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To: The Commission On Online Child Protection
C/o Kristrin Hogarth Litterst
Dittus Communications Inc.
1000 Thomas Jefferson Street, N.W.
Suite 311
Washington, D.C. 20007

Comments of Morality in Media, Inc.

I. Introduction

The Commission, in pursuit of its mandate from Congress, to “conduct a study to identify technological or other methods that will help reduce access by minors to material that is harmful to minors, seeks input from the general public to achieve that goal.” These “Comments” of Morality in Media are designed to assist the Commission in reaching its objective.

At the outset, this organization wishes to inform the Commission that it is certainly in favor of the existence of this study group. The concept of this Commission originated with Morality in Media. The tenor of our comments is to the effect that requiring filters by the users of the Internet--be they parents, school officials or libraries--is not the ultimate answer. A necessary part of the answer, says this organization, is to enforce existing "adult" obscenity laws and to utilize the approach made by the Child Online Protection Act (with suggested amendments held in reserve pending final determination of the constitutionality of COPA).

II. Enforcement of the Existing Obscenity Laws

The Commission mandate requires it to study not only technology but also “other methods” that will help reduce access by minors to material harmful to minors. "Adult" obscenity is, by definition, harmful to minors. The current Justice Department, which has a unit entitled “Child Exploitation and Obscenity Section,” has adamantly refused to enforce the existing laws against Internet obscenity.

The Congress, through the House Commerce Committee, on May 23, 2000 conducted a hearing on Internet Obscenity. Deputy Assistant Attorney General Alan Gershel acknowledged that the Justice Department's online enforcement efforts focus on child pornography. Neither Gershel nor another spokesperson for the Justice Department present at the hearing could recite any convictions or prosecutions of online obscenity since 1995. Representative Steve Largent stated, "Today we turned over a rock and uncovered some of the most horrible and unspeakable examples of Internet obscenity, a national scourge which the Justice Department allows to proliferate in our homes, schools and public libraries due to its lack of prosecution of federal obscenity law."

As an outcome of this hearing, Representative Largent and others introduced a bill to authorize up to \$5 million to be used by the Justice Department specifically for the hiring and training of staff, travel and other necessary expenses to prosecute obscenity cases.

The first suggestion of Morality in Media to the Commission therefore is to recommend vigorous enforcement of the federal laws against Internet obscenity, that is 18 U.S.C. 1462 and 1465. Section 1465 reads in part as follows:

Whoever knowingly transports or travels in, or uses a facility or means of, interstate or foreign commerce or an interactive computer service ... in or affecting such commerce for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both.

II. Filters are not the Ultimate Answer

1. The Onus Should be on the Purveyor

The tradition of the federal and state laws on obscenity and harmful to minors is to put the onus for restricting such material on the purveyor of the material, not on the recipient. This is also true in the broadcast indecency field. The parent is not obliged to rise from his or her couch and switch the dial. The one profiting from the obscenity or indecency must abide by the laws of our country. There is a principal in this nation that the government has a right to maintain a decent society. This includes, inter alia, the means of telecommunication commerce between the states and between the United States and foreign nations. To enforce prohibitions on material that is illegal to minors stops the proliferation of such material at the source and is the most efficient and sure way to protect children.

2. A Law Requiring Filters May be Ruled Invalid

This Commission is required by law to include expert technologists, including members engaged in the business of providing Internet filtering or blocking services or software. Morality in Media suggests that the Commission turn to such technologist members and ask them: (1) Are they familiar with the legal definitions of obscenity and material harmful to minors? (2) Do they presently use or could they use these legal definitions as the test to decide what material is to be filtered or blocked? and (3) Is it not true that presently the only thing that filtering or blocking software restricts are sites that in the past have transmitted “sexually explicit” material?

If their answer to the first question is yes. And their answer to the second question is no. And their answer to the third question is yes, then any attempt to use current filtering or blocking software (such as now embodied in the McCain and Santorum bills) or any effort by this Commission to champion the same as the solution for schools or libraries or otherwise, may run into a brick wall known as the Supreme Court of the United States.

Now why do we say this? It is obvious that filtering or blocking software, as presently used, and as conceivably used in the future, cannot apply the obscenity test or the test of harmful to minors. Let us look to the language of the COPA and 47 U.S.C. Sec. 231. It reads as follows:

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 is obscene or that (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

It goes without saying that no technology or software can determine:

1. How the average person would view the material?
2. Who is the average person?
3. What the community standards are?
4. What material appeals to the prurient interest?
5. What material is patently offensive?
6. Whether or not the depiction is artistic?
7. Whether it is political?
8. Whether it is scientific?
9. Whether it is literary?
10. Whether the value is serious?
11. How to apply "taken as a whole."
12. All the above with respect to minors.

It is true that a storekeeper, judge, jury or commercial distributor of explicit sexual material is called upon to apply such criterion, but they are living, thinking, live individuals--not so a machine. As a matter of fact, the filtering or blocking software blocks sites-- not what the statute calls for.

You may say that there are live individuals who program the machines and they can make such determinations. Aside from the fact that that is just not what is done, such a suggestion may run into another constitutional brick wall called the "Unlawful delegation of legislative authority." The cases are numerous that a person cannot be made a criminal by a non-governmental authority that makes decisions on what is lawful or unlawful. This is best illustrated by the attempts of legislators to utilize the Motion Picture Association of America's Ratings Standards to make binding decisions on what is obscene or harmful to minors as outlined below.

The Supreme Court in *A.L.A. Schechter Corp. v. United States*, 295 U.S. 495 (1935), held the Roosevelt Era National Industrial Recovery Act unlawful on this basis. The Live Poultry Code, which was part of the Act, delegated to industry groups the right to establish codes of fair competition. The law covered criminal penalties for violations. The Court said:

The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested.

There are a number of cases in the Motion Picture field which hold that the use of the MPAA Rating Standards in a statute or ordinance is an unlawful delegation of legislative authority because standards by which the movie industry rates its films do not correspond to the *Miller v. California* criteria. These cases will undoubtedly be used by the opponents of filtering or blocking software as precedents for rejecting software that apparently can only block "explicit sex" sites. In *Swope v. Lubbers*, 560 F.Supp 1328 at 1334, we find the following:

...it is well established that the Motion Picture ratings may not be used as a standard for a determination of constitutional status. (Quoting cases.) ...The standards by which the movie industry rates its films do not correspond to the *Miller v. California* criteria...

In *Eastern Federal Corp. v. Wasson*, 316 S.W.2d 373 at 374, the Supreme Court of South Carolina said:

We have concluded that the statute in question (taxing X-rated films) constitutes an unconstitutional delegation of legislative power. *See also, Motion Picture Association of America v. Specter*, 315 F.Supp. 824 (E.D. Pa. 1970); *Engdahl v. City of Kenosha*, 317 F.Supp 1133 (E.D. Wis. 1970); *Potter v. State*, 509 P.2d 933 (Okl. Ct. App. 1973); *State v. Watkins*, 203 S.E. 2d 429 (So. Car. Sup. Ct. 1973), *appeal dismissed*, 418 U.S. 911 *Cf. Private Censorship of Movies*, 22 Stan. L. Rev. 613 (1970); *Cf. Private Ratings of Motion Pictures*, 59 Geo. L. Rev. 1207 (1971).

3. If the Commission Recommends Filtering or Blocking Software, the Solution May Fail

Based on the above analysis of relevant legal principles and current technology, it is quite possible that if the Commission recommends the mandatory use of filtering or blocking software as the "Solution," such recommendation, if enacted into law as the ultimate solution and rejected, will leave the country with no control over material that is harmful to minors over the Internet. Because this is a real concern, Morality in Media recommends that such software not be relied on as the entire solution, but that the provisions of COPA be re-examined and that amendments be recommended in the event the present COPA is held invalid by the Supreme Court.

4. Present Filters Will Likely Block Material That is Protected Expression for Minors

As we have indicated above, filters that block sites that contain "explicit" sexual material are not programmed (and probably cannot be programmed) to apply the *Miller v. California* criteria or the COPA definition of harmful to minors. For this reason alone, it would appear that "explicit" sexual material having serious (for minors) artistic, political, scientific or literary value (and therefore protected expression for minors) may be blocked. This again gives opponents of filtering an argument for invalidation of any proposal to mandate filtering or blocking software.

5. Filters in the Home are Not the Answer

Although parental guidance and control are needed to protect children, promoting parental use of filters to shield children from harmful material on the Internet cannot be the whole answer. Parental failure to use available methods of keeping other sources of pornography out of the home via the mail, telephone, and television should caution against putting too much reliance on parental use of filtering technology.

Parents do not use available methods for a variety of reasons, including an unwillingness to believe that their adolescent child or teen would be interested in smut. Parents also have many things to worry about, other than pornographic material coming into their homes via the mails, telephone, television and now computers. Expenses involved in blocking, language barriers, technophobia, and physical or mental health may also make it difficult for parents to protect their children from harmful material coming into the home, without their permission or knowledge.

A serious problem with placing sole responsibility on parents for their child's access is the undeniable fact that children access the Internet outside the home. A study entitled "Online Victimization: A Report on the Nation's Youth," published in June 2000, by the Crimes Against Children Research Center, looked at youth Internet use patterns over the past year. The following chart shows the locations where children gain access to the Internet other than in their own homes and what they encounter when they do, relative to illegal or harmful matter.

Locations Where Children Gain Access to the Internet
Other Than in Their Own Homes

Locations	Other Households	School	Public Library
Locations where youth access the Internet	68%	73%	32%
Location of computer when sexual solicitation occurs	36%	5%	4%
Location of computer when unwanted exposure to sexual material occurs	13%	15%	3%

Additionally, the Report found that only 33% of households were using filtering or blocking software and that another 5% which had used some sort of filtering or blocking software were no longer doing so. Finding parental concern over the exposure to sexual material to be high, but also finding that only a minority of families have adopted the use of any software and that some have discontinued use of it, led the Crimes Against Children Research Center to conclude that "Before recommending that more families use such software, it is important to know more about its operation." The Report also noted that criminal statutes should be reviewed with the Internet in mind to make sure that relevant statutes cover Internet behaviors.

We direct the Commission's attention to another study, by the Annenberg Public Policy Center of the University of Pennsylvania, entitled "Media in the Home 2000--The Fifth Annual Study of Parents and Children," which examined the ways in which parents supervise their children's use of various media. For instance, the Study found that parental knowledge of policies designed to help supervise their children's use of television is low. Awareness of the Television Parental Guidelines rating system among parents has steadily declined since 1997, when 70% of parents said they were aware of the system, to this year where the percent is only 50. Of those who were aware of policies to help protect their children from offensive material on television, 40% of parents reported having a television with parental control features but of those 40% only 53% say they currently have the control feature engaged.

As for Internet access at home, 32% reported having used filtering devices for the Internet (similar to the 33% found by the "Online Victimization Report"). The Survey indicated that 18% of children were able to circumvent the V-chip technology and 5% of children with filtering software on home computers knew how to get around those protective measures.

Based on the above information, it is our opinion, that filtering or blocking software can help responsible parents, but it will not have any significant influence with kids whose parents are not responsible or those who access the Internet outside their own home.

6. Can Filtering be Used in a Constitutional Manner?

The answer, of course, is yes for parents (even if they do not solve the problem since children will be exposed to unfiltered material that is harmful to them in the homes of friends with unfiltered access and at school and in public libraries). It is a weak, ineffective answer to the overall problem of children's access.

The answer is not that simple for public libraries and schools. After all, these are governmental or quasi-governmental agencies. Libraries have traditionally selected the books, films and videos that have been added to their collections. The argument that a library which installs a computer connected to the Internet, thereby selects everything that is out there now and in the future is a non-sequitor because you cannot "select" information that does not exist on the computer at the time of installation. Whether or not to permit access to pornography in a library after the installation is not a matter of removal of information (as in *Board of Education v. Pico*, 102 S.Ct. 2799), but a matter of "selection," well within the discretion of the librarian.

In exercising this discretion, a library should be able use filtering software. It is however, our recommendation, that a library should not rely entirely on the judgment of the filtering software company--particularly if the library only wants to block access to material that meets the legal definitions of obscenity or harmful to minors. In our opinion, a library could block access to material that is, in its opinion, harmful to minors and material that is obscene for all. This may require a librarian to say "yes" I have seen a particular site (or a representative sample of blocked sites) and in my opinion it (they) is (are) predominantly pornography and/or harmful to minors as the case may be, and we do not want it (them) available at our library to children.

Now to say that the government cannot establish such a selection process or a Site Review Board or procedure, is to contradict the fact that film review boards were upheld by the Supreme Court in *Star v. Preller*, 325 F.Supp 1093, *aff'd*, 419 US 956 (1974). Such a Site Review Board in a library would have to conform to guidelines set forth in either *Freedman v. Maryland*, 380 U.S. 51 (1965) or *FW/PBS v. Dallas*, 110 S.Ct. 596 (1990). Under such an approach, the library would set up an Internal Prompt Appeal Procedure to decide complaints relative to a library's decision to block a particular site and depending on whether *Freedman* or *FW/PBS* applies, either the library or the patron would be required to initiate a prompt judicial review. Since a site block is not a mass seizure nor are we dealing with a motion picture theater analogy, it is probable that the patron would have to seek review.

While it is true, that possibly non-obscene or non-harmful to minors transmissions might, in the future, emanate from such a site, the prompt review procedure could deal with such a situation or in the alternative the principal embodied in *Denver Area v. FCC*, 518 U.S. 727, 740 (1996) can be applied, to wit:

The history of this Court's First Amendment jurisprudence...is one of continual development, as the Constitution's general command that 'Congress shall make no law... abridging the freedom of speech, or of the press,' has been applied to new circumstances requiring different adaptations of prior principals and precedents...Over the years, this Court has restated and refined these basic First

Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application... This tradition teaches that the First Amendment embodies an overreaching commitment to protect speech from governmental regulations through close judicial scrutiny..., but without imposing judicial formulas so rigid that they become a straightjacket that disables government from responding to serious problems.

The Court in *Denver Area* noted the importance of “protecting children from exposure to patently offensive depictions of sex.”

We believe that *Denver Area* can be applied to the right of “selection” by means of site blocking provided the librarian makes the decision in cooperation with the software provider and a prompt judicial review procedure is in place to resolve complaints as to the specific selections made by librarians. We believe that filters for obscenity can be installed in libraries under *Freedman* or *FW/PBS*. The use of filters is not analogous to the removal of books.

III. A Revised COPA if Such is Needed is the Only Answer

COPA can withstand constitutional scrutiny as is, regardless of the Third Circuit opinion decided on June 22, 2000 in *ACLU v. Reno*. The rationale of that Court’s opinion can be summed up in their summary of the same when the Court said:

Because material posted on the web is accessible by all Internet users worldwide and because current technology does not permit a web publisher to restrict access to its site based on the geographical locale of each particular Internet user, COPA essentially requires that every web publisher subject to the statute abide by the most restrictive and conservative state’s community standards in order to avoid criminal liability.

This rationale amounts to a significant misunderstanding of the concept of “contemporary community standards” and the wording of COPA. COPA relative to community standards states, “or that the average person, applying contemporary community standards, would find...” Nowhere does the statute say that you must apply the contemporary community standards of the state “of the Internet user.”

If we examine *Miller v California* and its progeny, we will discover that the definition of obscenity does not contain any element of community standards. That definition reads as follows:

Works which, taken as a whole appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political or scientific value.” (413 U.S. 15 at 24)

We note this fact in order to distinguish between the essence, the definition of obscenity, and the test for determining whether something is obscene, delineated later in *Miller* and reading as follows:

The basic guidelines for the trier of the fact must be: (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 specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

If we ask ourselves why did the Supreme Court separate the test for determining obscenity from the definition of obscenity to give us guidelines of “average person” and “contemporary community standards,” we find our answer in decided cases.

The Supreme Court elaborates on why it injected “average person” and “contemporary community standards” into the test for obscenity (and not its definition) when, in *Miller* it says:

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 material is not aimed at a deviant group, it will be Judged by its impact on an average person, rather than a particularly susceptible or sensitive person--or indeed a totally insensitive one... We hold that the requirement that the jury evaluate the materials with reference to contemporary community standards... serves this protective purpose... (423 U.S. 33-34).

We elaborate on this issue to show that the Supreme Court’s only concern in establishing this test was that the juror be directed not to apply his or her own individual standard, but to seek the mean of the community for the obvious purpose of fairness to the defendant. In effect, the Supreme Court is not concerned with whatever geographical or non-geographical “community standard” is applied as long as the jurors are instructed not to use their own standard, but to find a mean. They have approved national, district, state, county or federal standards or an instruction that no geographical community need be the criterion and that “community standards” could, without identifying a particular community, be determined in the same way a tort jury determines the concept of a reasonable person.

Hamling v United States, 418 U.S. 87, interprets *Miller* to state that no precise geographical area is a constitutional requirement for establishing the relevant community. A few quotations from *Hamling* are in order to clarify that the phrase “contemporary community standards” in no way can legally be equated with and confined to “contemporary state community standards.” At 408 U.S. 104 that court says:

Miller rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene... But in so doing the Court did not require as a constitutional matter the substitution of some smaller geographical area...; the test was stated in terms of

the understanding of ‘the average person, applying contemporary community standards.’... A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a ‘reasonable’ person in other areas of the law...Our holding in *Miller* that California could constitutionally proscribe obscenity in terms of a ‘statewide’ standard did not mean that any such precise geographic area is required as a matter of constitutional law. (Underlining added)

There is no way that one can read *Hamling* and come to the conclusion that COPA requires that a state standard be applied. The Third Circuit does so and therefore is in error, an error it will have a chance to correct if COPA reaches them again. If not, then hopefully the Supreme Court will rectify this error by authoritatively construing COPA to conform to *Hamling*.

As a practical matter and in fulfillment of its duties as a Commission, Morality in Media suggests that the Commission propose an amendment to COPA as a back-up proviso in the event COPA is struck down, reading as follows:

Contemporary community standards, as used in this Act, shall not require that the standards of any precise geographical community be applied, but the judge or juror may apply his or her knowledge of the views of the average person in the community and vicinage from which he or she comes in making the determination of what the contemporary community standards are, just as he or she is entitled to draw on his or her knowledge of the propensities of a “reasonable person” in other areas of the law.

We also note that the FCC has determined that the indecency definition for purposes of cable TV is not based on "a specific geographical area or a specific cable system." *In Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, First Report and Order, MM Docket No. 92-258 (2/3/93).

IV. Extraterritoriality is not a Concern in Sustaining COPA or Any Amended Version of That Act

While it is true that there will be difficulty in enforcing COPA on offshore sites, the fact that harmful to minors material will have its impact in the United States gives the United States jurisdiction. We will have to look to offshore countries to assist us in enforcing this law in this regard. It is noted that the statute refers to interstate or foreign commerce.

The fact that it may sometimes be next to impossible to prosecute foreign offenders does not affect the validity of COPA or make it unconstitutionally underinclusive. In *Moser v FCC*, 46 F.3d 970, the Ninth Circuit, in 1995 citing *United States v Edge Broadcasting Company*, 509 U.S. 418 (1993) stated:

The Supreme Court upheld a ban on broadcast of lottery advertisements by radio stations licensed in states without lotteries, despite evidence that listeners along state borders would be bombarded by ads broadcast by stations in states with lotteries. The Court said 'Nor do we require that the Government make progress on every front before it can make progress on any front...The Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated.'

V. Summary

We urge the Commission to reject filtering as the sole solution to the transmission of harmful to minors material to children and most importantly not to advocate it as the least restrictive effective means substitute for the COPA provisions. As we have expounded, filtering or blocking software cannot be the least restrictive effective means for the simple reason it will often prove ineffective. Many, if not most parents do not use screening technology on home computers, it is not foolproof, cannot filter out harmful to minors material (as used in the statute) and does not protect children outside the home.

We believe COPA, or COPA amended as we have suggested, will withstand judicial scrutiny. We suggest that the Commission recommend the same to Congress as the only effective alternative to the “special First Amendment problems” of this medium of expression and not suggest, as has the Third Circuit, that harmful to minors laws cannot be applied to the Internet because of its complexities. COPA cries out for the application of *Denver Area*'s new approach and not an approach by which we throw up our hands and suggest that parents and children will just have to suffer. As Justice Breyer said in *Denver Area*:

Tradition teaches that the First Amendment embodies an overreaching commitment to protect speech from government regulation through close judicial scrutiny... but without imposing judicial formulas so rigid that they become a straightjacket that disables government from responding to serious problems. This Court, in different contexts, has consistently held that government may directly regulate speech to address extraordinary problems...

And again;

Aware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunication ...we believe it unwise ... to pick one analogy or one specific set of words...

And finally;

The history of this Court's First Amendment jurisprudence ...is one of continual development, as the Constitution's general command that 'Congress shall make no law . . . abridging the freedom of speech, or of the press,' has been applied to new circumstances requiring different adaptations of prior principles and

precedents...our cases have not left Congress or the States powerless to address the most serious problems.

If *Denver Area* means anything, it means that the Supreme Court is not ready to abandon us to a "do nothing" approach to this most serious telecommunications problem. We will find a way--and that way is to embrace COPA as is, or "mend its every flaw" without running up the white flag labeled "filters."

We also reiterate that much if not most pornographic material on the Internet is "hard-core" and can be prosecuted under "adult" obscenity laws (18 U.S.C. 1462, 1465). Drastically reducing the amount of pornography on the Internet and making it harder for pornographers to brazenly conduct their illegal businesses will help reduce the likelihood that minors will come across pornography accidentally or use their computer to seek it out.

Respectfully submitted,

Paul J. McGeedy
General Counsel

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