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The Honorable Ted Stevens, Chairman
The Honorable Daniel K. Inouye, Co-Chairman
U.S. Senate Committee on Commerce, Science and Transportation
508 Dirksen Senate Office Building
Washington, DC, 20510-6125

Dear Chairman Stevens and Co-Chairman Inouye:

On behalf of the Center for Democracy and Technology ("CDT"), we write to express our strong concern about a provision included in the combined Burns-Kerry Amendment to H.R. 5252, the "Advanced Telecommunications & Opportunity Reform Act," that would require that mandatory government "warning labels" be affixed to a broad range of Internet content that the bill deems to be "sexually explicit." The labeling mandate is included in a broader and otherwise laudable amendment designed to protect children from sexual predators. That package has also been separately introduced in similar form in S. 3499 and S. 3432, both of which have been referred to the Judiciary Committee.

CDT strongly supports vigorous government action to address the protection of children in the online environment. But mandatory labeling of legal online content under threat of criminal sanction is ineffective, unwise, and unconstitutional. It will do nothing to protect children, but will cast a damaging chill over a broad range of legitimate and valuable content on the Internet, undermine voluntary labeling, tagging and rating programs, and invite constitutional challenge.

At the outset it is important to understand that government mandated "warning labels" will have little or no effect on online availability of adult oriented content to children. More than half of adult websites – hundreds of thousands of sites – are located outside of the United States and thus are beyond the reach of the U.S. law. Even if every U.S. website complied with the proposed labeling mandate, there would still be a vast quantity of sites that children could access.

The great bulk of adult sites – critically, including overseas adult sites – can already easily be identified and filtered now either because of obvious text such as "xxx" or "sex," or because they have voluntarily chosen to label their content. A recent announcement by the Free Speech Coalition, the principal trade association of the adult industry, to adopt "best practices" that include voluntary labeling makes clear that

voluntary labeling is fast becoming an industry standard. Voluntary labels, moreover, can be far more robust and informative than the one-size-fits-all label mandated in this legislation. These efforts should be encouraged, not swept aside.

Congress has been repeatedly rebuffed by the Supreme Court for its ill-conceived attempts to exert control over legal Internet content. The content labeling language now under consideration suffers from the same vagueness and over breadth problems that led the Court to strike down the Communications Decency Act (“CDA”) and the Child Online Privacy Protection Act (“COPA”). The broad language of the bill – which would apply to all “depictions” that are “sexually explicit” (including depiction with no nudity or actual sex acts) – would apply to many R rated movies, some PG, PG-13 and TV-PG content, music lyrics, art, and pages of text in online books, magazines and other publications.

Furthermore, under the vague definition of “primarily for commercial purposes,” sites supported by banner ads which offer important information on safe sex or other sexual matters and not for profits that may sell tickets or other merchandise appear to be covered as well. Indeed, under at least one court interpretation, content with no nudity may be found to meet the definition of “sexually explicit.” It is hard to overstate the broad chill that such a law would cast over the Internet, leading content creators to either self censor or attach a label to their site that they do not believe appropriately describes their site.

In addition to over breadth and vagueness concerns, a labeling bill would unconstitutionally compel speech by requiring that a “digital scarlet letter” be affixed to material that is legal and in many cases valuable. Courts have repeatedly struck down as unconstitutional “forced speech” labeling requirements that require a negative message to discourage children from accessing inappropriate content. These constitutional concerns would – as with CDA and COPA – lead to years of litigation that cost significant amounts of money and distract from the effort to protect kids online.

Moreover, in the Internet context, labels do not merely serve as a guide for parents, they are often relied on by filtering companies to block access to content altogether. Faced with a criminal law that forces web operators to attach a “sexually explicit” label that does not appropriately describe their content, and which may be used by filtering companies to literally disappear their content from view, most speakers will be forced to self censor their content. This is a result that the First Amendment does not permit.

While a labeling mandate would do nothing to protect children, it would do great harm to the voluntary rating and labeling initiatives – such as those provided by MPAA, ESRB, and RIAA – that consumers and developers of filtering and other user empowerment tools understand and rely on to make judgments about appropriate content for children. Those well-understood labels would either be preempted altogether by the government warning label or would co-exist on a site with that label, leading to confusion and dilution

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of the value of voluntary labels. At the same time, the use of more granular and robust labeling systems (such as those developed by the Internet Content rating Association) would be undermined. As the experience with the government mandated V-Chip in televisions makes clear, government mandates chills innovation and freeze technology in its tracks.

In conclusion, CDT strongly urges that the mandatory labeling provision be removed before there is further consideration of the telecommunications legislation. This controversial and unconstitutional provision will do nothing to protect children, but it will do great damage to the Internet and to voluntary efforts – now and in the future – to develop robust tools to empower users to make content decisions for their families.

We look forward to working with the Committee on this important issue.

Sincerely,

Leslie Harris
Executive Director

John Morris
Staff Counsel

cc: Members of the Committee on Commerce, Science and Transportation