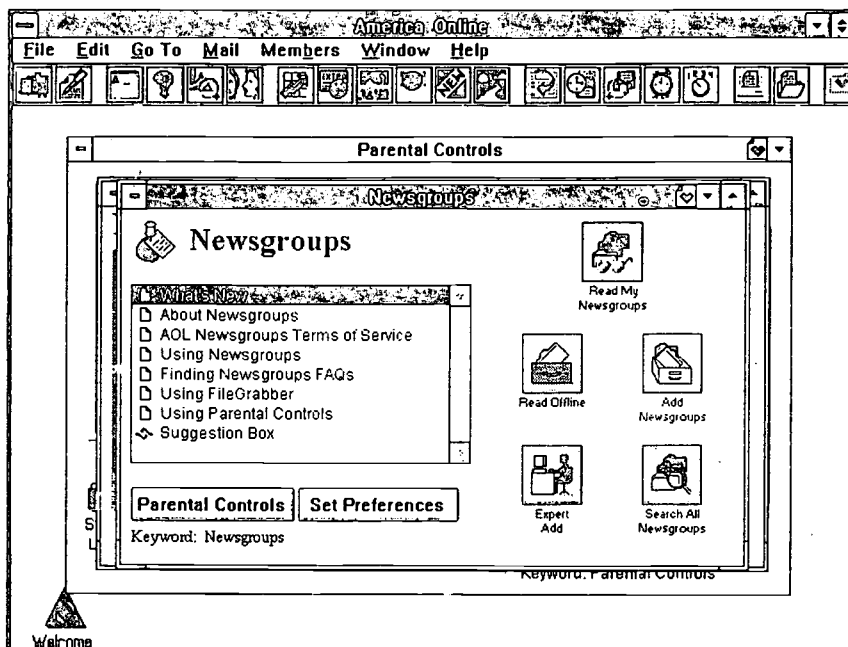
they are proprietary—and therefore are limited in their ability to impact a rapidly growing and very open network of global communicators.

The internet is unique in that it is perhaps the first major technology for communication developed unilaterally and with little or no economic motivation by volunteers in many nations. It currently connects millions from all countries and cultures, all are partners or part owner of it by virtue of their action of voluntarily connecting their computer to it.

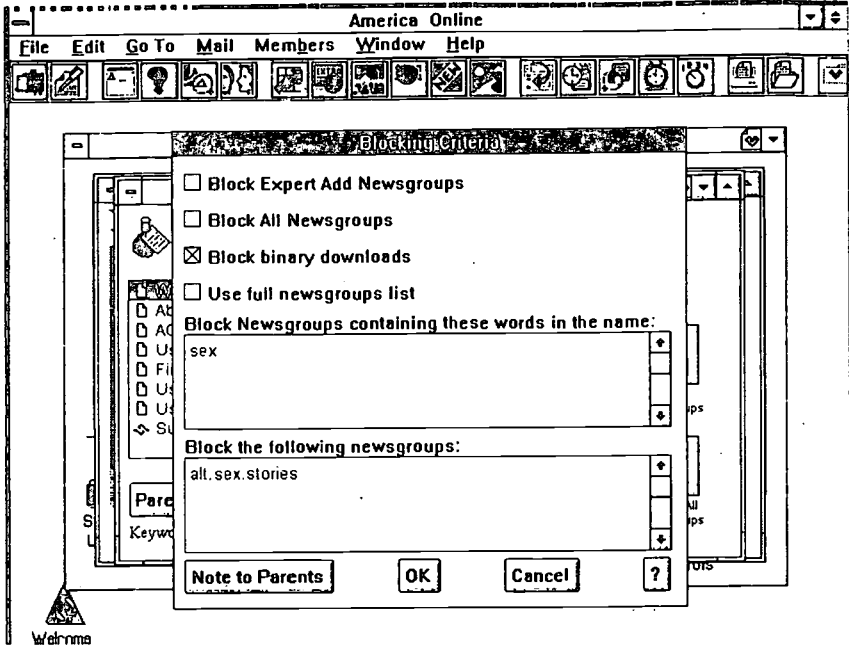
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