

Testimony
United States Senate Committee on the Judiciary
Why the Government Should Care about Pornography
November 10, 2005

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before the Senate Committee on the Judiciary

Subcommittee on the Constitution, Civil Rights and Property Rights

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Chairman Brownback, Ranking Member Feingold, and members of the Committee, thank you for permitting the Center for Democracy & Technology to testify today. I am Leslie Harris, a Senior Consultant and the incoming Executive Director of CDT. CDT is a non-profit public interest organization founded in 1994 to promote democratic values and individual liberties in the digital age. CDT works for practical, real-world solutions that enhance free expression, privacy, and democratic participation. We are guided by our vision of the Internet as a uniquely open, global, decentralized, and user-controlled medium. We believe the Internet has unprecedented potential to promote democracy, by placing powerful communications technology in the hands of individuals and communities.

Although this hearing is not focused on the Internet, inevitably there will be discussion of online content, and we welcome the opportunity to address the important question of how best to achieve the goal of protecting children from inappropriate material on the Internet consistent with constitutional values and the growth and health of the Internet.

From its inception, CDT has played a leading role in policy debates on how to protect children from inappropriate material online. In Congress, we have cautioned against overreaching and ultimately unconstitutional laws that have failed to provide any meaningful protection to children. In the courts, we have led or supported legal challenges to those unconstitutional laws. As a member of the congressionally-created COPA Commission, CDT's

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President Jerry Berman worked to evaluate the full range of approaches to protecting kids online, and joined the Commission's conclusion that filtering and other user empowerment tools (in the hands of parents) along with education, are the keys to protecting kids online

And perhaps most critically for this hearing, CDT has been at the forefront of industry and public interest efforts to support GetNetWise.org, a central user friendly resource, created by the Internet Education Foundation, that helps parent be "one click away" from the resources they need to make informed decisions about their families' use of the Internet. The site includes precautionary tips, recommended tools, short video tutorials and suggested actions to take to combat various cyber threats including kid's Internet safety and privacy. In the last year alone,

the site has attracted over 200,000 unique visitors, and is widely recognized as a critical resource for parents looking for information on how best to protect their children online.¹ Recently, GetNetWise's video tutorials and tools were integrated into the Federal Trade Commission's On Guard Online site, the only federal government effort to support the online user empowerment recommended by the COPA and Thornburgh reports.²

In any consideration by Congress of the issues surrounding sexual content on the Internet, we believe that the starting point should be the two blue ribbon panels that Congress itself directed to investigate how best to protect children in the online environment. In my testimony

today, I would like to briefly review the findings of those two blue ribbon panels, and discuss the lessons that Congress should take from those two studies. Both of those studies concluded that the most effective way to protect kids online is to combine education with the use of filtering and other technology tools to empower parents to decide what content their children should access. I will conclude my testimony with an overview of the latest efforts to make user empowerment tools more readily available as information and entertainment technologies converge.

The COPA Commission

and the Thornburgh Committee Report

In the late 1990s, Congress initiated two different studies to assess how best to protect children online. As part of the Child Online Protection Act passed in 1998 ("COPA"),³ Congress established the "COPA Commission" to "identify technological or other methods, if any, to help reduce access by minors to material that is harmful to minors on the Internet."⁴ The

Commission, which was comprised of eighteen commissioners from government, industry and advocacy groups, representing a wide variety of political affiliations,⁵ evaluated and rated

1 <http://www.getnetwise.org>.

2 <http://www.onguardonline.org>.

3 47 U.S.C. § 231.

4 See COPA § 5(c), 47 U.S.C. § 231, note.

5 The members of the COPA Commission were Donald Telage, Network Solutions Inc. (Commission Chairman); Stephen Balkam, Internet Content Rating Association; John Bastian, Security Software Systems;

Jerry Berman, Center for Democracy & Technology; Robert C. Cotner, Evesta.com (resigned); Arthur H. DeRosier, Jr., Rocky Mountain College; J. Robert Flores, National Law Center for Children and Families; Albert F. Ganier III, Education Networks of America; Michael E. Horowitz, Department of Justice; Donna

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protective technologies based upon various factors including their effectiveness and implications for First Amendment values. The Commission issued a final report in October 2000.⁶

Wholly independent of the COPA Commission, in November 1998, Congress instructed the National Academy of Sciences to undertake a study of "computer-based technologies and other approaches to the problem of the availability of pornographic material to children on the Internet."⁷ More than two years in the making, the National Academy released its study – entitled "Youth, Pornography, and the Internet" – in May 2002.⁸

The committee that prepared the National Academy of Science report was chaired by former U.S. Attorney General Richard Thornburgh, and was composed of a diverse group of people including individuals with expertise in constitutional law, law enforcement, libraries and library science, information retrieval and representation, developmental and social psychology, Internet and other information technologies, ethics, and education.⁹ Over the course of its two years of study and analysis, the committee received extensive expert testimony, and conducted numerous meetings, plenary sessions, workshops, and site visits.¹⁰

These two reports represent the best available analysis of how to protect children online.

They were prepared by blue ribbon panels that included participants from a diversity of backgrounds and from across the political spectrum. Congress should study these reports carefully and consider ways to support implementation of their findings.

Rice Hughes, Author, Kids Online/Founder, Protectkids.com; William M. Parker, Crosswalk.com; C. Lee Peeler, Federal Trade Commission; Gregory L. Rohde, Department of Commerce/NTIA; C. James Schmidt,

San Jose State University; William L. Schrader, PSINet; Larry Shapiro, Walt Disney Internet Group;

Srinija

Srinivasan, Yahoo! Inc.; Karen Talbert, Nortel Networks; and George Vradenburg III, America Online, Inc.

6 The "Final Report of the COPA Commission," released on October 20, 2000, is available online in HTML

format at <http://www.copacommission.org/report/> and in PDF format at <http://www.copacommission.org/report/COPAreport.pdf>.

7 Pub. L. No. 105-314, Title IX, § 901, 112 Stat. 2991 (1998).

8 See Nat'l Research Council of the Nat'l Academy of Sciences, "Youth, Pornography, and the Internet" (2002).

The full report is also available online in HTML format at http://books.nap.edu/html/youth_internet/ and in PDF format at <http://books.nap.edu/books/0309082749/html/index.html>.

9 Thornburgh Report, at viii – x. The members of the National Academy of Science's committee were Dick

Thornburgh, Kirkpatrick & Lockhart LLP, Washington, D.C., (Chair); Nicholas J. Belkin, Rutgers University;

William J. Byron, Holy Trinity Parish; Sandra L. Calvert, Georgetown University; David Forsyth, University

of California, Berkeley; Daniel Geer, @Stake Inc.; Linda Hodge, Parent Teacher Association; Marilyn Gell

Mason, Tallahassee, Florida; Milo Medin, Excite@Home; John B. Rabun, National Center For Missing and

Exploited Children; Robin Raskin, Ziff Davis Media; Robert J. Schloss, IBM T.J. Watson Research Center;

Janet Ward Schofield, University of Pittsburgh; Geoffrey R. Stone, University of Chicago; Winifred B. Wechsler, Santa Monica, California; and Herbert S. Lin (Senior Scientist and Study Director).

10 See Thornburgh Report, at x – xi & appendix A.

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Overview of Findings by
the COPA Commission

and the Thornburgh Committee Report

Both the COPA Commission and the Thornburgh Committee reached the same basic conclusions, although the longer Thornburgh Report spelled out its conclusions in much greater detail. The most critical two conclusions are (A) in light of the global nature of the Internet, criminal laws and other direct regulations of content inappropriate for minors will be ineffective, and (B) education and parental empowerment with filtering and other tools are far more effective than any criminal law. Both of those independent, non-political comprehensive evaluations concluded that protecting children online requires a three-part approach: public education, use of technologies, and parental involvement.

The Thornburgh Committee determined that approximately three-quarters of the commercial sites offering sexually explicit material are located outside the United States.¹¹

According to the report, there are hundreds of thousand non-U.S. sexual web sites. This substantial number of sexually explicit sites outside of the United States means that U.S. criminal statutes or censorship will be ineffectual in protecting minors from sexual content on the Internet. Simply put, even if it were possible (and constitutional) to somehow make all U.S.-based sites completely inaccessible to minors, minors would still have hundreds of thousands of overseas sexual sites available to them.

The National Academy report speaks bluntly about the significance of the overseas sexual content in terms of the likely effectiveness of COPA in furthering the governmental interest:

For jurisdictional reasons, federal legislation cannot readily govern Web sites outside the United States, even though they are accessible within the United States. Because a substantial percentage of sexually explicit Web sites exist outside the United States, even

the strict enforcement of [the COPA statute] will likely have only a marginal effect on the availability of such material on the Internet in the United States. Thus, even if the Supreme Court upholds COPA, COPA is not a panacea, illustrating the real limitations of policy and legal approaches to this issue.¹²

The COPA Commission also recognized that overseas content limits the effectiveness of any one nation's laws.¹³ That Commission analyzed the effectiveness of user-side filtering and blocking technologies. The results indicate that filtering and blocking technologies are more effective for protecting children (and less restrictive of First Amendment values), than the approach taken in the COPA criminal statute.¹⁴

11 See Thornburgh Report, at 4.

12 Thornburgh Report, at 207. See also Thornburgh Report, at 360 (further detailing why U.S. laws will be ineffective).

13 See Final Report of the COPA Commission, at 13 ("Material published on the Internet may originate anywhere, presenting challenges to the application of the law of any single jurisdiction.").

14 See Final Report of the COPA Commission, at 8, 21, 25, 27.

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Similarly, the Thornburgh Committee concluded that education and technology tools were the critical components of a strategy to keep children safe online:

[T]he most important finding of the committee is that developing in children and youth an ethic of responsible choice and skills for appropriate behavior is foundational for all efforts to protect them—with respect to inappropriate sexually explicit material on the Internet as well as many other dangers on the Internet and in the physical world. Social and educational strategies are central to such development, but technology and public policy are important as well—and the three can act together to reinforce each other's value. . . .

. . . .

Technology-based tools, such as filters, can provide parents and other responsible adults with additional choices as to how best to fulfill their responsibilities. Though even the most enthusiastic technology vendors acknowledge that their technologies are not perfect and that supervision and education are necessary when technology fails, tools need not be perfect to be helpful¹⁵

And critically, the Thornburgh Report suggests that one should look beyond criminal laws for governmental and public policy actions that might help to protect children. As the report notes, "public policy can go far beyond the creation of statutory punishment for violating some approved canon of behavior." The Committee considered a wide array of alternative public policy recommendations, and concluded, for example, that:

- Concrete governmental efforts to promote Internet media literacy and educational strategies would yield superior results without any significant burden on protected speech. Specifically, the report suggests government funding for the development of model curricula, support of professional development for teachers, support for outreach programs such as grants to non-profit and community organizations, and development of Internet educational material, including public service announcements and Internet programming akin to that offered on PBS.¹⁶

- Government support of parents' voluntary efforts to employ technological solutions would provide an effective alternative to criminal laws. While recognizing that filtering technology is not perfect, the Thornburgh Report concludes that filters (which may be installed directly on a computer by end-users or available as a feature offered by an ISP) can have "significant utility in denying access to content that may be regarded as inappropriate."¹⁷

15 Thornburgh Report, at 365-366.

16 Thornburgh Report, at 384-385.

17 Thornburgh Report, at 303. The COPA Commission also identified a range of governmental actions that it

believed would significantly contribute to the protection of children on the Internet. Significantly, the passage

and enforcement of new criminal laws (like the COPA statute) was not included in the Commission's recommendations. Many of the Commission's recommendations are similar to those later made by the National Academy committee. See Final Report of the COPA Commission, at 39-46.

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These two respected blue ribbon panels – the COPA Commission and the Thornburgh Committee – provide a road map for how to effectively protect children in the online.

Importantly, both studies endorse the use of filters and other user empowerment technologies by end-users, parents and other caregivers, not by governments or by third party intermediaries (such as ISPs) pursuant to a government mandate. As these studies acknowledge, user empowerment technologies are by their nature imprecise; they often block not only illegal and adult oriented sites, but also a significant amount of valuable and constitutionally protected content. In the hands of families, user empowerment technologies are the least restrictive means of furthering the government's interest in shielding children from inappropriate content; when deployed under government mandate, those same technologies can quickly become tools of censorship.¹⁸ The COPA Commission and Thornburgh Committee recommendations are carefully crafted to avoid that result and to provide guidance on how to take effective and constitutional action to protect children online.

Looking to the Future:

User Empowerment in the
Age of Convergence

Not only do the reports of the COPA Commission and the Thornburgh Committee provide a road map to Congress, but they also provide a road map to industry and the broader community, indicating what content and technology providers should do to address concerns about children and Internet content. And critically, the industry and public interest organizations are following that road map.

As I mentioned above, leading a broad array of efforts to promote user empowerment and facilitate parents' use of technology tools to protect their children is the GetNetWise.org web site. GetNetWise is a treasure trove of information on parental empowerment tools.

GetNetWise is a project of the non-profit Internet Education Foundation, which also staffs the Internet Caucus Advisory Committee and presents speakers and panel discussions on Internet policy issues.

As we are all aware, the Internet is continuing to rapidly evolve and grow, and previously separate technologies like cable television, cellular phones, and mp3 players are on a track to converge with Internet access and to provide access to a wide range of content across multiple platforms. What is critical to note is that user empowerment tools are also continuing to evolve, and are also on a track to converge. We have seen an important example of this progress just this week.

18 A case that CDT litigated illustrates the potential for censorship arising from direct attempts to control content on the Internet. In *CDT v. Pappert*, 337 F.Supp.2d 606 (E.D. Pa. 2004), a Pennsylvania state law required that ISPs

block their customers access to designated child pornography sites. The district court struck the law down as

unconstitutional because the state's effort to block access to fewer than 400 illegal sites resulted in the blocking of

access to more than one million wholly innocent and lawful web sites.

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On Tuesday, CTIA – the trade association for the wireless industry – announced that industry’s new “Wireless Content Guidelines” and the industry’s commitment to implement “Internet Content Access Control” technologies to empower parents to be able to control the types of content that can be accessed over wireless phones and other devices. Thus, as content is spreading to new technologies, parental empowerment technology is spreading with it.¹⁹

To be sure, convergence is leading to new challenges. With the lines between various media platforms blurring, the meaningfulness of traditional industry rating schemes may erode, leading to parental confusion. At the same time, the vast majority of audio and video coming online lacks basic ratings information that would otherwise be present if delivered through traditional media channels. Further, some attempts to assign ratings information to converged content are inconsistent, counterintuitive and confusing. In short, the rules of the road are far from clear when it comes to providing ratings information in a converged media environment necessary for meaningful user empowerment.

The Internet Education Foundation has begun a new initiative to help rationalize the differing rating systems and user empowerment tools that are available for TV, movies, DVDs, video games, and other technologies. The goal is to work with industry and other stakeholders to explore ways to ensure that the existing rating schemes easily map to new, non-traditional media outlets and, that content producers of all types can encode ratings information voluntarily into media files in a manner that will enable parents to continue to use technology to control their children’s access to digital content, regardless of the platform.

The convergence of technology that we will see over the next five to ten years will certainly present new challenges for policy makers. But that same convergence will lead to new more sophisticated tools that will help to address concerns about Internet and multimedia content that may be inappropriate for children. There may be important contributions that Congress can make to that effort, most importantly, to provide leadership and support to implement the recommendations of the COPA and Thornburgh studies. The Center for Democracy & Technology looks forward to working with the Judiciary Committee on these and other measures that support the user empowerment approach to protecting kids online.

19 CTIA’s announcements are discussed at

http://www.ctia.org/news_media/press/body.cfm?record_id=1565.