

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Implementation of the Child Safe Viewing Act;) MB Docket No. 09-26
Examination of Parental Control Technologies for)
Video or Audio Programming)

JOINT COMMENTS OF INDUSTRY & PUBLIC INTEREST GROUPS

**CENTER FOR DEMOCRACY & TECHNOLOGY, CONSUMER ELECTRONICS
ASSOCIATION, ENTERTAINMENT MERCHANTS ASSOCIATION, AMERICAN
BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AMERICAN CIVIL
LIBERTIES UNION, FEMINISTS FOR FREE EXPRESSION, NATIONAL COALITION
AGAINST CENSORSHIP, PUBLIC KNOWLEDGE, and WOODHULL FREEDOM
FOUNDATION**

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The Center for Democracy & Technology, Consumer Electronics Association, Entertainment Merchants Association, American Booksellers Foundation for Free Expression, American Civil Liberties Union, Feminists for Free Expression, National Coalition Against Censorship, Public Knowledge, and Woodhull Freedom Foundation respectfully submit these comments on the Notice of Inquiry (“NOI”) issued pursuant to the Child Safe Viewing Act, enacted in late 2008.¹ We appreciate the opportunity to express our views on the vital questions raised in this proceeding.

The goal of promoting the ability of parents and caregivers to raise their children as they see fit, and where appropriate to limit or guide their children’s access to content, is an important one. We applaud the decision of Congress to focus the Commission’s attention on empowering

¹ See Child Safe Viewing Act of 2007 (“Child Safe Viewing Act” or “Act”), S. 602, P.L. 110-452, 122 Stat. 5025 (Dec. 2, 2008).

parents, and away from approaches that would censor or restrict access to content more broadly. We look forward to working with the Commission on identifying the best ways to pursue this goal.

I. THE SCOPE OF THE INQUIRY

The NOI appropriately poses a range of questions seeking input on the goals and scope of this proceeding. As the NOI suggests, the Commission should ensure that it focuses on what Congress specified in the Child Safe Viewing Act, and not on broader conceptions of child protection or content regulation.

A. A Key Goal of the Act is to Promote the Empowerment of Parents to Raise Their Children as They Choose, Not to Allow Some to Impose Their Values or Preferences on Others.

Congress made plainly clear in the Act that its goal was to empower *parents* to guide their children’s television and media viewing, based on the values and preferences of the *parents*. The two most critical provisions in the Act – which asks the Commission to assess “advanced blocking technologies” (or “ABTs”) – specifically direct the Commission to look at technologies that place the decision making power in the hands of parents. First, the single and pivotal statutory definition in the Act defines “advanced blocking technologies” to mean:

technologies that can improve or enhance the ability of a parent to protect his or her child from any indecent or objectionable video or audio programming, *as determined by such parent*, that is transmitted through the use of wire, wireless, or radio communication.

Act § 2(d) (emphasis added). Similarly, in defining the intended “Content of [this] Proceeding,”

Congress specifically instructed the Commission to focus on ABTs that:

may be effective in enhancing *the ability of a parent to protect his or her child* from indecent or objectionable programming, *as determined by such parent*.

Act § 2(b)(5) (emphasis added).

Congress was clear that it is not interested in promoting technologies that would enable any government entity, public advocacy group, association, or private corporation to impose its values and content judgments on media distribution in this country, or in telling parents how to raise their children. Even if a majority of Americans, or a majority of this Commission, are offended by particular types of lawful content, the determination about what a child can view is to be made by the child's parent, guardian, or caregiver.

The Commission has appropriately recognized this statutory focus on empowering parents. *See* NOI ¶ 5. This focus on parental empowerment is consistent with the Commission's past actions with regard to the V-Chip, which appropriately places discretion over what V-Chip settings to use – and whether to use the V-Chip in the first place – in the hands of parents. Moreover, as video content moves away from media such as broadcast to the more unregulated online environment, focus on empowering individual parents and families rather than the regulation of intermediaries becomes both a constitutional and practical imperative. Such a focus has been central to Internet and online technology development, and the Commission should look to this development to inform its recommendations.

As the Commission reviews submitted comments and develops its report to Congress, it must keep in mind the overarching goals of placing decision-making power in the hands of parents and keeping the government out of the business of censoring the Internet or imposing one set of values on all.

B. A Core Focus of the Commission Must Be on “Encouraging” – Not Mandating – the Development, Deployment, and Use of Advanced Blocking Technologies.

In Section 2(a) of the Act, Congress gave the Commission three mandates, two of which are essentially fact-finding requirements,² and only one of which seeks the Commission’s expert advice on a substantive question: possible “methods of *encouraging* the development, deployment, and use” of advanced blocking technologies. Act § 2(a)(2) (emphasis added). Congress went on to stress that the “methods of encouraging” must not “affect the packaging or pricing of a content provider’s offering.” *Id.* By directing the Commission to focus on *encouraging* development and deployment of ABTs, and by emphasizing that such methods must not alter content providers’ offerings, Congress made clear that it is not looking for recommendations about *mandates* that could theoretically be imposed on content or service providers to implement or deploy ABTs.

The most effective way to *encourage* the development, deployment, and use of advanced blocking technologies is to facilitate innovation and competition in their development and to educate and assist parents who choose to use them. On the supply side, the government could provide research grants to explore new technologies that might offer parents more options to guide their children’s access to online content. To encourage the use of parental controls, the government could develop educational programs and/or offer financial assistance to parents to purchase such technologies (ensuring that it is the *parents* who are picking and choosing among market options). The Supreme Court had endorsed these approaches:

Congress undoubtedly may act to encourage the use of filters. We have held that Congress can give strong incentives to schools and libraries to use them. It could also take steps to promote their development by industry, and their use by parents. . . . By enacting programs to promote use of

² See Act §§ 2(a)(1), (3).

filtering software, Congress could give parents th[e] ability [to monitor what their children see] without subjecting protected speech to severe penalties.”³

These are among the steps that Congress could take to “*encourag[e]* the development, deployment, and use” of advanced blocking technologies that do not “affect the packaging or pricing of a content provider's offering.” Any blocking mandates would, in contrast, certainly affect provider’s offerings, likely imposing significant additional costs.

C. In Preparing its Report to Congress, the Commission Should Critically Evaluate the Ideas Suggested in the Act Itself.

In asking the Commission for input on the issues raised by the Act, Congress was appropriately looking to the Commission because of its experience with the V-Chip. In responding to Congress, however, the Commission should critically evaluate some of the premises and ideas expressed in the Act itself. Although the Act contains a number of ideas that Congress wants input on, by seeking such input, Congress did not suggest that all the ideas should be adopted without scrutiny. It is important to identify those ideas that are counter-productive, impractical, infeasible, or potentially unconstitutional.

As one example, the Act asks whether there are any “advanced blocking technologies” that can be used “across a wide variety of distribution platforms, including wired, wireless, and Internet platforms,” Act § 2(b)(1). But as detailed in Section III(A) below, it would be counterproductive for government to mandate or even promote the idea of a single or limited set of technologies working across platforms. On this and other points, the Commission should not take the Act as a starting point for what is “good” but should simply view the Act as an indication of the topics the Commission should evaluate.

³ *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 669-70 (2004).

Along the same lines, in interpreting the text of the Act, the Commission should be cautious in relying too heavily on the Senate Report⁴ that relates to the Act. The Act was significantly amended by the U.S. House of Representatives *after* the Senate’s consideration of the bill (and the Senate later agreed to the House’s amendments),⁵ so that the most authoritative indication of the intent of Congress is, of course, the language of the Act itself. The Commission should focus its consideration on that language.

II. THERE ARE BROAD THRESHOLD CONSTITUTIONAL CONSTRAINTS ON WHAT ACTIONS THE GOVERNMENT CAN TAKE IN THIS AREA.

The Act is limited to directing the Commission to conduct an inquiry, and thus does not itself require the Commission to take action that would have significant constitutional implications. Nevertheless, in evaluating the issues and preparing its Report – which might include recommendations of future government actions – the Commission should be aware of at least two key constitutional constraints on such possible actions.

First, the content at issue in this proceeding is lawful and fully protected by the First Amendment. The purpose of the Act is for Congress to learn more about technologies that might be used to help parents control access to content that they consider “indecent or objectionable.” The Supreme Court has made clear that “[s]exual expression which is indecent but not obscene is protected by the First Amendment,”⁶ and “the fact that protected speech may be offensive to some does not justify its suppression.”⁷ Thus, any action that would have the effect of restricting

⁴ S. Rep. No. 268, 110th Cong., 2nd Sess. 1 (2008) (“Senate Report”).

⁵ Compare differing versions of S. 602 available at <http://thomas.loc.gov/cgi-bin/query/z?c110:S.602>.

⁶ *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

⁷ *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977).

adult's access to "indecent" content will raise – and likely fall to – significant constitutional objections.

Second, under our First Amendment jurisprudence, the government's power to regulate lawful speech in an effort to protect children depends on the medium of communication. Thus, a restriction that might be constitutional for over-the-air broadcast content (under *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)) would not be for cable access (under *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000)) or online access (under *Reno v. ACLU*, 521 U.S. 844 (1997)). Although the Senate Report expressed some concern about the fact that television content could be viewed online with fewer restrictions than over broadcast,⁸ that difference comports with, and is compelled by, the U.S. Constitution. The distinction between media reflects the fact that non-broadcast environments (whether cable, gaming systems, or the online world) already offer fine-grained user controls that enable parents to guide what content their children access. Simply put, the constitutional protection for the publication of content online (for example) is not diminished because the content happens to have previously been or is simultaneously aired over the broadcast medium.

Although the Commission should be cognizant of these constitutional considerations, as discussed above there are a broad range of actions the Commission can recommend to advance the statutory goal and to provide tools for parents to guide their children's access to media without raising constitutional concerns.⁹

⁸ Senate Report, at 2.

⁹ See *supra* note 3 and accompanying text.

III. THE COMMISSION MUST BE CAREFUL TO AVOID RECOMMENDATIONS THAT WOULD HARM INNOVATION, COMPETITION, MARKET INCENTIVES, AND FREE SPEECH IN THE AREAS OF CONTENT CONTROLS AND PARENTAL EMPOWERMENT.

Although some in Congress and advocacy groups have expressed frustration about the current diversity of content rating schemes and user empowerment tools, the Commission should be very cautious about any recommendations that might diminish that diversity, for a host of reasons.

A. The Commission Should Approach the Idea of “Advanced Blocking Technologies” that Work “Across” Multiple Platforms With Caution.

The Act directs the Commission to assess “advanced blocking technologies” that “may be appropriate across a wide variety of distribution platforms, including wired, wireless, and Internet platforms.” Act § 2(b)(1). Although a goal of consistency and familiarity across technical platforms is understandable, in reality such platforms differ widely in terms of computing processing power, user interface, and level of connectivity, among many other factors. These differences make it both difficult and undesirable to achieve a single ABT that works “across” technology platforms. There are at least three important risks raised by efforts to pursue such a goal of a single “silver bullet” ABT.

First, in light of the greatly varying capabilities of differing communications platforms, a single “advanced blocking technology” designed to work across platforms would by necessity have to be reduced to a lowest common denominator in terms of technical capabilities. Thus, the greater flexibility and control that powerful media platforms could offer would be lost. There is a significant difference in capability between, for example, an in-home computing device and a small, portable device:

In-home device	Handheld device
AC power	Limited battery power
Full-time, high-speed, and low-cost online connectivity	Intermittent, low-speed, and high-cost online connectivity
Full-sized keyboard and large screen	No keyboard and very small screen

Ultimately, it would greatly constrain the user empowerment capabilities of in-home devices if they were limited to technologies that are viable on handheld devices. Even an approach that required the constrained device to use a subset of the capabilities of the more robust device would likely lead to diminished capabilities for one or both devices (and could easily by itself be confusing).

Second, a requirement – whether due to a mandate or voluntary consensus – that communications platforms use the same ABT would stifle the drive to innovate in the area of child safety and user empowerment technology. Since Congress and the FCC adopted V-chip requirements, the level of innovation in content blocking technologies for broadcast television has been significantly lower than the explosion of competitive and innovative user empowerment offerings seen in the online and Internet contexts. As a result, parents enjoy much greater flexibility when it comes to managing their children’s access to online content, in terms of the variety of filters available and parents’ ability to tailor filters to different content types and to children of different ages.¹⁰ Requiring a common technology to be used across platforms would squelch this flexibility and the competition and innovation *within* each individual platform. This would hinder, rather than help, the cause of empowering parents to guide their children’s media usage.

¹⁰ For more on the variety and flexibility of end-user Internet filters, see *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 790-93 (E.D. Pa. 2007) (Findings of Fact 68, 78-79, and 87-91), *aff’d*, 534 F.3d 181 (3d Cir. 2008).

Finally, as a practical matter, achieving a goal of a common ABT across platforms would almost certainly require a government mandate. The natural market incentive is for one market segment to *differentiate* itself from other market segments by highlighting technological differences or advantage. As noted above, under a common ABT some technologies would be forced to underutilize their inherent capabilities – something that runs directly contrary to the normal market incentives. It is simply unlikely that many, if any, market segments would sacrifice a competitive edge or distinction without being compelled to do so (by mandate or external pressure to “voluntarily” take action).

Although the goal of a common “advanced blocking technology” across platforms is superficially appealing, it is in fact fraught with risk, and would – like the V-chip – hinder innovation and progress in the area of parental empowerment. The Commission should carefully consider the pros and cons of the goal, but ultimately should report to Congress that a common ABT should *not* be a legislative or policy objective.

This rejection of a broad common ABT, however, leaves open the possibility that niche markets for cross-platform ABTs might well be viable and valuable. If, for example, a particular advocacy or religious group would like to develop a user empowerment technology that can work across platforms, they may find a viable market for such services. In the absence of such a truly voluntary – and most likely niche – effort in the marketplace, the Commission should avoid any suggestion that a common “advanced blocking technology” should be a governmental objective.

B. A Uniform System of Ratings is Unwise, Unworkable, and Would in Any Event Be Unconstitutional If Mandated.

As with the suggestions of having a single “advanced blocking technology” across platforms, a uniform system of ratings is a superficially attractive idea. But as with a cross-platform ABT, a uniform rating system would be problematic for at least four reasons.

First, today each industry works to improve its ratings process and to fit the ratings to the specific medium. To force a single system would either yield a far more complex range of ratings than we have today, or would require industries to remove customizations and features from their current systems. Moreover, it would remove the ability and incentive for cross-platform competition in the quality of ratings.

Second, uniform ratings would fail to satisfy all segments of our society, and ultimately would not eliminate the criticism of rating schemes. Any single system aimed at the sensibilities of the broadest cross section of America would, almost certainly, fall short of the goals of the leading advocacy groups attacking the current ratings schemes. Critically, a movement toward a single national system would greatly reduce market incentives to create tools that are specifically directed to the more niche groups in our society. By forcing a single rating system, the government would reduce the ability of groups with specific concerns to help their members with targeted ratings.

Third, any suggestion that a single ratings system could be imposed on all content *on the Internet* is wholly unworkable and unrealistic (in addition to being unconstitutional as discussed below). The current ratings systems run by the TV, movie, and gaming industries have elaborate processes for creating the ratings – in which it takes weeks or more to determine a rating – and a similar process could not possibly work in the online environment where millions of new pieces of content are created every day, by publishers all over the world.

Finally, and most critically, *any* requirement that a common rating system be used would be plainly unconstitutional under the First Amendment. The government is without constitutional power to require content creators or providers to “label” or “rate” their content. The Supreme Court has made clear that “[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views.” *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (citations omitted). A content label from a uniform rating scheme is exactly the type of subjective “compelled” speech that the First Amendment prohibits. *See Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795, 797-98 (1988); *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 18 (1986) (“PG&E”); *Entertainment Software Ass’n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

Again, as with the notion of cross-platform ABTs, the fact that a common rating system would be unwise and unconstitutional does not preclude individual groups from offering cross-platform rating schemes that seek to provide a single set of labels for movies, TV, games, and other content. Despite the service such a private rating system could provide, a common rating system could not be mandated.

C. The Internet Already Offers a Great Array of User Empowerment Tools, and the Commission Should Avoid Any Recommendation that Would Interfere with the Innovation and Competition Seen on the Internet.

From very early on (following the advent of commercial traffic on the Internet), the Internet has had a broad array of user empowerment tools, and competition to create new and better tools has continued unabated for the past fifteen years. This highly competitive marketplace for user empowerment sprang up on its own, without any law or mandate. The

Internet is a major “parental empowerment” success story, with effective and easy-to-use tools that offer parents a wide variety of approaches to online safety.¹¹

As the NOI notes, television video programming is the main focus on the Act, and Commission’s consideration of online content should be limited to that type of content. At about the same time as Congress passed the Child Safe Viewing Act, it also created the Online Safety and Technical Working Group (“OSTWG”) within NTIA to review online safety more broadly, and the Commission should not duplicate that effort. The Commission does not have any independent authority or experience with content on the Internet, and in light of the OSTWG effort the Commission should not reach out beyond the terms of the Act to address Internet content generally.

The Internet environment, in any event, presents a broad array of user and parental empowerment tools to help parents guide their children’s access to all sorts of content online (*including* television content).¹² As the District Court in the recently-concluded COPA litigation found after an extensive trial and evidence gathering, online filtering tools are easy-to-use and are remarkably effective at screening out unwanted content (including content on a broad range of topics beyond “indecency”).¹³ To the extent that the Commission’s mandate in this

¹¹ See *ACLU v. Gonzales*, 478 F. Supp. 2d at 795 (Finding of Fact 105) (“There is a high level of competition in the field of Internet content filtering.”).

¹² A recent comprehensive survey of user empowerment tools shows how technological advances in controlling access to sexually explicit content have kept up with the development of new technologies and services, both on and off the Web (in stark contrast to legislative approaches that often lag behind the curve). See Adam Thierer, *Parental Controls and Online Child Protection: A Survey of Tools and Methods*, at 100, available at <http://www.pff.org/parentalcontrols/>. Thierer provides an updated survey of the marketplace for parental controls and ratings systems in his Comments in this proceeding, available at [http://www.pff.org/issues-pubs/filings/2009/041509-%5BFCC-FILING%5D-Adam-Thierer-PFF-re-FCC-Child-Safe-Viewing-Act-NOI-\(MB-09-26\).pdf](http://www.pff.org/issues-pubs/filings/2009/041509-%5BFCC-FILING%5D-Adam-Thierer-PFF-re-FCC-Child-Safe-Viewing-Act-NOI-(MB-09-26).pdf). See also <http://www.getnetwise.org> (indexing vast array of user empowerment products available to protect kids online).

¹³ The trial court in the COPA case found that filtering software is capable of blocking up to 95% of sexually explicit Web content. See *ACLU v. Gonzales* at 795-96 (Findings of Fact 110-113); see also *id.* at 33 (Finding of Fact 103) (“Filtering products have improved over time and are now more effective than ever before.”); *id.*

proceeding does reach television content online, parents can easily control their children's access to such content using Internet focused user empowerment tools – without any need for a governmental mandate to restrict access to or otherwise interfere with online television content.

The power of the Internet and its ability to offer robust user empowerment tools flows in primary part from the fact that robust computing power lies at the edge of the network – within each users' computer – and each user or family can decide what tools they want to use to access and control content. Thus, families can adopt whatever strategy is appropriate for the individual family, *including* as it relates to television content. Critically, this approach is precisely consistent with the dictates of the Child Safe Viewing Act, which mandates that (a) parents must be the ones to decide what content is appropriate, and (b) the approaches to parental empowerment must not affect the pricing or configuration of service offerings. Empowerment tools controlled by individual parents fit this bill perfectly.

The Commission should be very careful not to disrupt the success story that online user empowerment represents. There is a robust and competitive market for user empowerment technology in the online environment, and neither Congress nor this Commission should interfere with that market.

CONCLUSION

We appreciate the opportunity to submit comments in this important proceeding, and we look forward to working with the Commission as it develops its report to Congress under the Act.

at 793-94 (Findings of Fact 92-99) (finding that filters are easy to install and use, and that a large majority of parents are satisfied with several filtering options).

ON BEHALF OF

CENTER FOR DEMOCRACY & TECHNOLOGY
CONSUMER ELECTRONICS ASSOCIATION
ENTERTAINMENT MERCHANTS ASSOCIATION
AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION
AMERICAN CIVIL LIBERTIES UNION
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