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COMMERCIAL DISTRIBUTION OF MATERIAL HARMFUL TO MINORS ON WORLD WIDE WEB

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

on

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Mr. MCCAIN, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 1482]

The Committee on Commerce, Science, and Transportation, to which was referred S. 1482, "A Bill to amend section 223 of the Communications Act of 1934 to establish a prohibition on commercial distribution on the World Wide Web of material that is harmful to minors, and for other purposes", having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The bill, S. 1482, creates a requirement that those engaged in the business of the commercial distribution of material that is harmful to minors through the World Wide Web (Web) restrict access to such material by minors under 17 years of age.

Commercial transactions in material harmful to minors on the Web occur through the use of a verified credit card, debit account, adult access code, or adult personal identification number (PIN). However, purveyors of such material generally display many unrestricted and sexually explicit images in order to advertise and entice the consumer into engaging in a commercial transaction. Children can move from Web page to Web page, viewing and downloading this material without restriction.

S. 1482 addresses this problem by requiring the Web page operator engaged in the business of the commercial distribution of such material to place material harmful to minors on the other side of the verification wall by requiring one of the aforementioned verification procedures before displaying explicit images.

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The bill was introduced in response to the Supreme Court ruling on the "indecency" and "patently offensive" provisions of the Communications Decency Act, and addresses the concerns of the Court in the case, Reno v. ACLU, 117 S. Ct. 2329 (1997).

S. 1482 presents no ban on the distribution or display of material harmful to minors. Rather, it simply requires the sellers of such material to recast their message in such a way as not to be readily available to children.

BACKGROUND AND NEED

The World Wide Web

It is beyond question that a substantial amount of sexually explicit material is readily available on-line, and that such material may be easily viewed within the United States by anyone possessing a computer, a mouse, and access to the Internet. This includes minor children, under 17 years of age.

The World Wide Web (Web) is a portion of the Internet that utilizes a formatting language known as hypertext markup language (HTML). HTML documents may consist of text, images, and sound. Information is published on the Web on "home pages." Home pages are established and operated by individuals and organizations, for personal use, not-for-profit, or for-profit. In addition, HTML allows home page operators to create "links" from their respective pages to other documents residing on other computers elsewhere on the Internet.

People navigate the Web through the use of "search engines." Search engines allow the user to search for information by typing in one or a series of search terms. The search engine then presents the user with a list of sites that include the key words contained in the search term(s). The list is not limited to the topic, but rather to the words included in the search.

Exposure To Sexually Explicit Material Harms Children

A child's sexual development occurs gradually through childhood. Exposure to pornography shapes children's sexual perspective by providing them information on sexual activity. However, the type of information provided by pornography does not provide children with a normal sexual perspective.

To children, pornography is instructional in that it provides a visual message about new information. However, that information is not an accurate portrayal of human sexuality. Photographs, videos, magazines, and virtual games which portray rape and the dehumanization of females in sexual scenes are powerful forms of sex education. Unlike learning provided in an educational setting, exposure to pornography is counterproductive to the goal of healthy and appropriate sexual development in children. It teaches without supervision or guidance, inundating children's minds with graphic messages about their bodies, their own sexuality, and those of adults and children around them. [1]

Many people—including children and adolescents—learn about sex through pornography; it shapes their beliefs, attitudes, and expectations . . . . The prevalence of violent, abusive, and degrading

[1] Dr. Gary Brooks, Assistant Chief of Psychology Services, Department of Veterans Affairs, The Centerfold Syndrome (1995).

pornography can induce beliefs that such practices are not only common, but acceptable. [2]

It is critical to the normal sexual development of children to shield them from sexually explicit material that serves to distort normal sexual development. "Our children live in a society whose psychological and social contexts do not stress the differences between adults and children. We may safely assume that media play an important role in the drive to erase differences between child and adult sexuality . . . . The traditional restraints against youthful sexual activity cannot have great force in a society that does not, in fact, make a binding distinction between childhood and adulthood." [3]

The Government Has A Compelling Interest In Protecting Children

The Supreme Court's precedent is clear in establishing the government's compelling interest in protecting children from exposure to sexually explicit material. The Court has repeatedly articulated such an interest in Ginsberg v. New York, 390 U.S. 629, 636-43 (1968); FCC v. Pacifica Foundation, 438 U.S. 726, 748-50 (1978); New York v. Ferber, 458 U.S. 747, 757 (1882); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126-128 (1989); Denver Area Ed. Tel. Consortium v. FCC, 116 S. Ct. 2374, 2391 (1996); and Reno v. ACLU, 117 S. Ct. 2329 (1997). As stated by the Court: "It is evident beyond the need for elaboration that the State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'." (Ferber at 757). "This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." (Sable at 126).

Though the primary responsibility for children resides with the parent, the parent deserves the support of the law in protecting the welfare of the child. This principle is of particular importance as it relates to shielding children from exposure to sexually explicit material over the Web, where they may be exposed to such material outside the home, at a friend's house, at the local library, or at school. "While the supervision of children's reading may be best left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them." [4]

Moreover, there is unanimous precedent for resting a reasonable burden of restricting children's access to sexually explicit pornography upon the content provider. [5]

It is this compelling interest in protecting children which S. 1482 seeks to address. The bill seeks to restrict access to commercial pornography on the Web by requiring those engaged in the business of the commercial distribution of material that is harmful to minors to take certain prescribed steps to restrict access to such material by minors under 17 years of age.

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[2] Jerry Bergman, Ph.D., The Influence of Pornography on Sexual Development: Three Case Histories.
[3] Neil Postman, The Disappearance of Childhood.
[4] People v. Kahan, 15 N.Y.2d 311, 312, 206 N.E.2d 333, 334 (1965), cited in Ginsberg at 640.
[5] See FCC v. Pacifica, 438 U.S. 726 (1978). See also: Sable Communications of Cal. v. FCC, 492 U.S. 115 (1989), Ginsberg v. New York, 390 U.S. 629 (1968).

Voluntary Measures

The principal methods of voluntarily restricting children's access to sexually explicit material over the Web are the Platform for Internet Content Selection (PICS), a standard protocol for reacting to ratings services such as Recreational Software Advisory Council (RSACi) and Safesurf, and blocking and screening software on the end-user computer and/or on the server or ISP level (such as X-Stop, N2H2, Net Nanny, SurfWatch, Cyber Patrol, Net Shepherd, etc.).

PICS was developed by the World Wide Web Consortium and is designed to allow third party organizations or the actual content provider to rate Web sites according to content. Users would then utilize the ratings to block these sites according to their preference.

The PICS solution has yet to be proven effective. PICS relies on the voluntary efforts of the purveyor of sexually explicit images, those deriving profit from the sale of such material, to rate their site off-limits. There is no incentive for the commercial pornography operator to rate sites, and they have every financial incentive not to rate them. The result is that rated sites are "more the exception than the rule."[6]

There are several different types of blocking software on the market, each offering various combinations of features. One approach is to block access to a pre-established list of Internet and Usenet sites. Another is to screen out sites that contain certain words or combinations of words. Some software also screens out certain types of files.

As stated above, users navigate the Web by use of search engines, keying in terms or combinations of terms designed to locate content of interest. "Web surfers looking for porn typically tap into such search services and use keywords like 'sex' and 'XXX.' But so many on-line sex shops now display those words that their presence won't make a site stand out in a list resulting from a user's query. To get noticed, pornographers increasingly try to trick search engines into giving them top billing—sometimes called 'spoofing'."[7] As a result of the aggressive tactics of commercial pornographers, search terms such as "water baby," a popular children's doll, and "fiesta" will produce commercial sites displaying graphic pornography.[8]

Congress Can Enact Laws To Protect Children From Sexually Explicit Material

As stated, the Government has a compelling interest in protecting the physical and psychological welfare of children. Further, the government may enact laws designed to shield children from exposure to sexually explicit material.[9] Most relevant to this bill, the Court, in its ruling against the indecency provisions of the Communications Decency Act, reaffirmed "the legitimacy and importance of protecting children from harmful materials."

In fact, in ruling against the indecency portions of the CDA, the Supreme Court examined various methods of restricting sexually explicit material such as "making exceptions for messages with ar-

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[6] "Web Site Ratings—Shame on Most of Us," P.C. Week, February 3, 1997.
[7] "The Erotic Allure of Home Schooling," Fortune, September 8, 1997.
[8] Testimony of Sen. Dan Coats, Senate Committee on Commerce, Science, and Transportation, Hearing on Indecency on the Internet, February 10, 1998.
[9] See Ginsberg v. New York, Pacifica, Denver Area, supra.

tistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial web sites—differently from others, such as chat rooms." [10]

S. 1482 is Narrowly Tailored to Meet The Compelling Interest of Protecting Children From Exposure to Sexually Explicit Material and it Protects the First Amendment Rights Of Adults

S. 1482 amends Section 223 of the Communications Act of 1934 (47 U.S.C. 223), creating a requirement that whoever, via the Web, is "engaged in the business of the commercial distribution of material that is harmful to minors shall restrict access to such material by persons under 17 years of age."

The bill addresses the specific concerns of the Supreme Court in its ruling on the CDA in several key ways. In ruling against the indecency portions of the CDA, the Court stated that "the government interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults." [11]

The principal concern of the Court with the CDA was that the "indecency" and "patently offensive" content standards used in the challenged sections of the CDA were overly vague as applied to the Internet. In particular, the Court pointed to the lack of an exception for materials with redeeming social value. The Court came to this conclusion despite the existence of substantial legislative history demonstrating the contrary. [12]

The Court also was concerned that the defenses to prosecution under the CDA were not technologically feasible for certain on-line services such as E-mail and chat rooms. On the Web, where technological feasibility was acknowledged, the Court was concerned that such measures would be cost prohibitive to some non-commercial content providers. With regard to restricting access by minors by requiring use of a verified credit card or adult identification, the Court in Reno noted: "Such verification is not only technologically available but is used by commercial providers of sexually explicit material. These providers, therefore, would be protected by the defense. Under the findings of the District Court, however, it is not economically feasible for most non-commercial speakers to employ such verification." [13]

The Committee notes the FCC's dial-a-porn regulations, mentioned with approval in Sable, 109 S. Ct. at 2833-34, 2838, that provided a defense by allowing a provider, before transmission of a message, to restrict customer access by requiring either payment by credit card or authorization by access or identification code. The Court found that such commercial restrictions would be effective in excluding most juveniles, stating: "For all we know from the record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people will manage to secure access to such messages."

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[10] Henry Cohen, Legislative Attorney, American Law Division, Congressional Research Service, Obscenity: Constitutional Principles and Federal Statutes.

[11] Reno v. ACLU, 117 S. Ct. at 2346.

[12] See Conf. Rep. No. 104-230, at 188-91, 1996 U.S.C.C.A.N. Leg. Hist. 201-05. See also, 141 Cong. Rec., July 12, 1995, S. 9770-75, and 141 Cong. Rec., June 14, 1995, S. 8328, 8337, 8386.

[13] 117 S. Ct. at 2349.

Finally, the Court was concerned that the CDA wrested primary authority over the child from the parent should the statute be construed to make criminal a parental choice to make sexually explicit material available to a child.

S. 1482 Prohibits Government Content Regulation On The Web

The bill provides no ban on content. Rather, it simply requires that commercial pornographers on the Web recast their message in such a way as not to be readily accessible by minors. In order to remove any ambiguity concerning the intent of the bill, specific language is provided expressly prohibiting government content regulation under the legislation.

S. 1482 Conforms With The Court's Opinion In Reno v. ACLU

S. 1482 adopts the harmful to minors content standard. The constitutional application of the "harmful to minors" standard was established in Ginsberg v. New York. Harmful to minors laws are used to regulate the commercial distribution of pornography to minors. Forty-eight states have harmful to minors laws.

In its opinion in Reno v. ACLU, the Supreme Court contrasted the constitutional application of the harmful to minors standard upheld in Ginsberg, with the statutory construction of the challenged sections of the CDA and the use of the "indecent" and "patently offensive" content standards. It is this analysis which is the foundation for the constitutionality of S. 1482.

The Court outlined four specific differences between Ginsberg and the CDA. First, the Court wanted the discretion of a parent to purchase prohibited materials for their children to be preserved. Second, the Court pointed out that the New York statute upheld in Ginsberg was limited to only commercial transactions. Third, the harmful to minors standard contains a serious value element ensuring that material that possesses serious literary, artistic, political, or scientific value would not be swept up in the statute. Finally, the New York statute upheld in Ginsberg defined a minor as someone under 17 years of age.[14] All four of the concerns are directly addressed in the bill.

Parents Maintain Authority And Minor is Defined As Those Under 17 Years of Age

S. 1482 contains no restriction on the discretion of the parent to purchase material for their children who fall within this age group. The bill simply requires the content provider to implement certain procedures designed to restrict access by minors. Parents desiring to do so may purchase or display such material for their child. A minor is defined under the bill as persons under 17 years of age.

Scope is Limited To Commercial Transactions

The bill is strictly limited to those "engaged in the business of the commercial distribution of material that is harmful to minors." The term "engaged in the business" is taken directly from 18 U.S.C. § 1466(b), and the Committee intends to give the phrase the same meaning established therein, substituting the term "obscene matter" with the term "harmful to minors."

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[14] 117 S. Ct. at 2341.

Materials with Serious Literary, Artistic, Political, and Scientific Value are Protected

The bill provides a three-prong test to determine material "harmful to minors." All three prongs must be met in order for the material to be determined "harmful to minors." The third prong stipulates that the material must "lack serious literary, artistic, political, or scientific value." The Committee intends, in considering this third part of the test, that the material be taken as a whole, and that it be considered in the context of what has value as to minors.

The "harmful to minors" standard is also familiar to the federal courts, even though that standard is not used in present federal statutes, since the federal District Courts and U.S. Courts of Appeals have routinely heard challenges to state "harmful to minors" display laws and upheld those laws on a regular basis over the years. See, e.g., American Booksellers v. Webb, 919 F.2d 1493 (11th Cir. 1990); American Booksellers Ass'n v. Com. of Va., 882 F.2d 125 (4th Cir. 1989) (which, on remand from the Supreme Court, upheld Virginia's "harmful to minors" display law in Commonwealth v. American Booksellers Ass'n., 372 S.E.2d 618 (Va. 1988)); Upper Midwest Booksellers v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985); M.S. News Co. v. Casado. 721 F.2d 1281 (10th Cir. 1983). It is reasonable to conclude that, since issues of "Penthouse" magazine have been found "obscene" as a matter of law in federal courts (Penthouse v. McAulliffe, 610 F.2d 1353 (5th Cir. 1980); Penthouse v. Webb, 594 F.Supp. 1186 (N.D.Ga. 1984)), such a "men's" magazine would certainly be found "harmful to minors" (like those magazines in Ginsberg v. New York), and thus would be restricted from distribution or display to minors on the Web under that standard.

Verification Procedures Are Technically And Economically Feasible

The scope of the bill is strictly limited to commercial activity and to the Web. As such, the technical and economic feasibility concerns of the Court are both addressed. As stated, the Court acknowledged the technological and economic feasibility of restricting access on the Web by means outlined under the bill. [15]

In fact, the use of the verification means prescribed under S. 1482 are standard practice among commercial pornographers on the Web. However, "most adult sites have teasers (pornographic images displayed without age verification) so that the user will look further into the pages." [16] As to the economic feasibility of commercial content providers" complying with the bill, it is not only feasible but profitable for them to do so. Adult verification systems (AVS) providers generally pay commissions to pornographic site operators who provide referrals to the AVS provider. [17] There is a broad range of AVS services available to users, with many subscription options and payment methods including credit card, check, and money order. Users have many options as methods to

[15] 117 S. Ct. at 2337 ("Technology exists by which an operator of a Web site may condition access on the verification of requested information such as a credit card or an adult password."); 117 S. Ct. 2347 (Unlike the regulations upheld in Ginsberg and Pacifica, the scope of the CDA is not limited to commercial speech or commercial entities.)

[16] Committee Testimony, Undercover Detective, Committee on Commerce, Science and Transportation, Hearing on Internet Indecency, February 10, 1998. See also, Testimony of Seth Warshavsky.

[17] See, e.g., http://www.adultcheck.com/cgi-bin/merchant.cgi?2078

subscribe, such as E-mail, phone, fax, and mail.[18] In fact, given that the scope of the bill is limited to commercial activity, and that the AVS procedures prescribed under the bill represent standard procedures for conducting commercial activity on pornographic Web sites, the effect of the bill is simply to reorder the process in such a way as to require age verification before pornography is made available, essentially requiring the commercial pornographer to put sexually explicit images on the other side of a verification wall that already exists. The commercial pornographer is not otherwise restricted in his trade.

LEGISLATIVE HISTORY

Congress has had extensive involvement with the issue of the availability of sexually explicit material to minors on the Internet. This history begins with the introduction of the Communications Decency Act of 1995 (CDA), introduced during the 104th Congress as S. 314. The Senate Committee on Commerce, Science and Transportation amended the bill and added it to S. 652, the Telecommunications Competition and Deregulation Act of 1995, which it reported on March 30, 1995.[19] During floor consideration of S. 652, an amendment was offered by Senators Exon and Coats further modifying the CDA provisions of S. 652. Extensive debate occurred on the amendment, with the Senate adopting it by a vote of 84-16 on June 14, 1995.[20] S. 652 was passed by the Senate on June 15, 1995, and by the House on October 12, 1995. On December 6, 1995, during the House/Senate Conference Committee on the Telecommunications Act, the House conferees voted during private session to adopt the Senate provisions on computer indecency. Conference reports to accompany S. 652 were filed by the House on January 31, 1996[21], and by the Senate on February 1, 1996.[22] President Clinton signed S. 652 into law on February 8, 1996, as Public Law 104-104, the Telecommunications Act of 1996.[23] Title V of that law is the Communications Decency Act of 1996.

Two provisions of the CDA were challenged in District Court, with the three judge panel that initially heard the case granting a preliminary injunction against enforcement.[24] Ultimately, the Supreme Court struck down the "indecency" and "patently offensive" provisions of the CDA.

S. 1482 was introduced by Senator Coats on November 8, 1997. At the time of introduction, Senator Coats submitted an extensive floor statement responding to the Court's opinion in ACLU v. Reno and outlining how the legislation conforms to the opinion. On January 27, 1998, Senators Lott and Inhofe were added as co-sponsors.

On February 10, 1998, Senator McCain chaired a Committee on Commerce, Science, and Transportation hearing on Indecency on the Internet. The Committee heard extensive testimony regarding pornography on the Internet, the threat it poses to the physical and

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[18] See, e.g., http://www.validate.com/cgi-bin/validate/member.pl?150224, http://ishield.com/siterefer.cfm?siteid=trevor

[19] S. Rep. No. 104-23, 104th Cong., 1st. Sess. (1995).

[20] Cong. Rec., June 14, 1995, at S. 8328-8347.

[21] H. Conf. Rep. No. 104-458, 104th Cong., 2d. Sess. (1996).

[22] S. Conf. Rep. No. 104-230, 104th Cong., 2d. Sess. (1996).

[23] 110 Stat. 56 (1996).

[24] 929 F.Supp. 824, 883 (E.D. Pa. 1996).

psychological well-being of children, and how S. 1482 would address the problem of easy access to commercial pornography on the Web by children.

On March 12, 1998, the Committee on Commerce, Science and Transportation met in open executive session and ordered S. 1482 reported by voice vote.

SUMMARY OF MAJOR PROVISIONS

The provisions of S. 1482 are summarized below as they appear in the bill.

1. The bill amends section 223 of the Communications Act of 1934 (47 U.S.C. § 223) by inserting a new subsection (e).

2. Subsection (e)(1) establishes a requirement that whoever is engaged in the business of the commercial distribution of material that is harmful to minors shall restrict access to such material by minors under 17 years of age.

3. Subsection (e)(2) establishes that a person found guilty of violating the requirement may be fined not more than $50,000, and imprisoned not more than six months, or both.

4. Subsection (e)(3) establishes that any person found to be in intentional violation of the requirement may be fined up to $50,000 for each day that the person is found to be in violation.

5. Subsection (e)(4) establishes a civil fine of not more than $50,000 for each day of violation.

6. Subsection (e)(5) establishes an affirmative defense to prosecution if the defendant restricted access to material harmful to minors under 17 years of age by prescribed means.

7. Subsection (e)(6) expressly prohibits the Commission from regulating in any manner the content of any information on the Web.

8. Subsection (e)(7)(A) establishes a three prong test to define "material that is harmful to minors." Material must appeal to the prurient interest in sex, must depict sexually explicit material, in a patently offensive way with respect to what is suitable to minors and—taken as a whole—must lack serious literary, artistic, political, or scientific value for minors. Subsection (e)(7)(B) assigns the terms "sexual act"[25] and "sexual contact"[26] the same meanings as assigned them in section 18 U.S.C. 2246.

9. Finally, the bill requires the Department of Justice and the Federal Communications Commission to post on their Web sites information necessary to inform the public of the meaning of the term "material that is harmful to minors."

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[25] 18 U.S.C. § 2246(2) defines "sexual act" as: "(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; (B) contact between the mouth and penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."

[26] 18 U.S.C. § 2246(3) defines "sexual act" as: "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

[Insert CBO letter, attached as page(s) —— through ——]

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

The legislation creates a requirement that those engaged in the commercial distribution of material harmful to minors on the Web restrict access to such material by minors under 17 years of age. The legislation creates no regulatory oversight. In fact, S. 1482 expressly prohibits the Federal Communications Commission from exercising regulatory authority over Web content under the bill.

Section 1(e)(5) establishes several affirmative defenses to prosecution for those engaged in such commercial activity on the Web. These defenses are that the defendant restricted access by means of requiring use of a verified credit card, debit account, adult access code, or adult personal identification number, or in accordance with such other procedures as the Commission may prescribe.

As previously established the technological requirements established under this section are standard throughout the commercial pornography industry on the Web. As such, the legislation does not create a new regulatory requirement. Rather, it requires the content provider to recast their message, placing material harmful to minors on the other side of the pre-existing verification technology. As such, the number of persons affected by this legislation is nominal.

ECONOMIC IMPACT

As stated, the adult verification system (AVS) requirements under this bill are standard throughout the commercial pornography industry on the Web. AVS services are generally provided free-of-charge to the Web site operator. In fact, the operator is often paid a referral fee for clients he refers to the AVS provider. This creates a revenue center for the operator. Thus, there is no negative economic impact on the commercial content provider.

The scope of the legislation is limited to commercial Web sites. Any customer utilizing the site is currently required to utilize an AVS service in order to participate in an economic transaction on the site. Therefore, the legislation poses no new economic burden on the consumer.

PRIVACY

The AVS system procedures established as affirmative defenses to prosecution under the legislation do require the customer to provide basic personal information necessary to establish their age. However, as stated, these procedures are the status quo on the Web. As such, the legislation will not present any new threat to privacy.

PAPERWORK

The legislation creates no paperwork requirement.

SECTION-BY-SECTION ANALYSIS

Section 1. Prohibition on commercial distribution on the World Wide Web of material that is harmful to minors.

This section, which is the only section of the bill, adds a new subsection (e) to section 223 of the Communications Act of 1934.

(1) Subsection (e)(1) establishes the requirements under the bill, requiring that "whoever, through interstate or foreign commerce in or through the World Wide Web, is engaged in the business of the commercial distribution of material that is harmful to minors shall restrict access to such material by persons under 17 years of age."

The term "engaged in the business" is assigned a specific definition in 18 U.S.C. § 1466(b).[27] The Committee intends that this term be interpreted as having the same meaning, as applicable to the World Wide Web, under S. 1482, substituting the term "material that is harmful to minors" for the term "obscene matter." As such, anyone engaged in the business of commercial distribution of material that is harmful to minors is any person who sells or transfers or offers to sell or transfer material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit, although it is not necessary that the person make a profit or that the selling, or transferring, or offering to sell or transfer such material be the person's sole or principal business or source of income. Finally, the Committee intends that the above described activities be interpreted as to require the defendant to be knowingly engaged in such activities, with scienter of the overall character and sexually explicit nature of the material.

By limiting the scope of the bill to only commercial activity, the bill is brought into line with the previously outlined Supreme Court discussion in Reno v. ACLU of the contrast between the CDA and the New York statute upheld in Ginsberg v. New York.

The term "minor" is established as persons under 17 years of age. Again, by defining a minor as someone under 17 years of age, the bill is brought into line with the Court's opinion in Reno v. ACLU to exclude the typical college freshman.

(2) The fines and penalties levels under S. 1482 are identical to those already contained under section 223(b)(4) and (b)(5)(A).

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[27] 18 U.S.C. § 1466(b) defines "engaged in the business" to mean: "that the person who sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit, although it is not necessary that the person make a profit or that the selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income . . . ."

Persons may be fined not more than $50,000, imprisoned not more than six months, or both. The bill further establishes that whoever is found to have intentionally violated the requirements of new subsection (e)(1) may be fined up to $50,000 for each violation, with each day of violation constituting a separate violation. In addition, the bill establishes a limit of $50,000 in civil penalties, with each day of violation constituting a separate violation.

(3) The bill establishes an affirmative defense to prosecution under the subsection if the defendant has restricted access to material harmful to minors under 17 years of age by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number, or in accordance with procedures as prescribed by the Commission.

As outlined previously, the Supreme Court, in its ruling against the CDA, acknowledged the technical feasibility of the above measures on the Web. Further, the Court acknowledged the economic feasibility for commercial content providers. What is more, it has been established that these AVS measures are generally provided, for little or no charge, to the content provider. The content provider is further paid commissions for referrals by the AVS operator. In addition, evidence shows that these AVS services present no real obstacle for adult users. The requirements under this bill are virtually identical to those ruled constitutional under the dial-a-porn statutes. Since a commercial pornographer can take a credit card or PIN from an adult to sell access to thousands of hard and soft core pornographic images, then they can take the card or PIN before showing the free teaser material to minors who seek or stumble onto those Web sites.

The bill accounts for the dynamic and evolving nature of the medium by providing that the Commission may prescribe measures that would serve as additional defenses to prosecution. The Committee anticipates that, as Web technology evolves, and new and more effective means of restricting access to pornographic material by minors are developed, the Commission may prescribe regulations that incorporate these new technologies. This provision gives the defenses a "living" quality.

(4) The bill establishes a definition of "material that is harmful to minors" that mirrors the New York statute upheld in Ginsberg v. New York, as upheld for the States since Miller v. California.[28] The definition is, in fact, a three prong test designed to determine material "obscene as to minors." It means any communication, picture, image, graphic image file, article, recording, writing, or other matter that: (1) taken as a whole and with respect to minors, appeals to the prurient interest in nudity, sex, or excretion; (2) depicts, describes, or represents sexual acts or activities, in a patently offensive way with respect to what is suitable to minors; (3) and lacks serious literary, artistic, political, or scientific value. On this third prong, the Committee intends that the material be taken as a whole and be considered in the context of serious value as to minors.

[28] 413 U.S. 15, 24-25 (1973). This decision established the three prong test for adult "obscenity" and thereby serves to modify some of the terms contained in the harmful to minors test.

This definition ensures that the bill may not be construed as to restrict access to public health information, art, literature, and political information.

(5) As previously discussed, the terms "sexual act" and "sexual contact" are given the same meanings assigned to them under 18 U.S.C. 2246. These definitions have been adopted to provide clarity as to the meaning of the material covered under the new subsection (e), as well as to provide definitions with which the courts are familiar.

(6) Subsection (b) of section 1 of the bill directs the Attorney General, in the case of the Department of Justice, and the Federal Communications Commission, each to make available on their respective Web sites information necessary to inform the public of the meaning of the term "material that is harmful to minors." This provision is designed to ensure that there is adequate information available to the public regarding the meaning of this term. By posting this information on the Web, it will be universally available with no cost to the user.

Conclusion

S. 1482 is narrowly tailored to restrict children's access to material that is harmful to minors, and at the same time, it protects the First Amendment rights of adults to view such material. The means of restricting access established under the bill are both technically and economically feasible for the commercial content provider on the Web, and present no meaningful hurdle for the potential adult consumer. The Supreme Court has repeatedly affirmed the compelling governmental interest in protecting the physical and psychological welfare of children. Further, the Court has repeatedly upheld as constitutional narrowly tailored statutes designed to restrict the commercial distribution of pornography to minors. Equally, it is an established precedent that it is the responsibility of the content provider to restrict access by minors to pornographic material, even where voluntary measures are available. For example, in Dial Information Services, the Court upheld the requirement that the "speaker" of indecent telephone speech bear the burden of keeping his speech away from children, despite the existence of commercially available blocking devices for the home.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

SEC. 223. OBSCENE OR HARASSING TELEPHONE CALLS IN THE DISTRICT OF COLUMBIA OR IN INTERSTATE OR FOREIGN COMMUNICATIONS.

(a) Whoever—

(1) in interstate or foreign communications—

(A) by means of a telecommunications device knowingly—

(i) makes, creates, or solicits, and

(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person;

(B) by means of a telecommunications device knowingly—

(i) makes, creates, or solicits, and

(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

(C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;

(D) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

(E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication; or

(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

(b)(1) Whoever knowingly—

(A) within the United States, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined in accordance with title 18, United States Code, or imprisoned not more than two years, or both.

(2) Whoever knowingly—

(A) within the United States, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(3) It is a defense to prosecution under paragraph (2) of this subsection that the defendant restricted access to the prohibited communication to persons 18 years of age or older in accordance

with subsection (c) of this section and with such procedures as the Commission may prescribe by regulation.

(4) In addition to the penalties under paragraph (1), whoever, within the United States, intentionally violates paragraph (1) or (2) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(5)(A) In addition to the penalties under paragraphs (1), (2), and (5), whoever, within the United States, violates paragraph (1) or (2) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either—

(i) by a court, pursuant to civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(6) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1) or (2). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

(c)(1) A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication specified in subsection (b) from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

(2) Except as provided in paragraph (3), no cause of action may be brought in any court or administrative agency against any common carrier, or any of its affiliates, including their officers, directors, employees, agents, or authorized representatives on account of—

(A) any action which the carrier demonstrates was taken in good faith to restrict access pursuant to paragraph (1) of this subsection; or

(B) any access permitted—

(i) in good faith reliance upon the lack of any representation by a provider of communications that communications provided by that provider are communications specified in subsection (b), or

(ii) because a specific representation by the provider did not allow the carrier, acting in good faith, a sufficient period to restrict access to communications described in subsection (b).

(3) Notwithstanding paragraph (2) of this subsection, a provider of communications services to which subscribers are denied access pursuant to paragraph (1) of this subsection may bring an action for a declaratory judgment or similar action in a court. Any such action shall be limited to the question of whether the communications which the provider seeks to provide fall within the cat-

egory of communications to which the carrier will provide access only to subscribers who have previously requested such access.

(d) Whoever—

(1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age,

any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

(e)(1) Whoever in interstate or foreign commerce in or through the World Wide Web is engaged in the business of the commercial distribution of material that is harmful to minors shall restrict access to such material by persons under 17 years of age.

(2) Any person who violates paragraph (1) shall be fined not more than $50,000, imprisoned not more than six months, or both.

(3) In addition to the penalties under paragraph (2), whoever intentionally violates paragraph (1) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(4) In addition to the penalties under paragraphs (2) and (3), whoever violates paragraph (1) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(5) It is an affirmative defense to prosecution under this subsection that the defendant restricted access to material that is harmful to minors by persons under 17 years of age by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number or in accordance with such other procedures as the Commission may prescribe.

(6) This subsection may not be construed to authorize the Commission to regulate in any manner the content of any information provided on the World Wide Web.

(7) For purposes of this subsection:

(A) The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that—

(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(iii) lacks serious literary, artistic, political, or scientific value.

(B) The terms "sexual act" and "sexual contact" have the meanings assigned such terms in section 2246 of title 18, United States Code.

[(e)] *(f)* In addition to any other defenses available by law:

(1) No person shall be held to have violated subsection (a) or (d) solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.

(2) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications.

(3) The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of this section that is owned or controlled by such person.

(4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.

(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d), or under subsection (a)(2) with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person—

(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

(6) The Commission may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d). Nothing in this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize such measures. The Commission shall not endorse specific products relating to such measures. The use of such measures shall be admitted as evidence of good faith efforts for purposes of paragraph (5) in any action arising under subsection (d).

Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.

[(f)(1)] *(g)(1)* No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this section or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

(2) No State or local government may impose any liability for commercial activities or actions by commercial entities, nonprofit libraries, or institutions of higher education in connection with an activity or action described in subsection (a)(2) or (d) that is inconsistent with the treatment of those activities or actions under this section: *Provided, however*, That nothing herein shall preclude any State or local government from enacting and enforcing complementary oversight, liability, and regulatory systems, procedures, and requirements, so long as such systems, procedures, and requirements govern only intrastate services and do not result in the imposition of inconsistent rights, duties or obligations on the provision of interstate services. Nothing in this subsection shall preclude any State or local government from governing conduct not covered by this section.

[(g)] *(h)* Nothing in subsection (a), (d), [(e), or (f)] *(f), or (g)* or in the defenses to prosecution under subsection (a) or (d) shall be construed to affect or limit the application or enforcement of any other Federal law.

[(h)] *(i)* For purposes of this section—

(1) The use of the term "telecommunications device" in this section—

(A) shall not impose new obligations on broadcasting station licensees and cable operators covered by obscenity and indecency provisions elsewhere in this Act; and

(B) does not include an interactive computer service.

(2) The term "interactive computer service" has the meaning provided in section 230(e)(2).

(3) The term "access software" means software (including client or server software) or enabling tools that do not create or provide the content of the communication but that allow a user to do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(4) The term "institution of higher education" has the meaning provided in section 1201 of the Higher Education Act of 1965 (20 U.S.C. 1141).

(5) The term "library" means a library eligible for participation in State-based plans for funds under title III of the Library Services and Construction Act (20 U.S.C. 355e et seq.).

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