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## Rating Internet Content and the Spectre of Government Regulation, 16 J. Marshall J. Computer & Info. L. 625 (1998)

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# RATING INTERNET CONTENT AND THE SPECTRE OF GOVERNMENT REGULATION

## I. INTRODUCTION

The Supreme Court, in *Reno v. ACLU*,<sup>1</sup> struck down the Communications Decency Act ("CDA") as unconstitutional.<sup>2</sup> This landmark decision has fueled the fire for one of the hottest debates regarding the Internet. The debate focuses on whether the Internet community can

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1. *Reno v. ACLU*, 117 S. Ct. 2329 (1997).

2. *See id.* at 2351. The two disputed provisions of the Communications Decency Act ("CDA") sought to protect minors from viewing obscene or indecent material on the Internet. *See id.* First, the "indecent transmission" provision criminalized the "knowin[g] . . . transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient is under 18 years of age." 47 U.S.C. § 223(a)(1)(B)(2) (1996). Second, the "patently offensive" provision criminalized the "knowin[g]" transmission of "communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" to any recipient under 18 years of age. 47 U.S.C. § 223(d)(1)(B) (1996).

The Supreme Court held that both provisions violated the First Amendment's right to free speech. *See Reno v. ACLU*, 117 S. Ct. at 2351. The Court found the CDA to be a content based regulation and subjected the disputed provisions to a strict scrutiny standard of review. *See id.* at 2344. The Court held that both provisions were overbroad in their application. *See id.* at 2346. As such, the CDA not only prohibited the transmission of obscene speech, but also prohibited adults from receiving constitutionally protected speech. *See id.* The Court reasoned that "the CDA [would] effectively suppress[] a large amount of [free] speech that adults have a constitutional right to receive and to address to one another." *Id.* Notwithstanding the state's compelling interest in protecting the health and well-being of minors, the CDA was not the least restrictive means available to accomplish the state's interest. *See id.* at 2348. *See also* *Shea v. Reno*, 930 F. Supp. 916, 935 (S.D.N.Y. 1996) (bringing a second challenge to section 223 of the CDA). In *Shea v. Reno*, the editor-in-chief ("plaintiff") of an electronic newspaper, the American Reporter, published an editorial containing words that would arguably fall within the scope of the "patently offensive" provision of the CDA. *Id.* at 923. As such, the plaintiff sought an injunction to prevent enforcement of the provision premised on the First Amendment right to freedom of speech. *See id.* at 922. The plaintiff argued that the statute was vague and overbroad. *See id.* at 935. A three-judge District Court held that the "patently offensive" provision was subject to strict scrutiny. *Id.* at 940. Although the District Court found that the statute was not fatally vague, the court held that the "patently offensive" provision was overbroad. *Id.* at 941-42. The court stated that the provision operated as a complete ban on constitutionally protected indecent speech between adults. *See id.*

develop a voluntary rating system that will effectively regulate Internet content while protecting the ideals of free speech.<sup>3</sup>

Shortly after the *Reno v. ACLU* decision, President Clinton retreated from the ill-fated CDA and announced he would support industry efforts to develop a voluntary rating system to control indecent speech on the Internet.<sup>4</sup> The White House supported this censorship position by hosting an "Internet Summit" in July of 1997 focusing on rating systems, parental empowerment, and censorship.<sup>5</sup> After the summit, industry leaders pledged to develop a voluntary rating system that would empower parents and limit children's access to harmful Internet materials.<sup>6</sup>

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3. See Jonathan Weber, *A New Battle Over Keeping the Web Clean*, L.A. TIMES, Aug. 4, 1997, at D1, available in 1997 WL 2235184 (reporting on the aftermath of the *Reno v. ACLU* decision). The debate over Internet rating systems is being waged by factions of the formerly united plaintiffs in *Reno v. ACLU*. See *id.* One side is led by computer and Internet industry leaders such as Microsoft and America Online. See *id.* These companies are pushing for a "family friendly" Internet via voluntary rating of content. *Id.* On the other side, free speech advocates, such as the ACLU, feel that any type of content rating will amount to blatant censorship. See *id.*

4. See The White House Office of the Press Secretary, *Statement by the President* (June 26, 1997) <<http://www.library.whitehouse.gov>> (describing President Clinton's recent support for private regulation of the Internet).

I will convene industry leaders and groups representing teachers, parents and librarians. We can and must develop a solution for the Internet that is as powerful for the computer as the v-chip will be for the television, and that protects children in ways that are consistent with America's free speech values. With the right technology and rating systems - we can help ensure that our children don't end up in the red light districts of cyberspace.

*Id.*

5. *Businesses, Public and Private Groups Unite Behind Initiative for Family-Friendly Internet Online World* (July 16, 1997) <[http://www.netparents.org/970716\\_stmnt.html](http://www.netparents.org/970716_stmnt.html)> (describing support by industry and private groups regarding President Clinton's goal for a "family friendly" Internet). The Internet Summit was held at the White House on July 16, 1997. See *id.* Those attending comprised a broad cross-section of industry and other public and private organizations. See *id.* Some of the major participants were America Online, the Center for Democracy and Technology, the American Library Association, Recreational Software Advisory Council ("RSAC"), AT&T, the Software Publishers Association, and others. See *id.* Cf. ACLU Press Release: *In Late Reversal, White House Invites ACLU to Internet Censorship Summit* (July 15, 1997) <<http://www.aclu.org/news/n071597b.html>> (noting that the White House did not invite the ACLU to participate in the Summit until, July 15, 1997, the day before the meeting).

6. See Julie Hirschfeld, *Consensus Announced to Make Web Child-Safe*, DALLAS MORNING NEWS, July 17, 1997, at 2D, available in 1997 WL 11505608 (noting that industry leaders, private groups, and the White House agree that private regulation of the Internet will be the only constitutional means to empower parents with the tools to shield children from harmful Internet content); Louise Kehoe, *Clinton Acts to Protect Cyber-Kids*, FIN. TIMES, July 17, 1997, available in 1997 WL 11042015 (noting that participating groups in the "Internet Summit" support a self-regulatory scheme to protect children from harmful Internet content); *Businesses, Public and Private Groups Unite Behind Initiative for Family-Friendly Internet Online World*, *supra*, note 5 (containing several statements by participants regarding their perceptions of the meeting). See also Stephen Balkam, *Content*

The foundation for a voluntary rating system lies in technology entitled Platform for Internet Content Selection ("PICS").<sup>7</sup> PICS is not a rating system.<sup>8</sup> Rather, it is a set of common protocols that enables blocking software to associate a rating label with Internet content.<sup>9</sup> PICS allows websites to be rated by content providers or independent third parties.<sup>10</sup> PICS labels are based on existing rating systems such as RSACi, which stands for Recreational Software Advisory Council.<sup>11</sup> Cur-

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*Ratings for The Internet and Recreational Software* (visited Nov. 6, 1997) <<http://www.rsac.org/Balkam1.html>> (providing a detailed history of the Recreational Software Advisory Council and the RSACi rating system). Stephen Balkam, the executive director of the Recreational Software Advisory Council ("RSAC"), suggests the true impetus behind the private industry's effort to regulate the Internet is motivated by intense pressure from the federal government:

I would say that it is very rare for a group of companies to voluntarily (in the true sense of the word) and without prompting, decide to set up a rigorous, self-policing system that will cost its members time and money to set up, administer, promote, and develop. Further, it could be argued that to do this would run counter to the mission of most trade associations unless there was a very real and potent threat of similar if not worse legislation coming from central government. Only then can an industry association legitimately spend its member dues on rallying behind a self-regulatory regime.

*Id.* But see ACLU Press Release: *ACLU Wary of White House Goals on "Voluntary" Internet Censorship*, (July 16, 1997) <<http://www.aclu.org/news/n071697a.html>> (indicating that the ACLU fears that voluntary rating systems will be tantamount to government coerced censorship and could enable the government to require content providers to self rate).

7. See *About the World Wide Web Consortium [W3C]* (visited Nov. 6, 1997) <<http://www.w3.org/Consortium/>> (giving general information regarding the World Wide Web Consortium and the PICS initiative). The World Wide Web Consortium ("W3C") developed PICS as a universal means to associate ratings with Internet content. See *id.* Established in 1994, the W3C seeks "to develop common protocols for the evolution of the World Wide Web." *Id.* The W3C working group is an international consortium. See *id.* The W3C is jointly hosted by the MIT Laboratory for Computer Science in the United States; the Institut National de Recherche en Informatique et en Automatique in Europe; and the Keio University Shonan Fujisawa Campus in Asia. See *id.* The W3C also works with a broad cross-section of industry leaders. See *id.* See also *ACLU v. Reno*, 929 F. Supp. 824, 838-39 (E.D. Pa. 1996), *aff'd*, *Reno v. ACLU*, 117 S. Ct. 2329 (1997) (describing the PICS initiative and listing some of the major participating companies and organizations in the PICS working group).

8. See *Platform for Internet Content Selection* (visited Nov. 6, 1997) <<http://www.w3.org/PICS/>> (providing further information on PICS). The W3C notes that PICS is simply a set of technical specifications enabling PICS compatible filtering software to recognize ratings from any source. See *id.* W3C emphasizes that PICS is not a rating system and therefore does not rate any Internet content. See *id.*

9. See *id.*

10. See Paul Resnick & James Miller, *PICS: Internet Access Controls Without Censorship* (visited Nov. 7, 1997) <<http://www.w3.org/iacwcv2.htm>> (providing an overview of how PICS operates in relation to rating systems). Any PICS based rating system allows individual websites to be labeled by its own author or by independent organizations called rating services. See *id.*

11. See *Recreational Software Advisory Council Welcomes IBM as Corporate Sponsor* (last modified July 16, 1997) <<http://www.rsac.org/press/970716.html>> (noting that "RSAC"

rently, the use of PICS is becoming more widespread.<sup>12</sup> Proponents of a "family friendly" Internet want PICS technology to become universal coupled with at least one widely used rating system that will effectively suppress any Internet speech that may be harmful to children.<sup>13</sup>

The trend to save America's children from the pitfalls of the Internet raise questions regarding the long term implications of rating systems.<sup>14</sup> Rating vocabularies based on PICS are plagued by inherent limitations.<sup>15</sup> These limitations pose problems for content providers who rate their own speech because authors will encounter difficulties obtaining

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and "RSACi" are two distinct entities). The group, RSAC, developed the RSACi rating system. *See id.* RSACi stands for Recreational Software Advisory Council (Internet). *See id.* RSAC claims that its Internet rating system is an "objective content-labeling advisory system" that is based on the PICS protocol. *Id.* The RSACi system enables content providers to voluntarily rate their own websites by completing an on-line questionnaire regarding the levels and intensity of violence, sex, nudity, and language. *See id.* The responses generate an informational rating label that can be read by any PICS compliant web-browser or blocking software. *See id.* In turn, PICS compliant software, programmed to read the RSACi vocabulary, can filter content based on the above categories. *See id.* *See also* Ray Soular & Wendy Simpson, *The SafeSurf Internet Rating Standard* (visited Nov. 6, 1997) <<http://www.safesurf.com/ssplan.htm>> (providing general and technical information regarding SafeSurf's Internet rating system). SafeSurf is another popular rating vocabulary. *See id.* Like the RSACi system, SafeSurf utilizes an on-line questionnaire, available through its website, to generate a PICS label. *See id.* *See also* *Classify Your Site With the SafeSurf Rating System* (visited Nov. 6, 1997) <<http://www.safesurf.com/classify/index.html>> (providing an example of SafeSurf's rating questionnaire). SafeSurf enables website authors to rate their Internet speech for the following categories: (1) profanity; (2) heterosexual themes; (3) homosexual themes; (4) nudity; (5) violence; (6) sex, violence, and profanity; (7) intolerance; (8) glorifying drug use; (9) other adult themes; and (10) gambling. *See id.* Within each one of the above categories, the content provider must describe the content. *See id.* For example, the "sex violence, profanity" category can be assigned any one of the following SafeSurf descriptions: (1) subtle innuendo; (2) explicit innuendo; (3) technical reference; (4) non-graphic-artistic; (5) graphic-artistic; (6) graphic; (7) detailed graphic; (8) explicit vulgarity; and (9) explicit and crude. *Id.* These categories are highly subjective and open to interpretation. As such, content providers are forced to make very subjective ratings regarding their speech that are far from universally objective.

12. *See Recreational Software Advisory Council Gives Microsoft Internet Explorer 3.0 Top Rating* (visited Nov. 6, 1997) <<http://www.rsac.org/press/960813/html>> (noting that Microsoft incorporates PICS in its web-browser, Internet Explorer 3.0, and uses the RSACi rating system as a default). *See also* Ann Beeson & Chris Hansen, *Fahrenheit 451.2: Is Cyberspace Burning?* (visited Nov. 6, 1997) <<http://www.aclu.org/issues/cyber/burning.html>> (providing a critical view of Internet rating systems including the prospect of self-imposed and government censorship). Microsoft and Netscape have joined forces in adopting the PICS protocol. *See id.* PICS will be widely available because the two companies account for more than ninety percent of the web-browser market. *See id.*

13. Beeson & Hansen, *supra* note 12.

14. *See id.*

15. *See infra* notes 107-27 and accompanying text for a discussion of the deficiencies of the RSACi rating system.

accurate labels for scientific, literary, artistic, or educational material.<sup>16</sup>

To facilitate full participation among content providers, the federal government will propose legislation that will regulate industry efforts to implement a voluntary rating system. Members of the 105th Congress have taken the first step in this process by introducing legislation requiring PICS compatible blocking software to be installed on all new computers.<sup>17</sup> Additionally, Senator Patty Murray recently proposed legislation that would take regulation one step further. The Senator's proposal requires website authors to rate their speech and criminalizes the act of misrating a website.<sup>18</sup>

However, any government regulation of private industry or citizens must pass constitutional muster. In this case, the courts must strike down any legislation that seeks to regulate the Internet through content based ratings. Due to the limitations of rating vocabularies as they currently exist, any federal regulation of this type will compel content providers to speak where they otherwise would not and to rate their websites contrary to their own opinion under the threat of criminal prosecution.<sup>19</sup> Such heavy-handed regulation will constitute a content based regulation of protected speech and courts will likely hold the regulation to be unconstitutional as violative of the First Amendment under a strict scrutiny

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16. See *infra* notes 107-27 and accompanying text.

17. See Family Friendly Internet Access Act of 1997, H.R. 1180, 105th Cong. (1997) (proposing that Internet access providers must provide screening software to their customers for little or no fee); Internet Freedom and Child Protection Act of 1997, H.R. 774, 105th Cong. (1997) (proposing that Internet access providers must provide screening software to their customers).

18. See Senator Patty Murray Press Release, *Murray Outlines Plan to Protect Children From Material on Internet* (June 26, 1997) <<http://www.senate.gov/~murray/releases/970626.html>> (outlining proposed Internet regulation). The pertinent sections of the proposed legislation are as follows:

- 1) Ensure every parent with a computer has access to filtering software. These programs, such as Cyber Patrol, Net Nanny, Surf Watch, and Microsoft's Internet Explorer, are useful tools for parents. However, they are only used in less than 40 percent of the homes accessing the Internet;
- 2) Create a parental warning alongside copyright protections on each homepage;
- 3) Create incentives for webpage creators to rate their own pages for content. These ratings can be accessed through PICS, the Platform for Internet Content Selection, and can be uniformly judged by ratings systems such as RSACi;
- 4) Make it a *criminal offense* to misrate websites;
- 5) Make it a criminal offense to steal sites previously rated as childsafe;
- 6) Make it a felony for anyone to solicit or exploit childsafe chat rooms; and
- 7) Create a 1-800 number to provide concerned parents with a mechanism to report harmful material on the Internet. A toll-free line in Great Britain has proven successful in uncovering illegal material and providing parents with a resource for action.

*Id.* (emphasis added).

19. See *infra* notes 142-65 and accompanying text for a discussion of First Amendment protections against compelled speech.

standard.<sup>20</sup>

Part II of this Comment provides a background of the Internet, blocking software and rating systems. Part II also discusses the First Amendment analyses of content based regulations. Part III analyzes the technical and cultural limitations of the RSACi rating vocabulary. Next, this analysis demonstrates that the federal government will attempt to regulate any PICS based rating systems and its unconstitutionality. Part IV proposes that parents can utilize modified versions of existing blocking software to protect their children without government regulation. Part V provides a conclusion.

## II. BACKGROUND

### A. INTERNET, BLOCKING SOFTWARE, AND RATING SYSTEMS

#### 1. *The Internet*

The District Court in *ACLU v. Reno* described the Internet as “not [being] a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks.”<sup>21</sup> In simpler terms, the Internet is a decentralized<sup>22</sup> means of global communication<sup>23</sup> that links people, schools, corporations, libraries, governments and organizations.<sup>24</sup> Communications can be sent almost instantaneously to other individuals or groups through cyberspace.<sup>25</sup>

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20. See *infra* notes 62-70 and accompanying text for a discussion about the strict scrutiny standard.

21. *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996), *aff'd* *Reno v. ACLU*, 117 S. Ct. 2329 (1997). The court noted that the actual size of the Internet is unknown. See *id.* at 831. However, estimates indicate there are over 9.4 million host computers worldwide. See *id.* This figure does not include the millions of personal computers that access the Internet via modems. See *id.* Similarly, an estimated 40 million users currently have access to the Internet. See *id.* Expectations indicate that as many as 200 million users will have access by the year 1999. See *id.*

22. See *MTV Networks v. Curry*, 867 F. Supp. 202, 204 n.1 (S.D.N.Y. 1994) (noting that the Internet is not owned by any person or entity, rather, it is a cooperative venture that is regulated by volunteer agencies).

23. See *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 163 (D. Conn. 1996) (noting that communications on the Internet are transmitted primarily by modems that send electronic data over existing telephone lines).

24. See *ACLU v. Reno*, 929 F. Supp. at 831. See *Reno v. ACLU*, 117 S. Ct. at 2335 (1997) (noting that the Internet “constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers”).

25. See William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 220 n.5 (1995). The science fiction writer, William Gibson, coined the term “cyberspace” in his novel “Neuromancer.” *Id.* Today, the term refers to the “conceptual ‘location’ of the electronic interactivity available using one’s computer.” *Id.* Although cyberspace has no physical dimensions, activity takes

There are several ways to communicate over the Internet, but the most well known and most pertinent to this discussion is the World Wide Web ("Web").<sup>26</sup> The Web can be used to transmit and access text, sound, pictures, and video images.<sup>27</sup> Documents containing such information do not reside at any one location.<sup>28</sup> These documents are "stored on servers around the world [that] run . . . Web server software."<sup>29</sup> Information on the Web can be obtained through a "web-browser" that displays information in the standard Web formatting language called HTML or "hypertext markup language."<sup>30</sup> Every document on the Web has its own unique address called a URL, or "uniform resource locator."<sup>31</sup> Any individual or organization can create its own personal "home page" formatted in the HTML language with its own URL so other Internet users can locate the website.<sup>32</sup> Additionally, many home pages and individual documents are connected to each other through "hyperlinks."<sup>33</sup> Hyperlinks appear on the computer screen as highlighted text or images which allow a user to go to a related document when accessed.<sup>34</sup>

Indeed, many home pages contain sexually explicit material and other content that may be harmful to children.<sup>35</sup> Although this type of speech is constitutionally protected and suitable for adults, many parents fear that it harms their children.<sup>36</sup> In reality, websites that display indecent material account for only a small percentage of all the informa-

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place in cyberspace via computers as though it "happened in the real world and in real time." *Id.* However, the electronic activity "constitutes only a 'virtual reality.'" *Id.*

26. See *ACLU v. Reno*, 929 F. Supp. at 832-34. The six most common forms of communication on the Internet are:

- (1) one-to-one messaging (such as "e mail"),
- (2) one-to-many messaging (such as "listserv"),
- (3) distributed message databases (such as "USENET newsgroups"),
- (4) real time communication (such as "Internet Relay Chat"),
- (5) real time remote computer utilization (such as "telnet"), and
- (6) remote information retrieval (such as "ftp," "gopher," and the "World Wide Web").

*Id.* at 834.

27. See *id.*

28. See *Shea v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1996).

29. *Id.* at 929.

30. See *id.* Some of the well known web-browsers include Netscape Navigator, Mosaic, and Microsoft's Internet Explorer. See *id.*

31. See *id.*

32. See *ACLU v. Reno*, 929 F. Supp. at 836-37.

33. *Shea v. Reno*, 930 F. Supp. at 929. Hyperlinks are operated by a common communications protocol called hypertext transfer protocol ("HTTP") allowing web-browsers to travel "seamlessly between documents." *Id.*

34. See *id.*

35. See *ACLU v. Reno*, 929 F. Supp. at 844.

36. See *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989) (affirming that sexual expression which is indecent, but not obscene, receives First Amendment protections).



tion that is available on the Web.<sup>37</sup> Moreover, Internet users must actively seek out this information and it is unlikely that, for example, sexually explicit material will be encountered "by accident."<sup>38</sup>

## 2. Stand Alone Blocking Software

Nevertheless, parents are demanding tools to limit Internet access by their children.<sup>39</sup> Stand alone-blocking software was the first product available to limit access to objectionable Internet content.<sup>40</sup> Most blocking software restricts access to a list of researched websites that are deemed unsuitable for children.<sup>41</sup> Cyber Patrol, a popular blocking software program, allows the user to surf the Internet, except those webpages that are excluded by its "CyberNOT Block List."<sup>42</sup> Similarly,

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37. See *Shea v. Reno*, 930 F. Supp. at 931. In discussing sexually explicit Internet content, the district court found that:

[t]here is no evidence that sexually explicit content constitutes a substantial—or even significant—portion of available Internet content. While it is difficult to ascertain with any certainty how many sexually explicit sites are accessible through the Internet, the president of a manufacturer of software designed to block access to sites containing sexually explicit material testified in the Philadelphia litigation that there are approximately 5000 to 8000 such sites, with the higher estimate reflecting the inclusion of multiple pages (each with a unique URL) attached to a single site. The record also suggests that there are at least thirty-seven million unique URLs. Accordingly, even if there were twice as many unique pages on the Internet containing sexually explicit materials as this undisputed testimony suggests, the percentage of Internet addresses providing sexually explicit content would be well less than one tenth of one percent of such addresses.

*Id.* (citations omitted).

38. *ACLU v. Reno*, 929 F. Supp. at 844-45. Internet communications do not appear on a user's computer screen without warning. See *id.* Accidental encounters with indecent Internet content rarely occur. See *id.* In most cases, the title of the document and a description of its content appear before an Internet user takes the step of actually accessing the document. See *id.* Similarly, "[a]lmost all sexually explicit images are preceded by warnings as to the content." *Id.* at 844.

39. See generally *Netparents.org: Resources For Internet Parents* (last modified Aug. 8, 1997) <<http://www.netparents.org/>> (advocating that parents should control what their kids see on the Internet so children may view Internet content that is consistent with family values).

40. See Center for Democracy and Technology, *Internet Family Empowerment White Paper* (July 16, 1997) <<http://www.cdt.org/speech/empower.html>> (providing a position paper, written by the Center for Democracy and Technology ("CDT") in conjunction with the Citizen's Internet Empowerment Coalition, regarding parental empowerment, blocking software, and rating systems). The CDT advocates that blocking software will empower parents without invasive, and possibly unconstitutional, government regulation. See *id.*

41. See *Shea v. Reno*, 930 F. Supp. at 932 (providing stipulated findings of fact regarding blocking software and labeling schemes); *The Cyber Patrol Fact Sheet* (visited Nov. 6, 1997) <<http://www.microsys.com/cyber/fact.htm>> (describing how Cyber Patrol researches websites to determine whether they contain material parents might find objectionable).

42. *The Cyber Patrol Fact Sheet*, *supra* note 41 (noting that the CyberNOT List categorizes websites using set criteria to identify objectionable content). See also *Overview: The CyberNOT Block List* (visited Nov. 6, 1997) <<http://www.microsys.com/cyber/>

Cyber Patrol offers blocking capabilities through its "CyberYES List" which only allows access to websites that the company deems suitable and fun for children.<sup>43</sup> Currently, most blocking software programs, including Cyber Patrol, now incorporate PICS capabilities.<sup>44</sup>

### 3. PICS and Internet Rating Vocabularies

The PICS initiative facilitates the rating and filtering of Internet content in a more sophisticated manner. Rather than having a commercial company rate websites, PICS allows content providers and independent organizations to publish their own content based label for any URL.<sup>45</sup> Similarly, both content providers and third party raters may choose which rating system to use.<sup>46</sup>

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cp\_block.htm> (noting that decisions regarding the CyberNot Block List are made by "a team of professionals," including parents and teachers, who determine the effect a website may have on a typical twelve year old).

43. *The Cyber Patrol Fact Sheet*, *supra* note 41. Any website Cyber Patrol does not rate will automatically be blocked. *See id.* *See also* *Shea v. Reno*, 930 F. Supp. 916, 932 (S.D.N.Y. 1996). The District Court noted that blocking software also operates according to string recognition. *See id.* In doing so, the software recognizes words or character patterns in a website's URL and automatically blocks access to that site. *See id.* *Cf.* Nell Minow, *Filtering Filth, Web Filters: Which Ones Work?* (Aug. 14, 1997) <<http://www.slate.com/Features/Filth/Filth.asp>> (noting that blocking software "fail[s] in two ways: over-inclusiveness—blocking sites that shouldn't be blocked—and under-inclusiveness—letting bad stuff through."); *Some Non-Profit Sites Blocked by CYBERSitter* <[http://www.peacefire.org/censorware/CYBERSitter/blocked\\_org.shtml](http://www.peacefire.org/censorware/CYBERSitter/blocked_org.shtml)> (discussing how blocking software companies arbitrarily block websites that provide useful information). Blocking software companies block many websites that are helpful to children because the software company does not agree with their moral philosophy. *See id.* CYBERSitter is another commercially available blocking software program. *See id.* CYBERSitter blocks the National Organization for Women because their webpage offers hyperlinks to information about "alternative lifestyles." *Id.* Other sites blocked by CYBERSitter include the International Gay and Lesbian Human Rights Commission, The Ethical Spectacle, The Human Awareness Institute and others. *See id.* *See also* *Cyber Patrol Examined* <[http://www.peacefire.org/censorware/Cyber\\_Patrol/](http://www.peacefire.org/censorware/Cyber_Patrol/)> (discussing how blocking software companies arbitrarily block websites that provide useful information). Cyber patrol also blocks websites the company does not agree with. *See id.* Some websites currently blocked by Cyber Patrol include Planned Parenthood, Environlink, AIDS Authority, The Boston Coalition For Freedom of Expression and others. *See id.* Cyber Patrol also blocks access to newsgroups including alt.atheism and soc.feminism. *See id.*

44. *See* Paul Resnick, *Filtering Information on the Internet* (visited Nov. 6, 1997) <<http://www.sciam.com/0397issue/0397resnick.html>> (noting that Cyber Patrol and Microsoft's Internet Explorer are currently using PICS to filter Internet content).

45. *See* Esther Dyson, *Release 1.0: Labels and Disclosure* (Nov. 8, 1997) <<http://www.edventure.com/release1/1296body.html>> (noting that a single webpage may carry numerous labels from different commercial rating services or private groups such as the local Parent Teacher Association or religious organization).

46. *See* *Platform for Internet Content Selection*, *supra* note 8 (providing specific information for website authors regarding the PICS initiative). The W3C claims that PICS is "values-neutral" because it does not endorse any particular rating vocabulary. *Id.* The

For example, the first step in rating a website using the RSACi vocabulary consists of filling out a detailed on-line questionnaire regarding the amounts of nudity, sex, violence, and language.<sup>47</sup> The questionnaire is then graded by an RSAC computer which generates the appropriate label.<sup>48</sup> The RSAC computer then attaches the label to the website's URL.<sup>49</sup> An RSACi rating allows parents to use any PICS compliant web browser or blocking software to set the RSACi levels according to the maturity level of their child.<sup>50</sup> However, in the event that a content provider does not rate a website, PICS will enable filtering software or web-browsers to block the website. Consequently, PICS not only blocks objectionable material, but also acceptable material simply because it is unrated.<sup>51</sup> Theoretically, this system will protect children from harmful Internet content.

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website author or an independent organization may choose which particular rating system to use. *See id.* *See also* Center for Democracy and Technology, *supra* note 40 (discussing parental empowerment, blocking software, and rating systems). Estimates indicate that there are a significant amount of websites that are currently rated. *See id.* According to the CDT, there are over 35,000 sites rated using the RSACi vocabulary, over 50,000 sites rated using the SafeSurf vocabulary and over 300,000 sites rated by an independent company called Net Shepard. *See id.* *See also* *Resources For Internet Parents*, *supra* note 39 (noting similar estimates in the number of websites currently rated by various organizations); *Recreational Software Advisory Council Welcomes IBM as a Corporate Sponsor*, *supra* note 11 (predicting that the number of websites rated by the RSACi system will grow to over 120,000 by the year 1998).

47. *See* *RSACi-About* (visited Aug. 19, 1997) <<http://www.rsac.org/about.html>> (providing general information regarding the RSACi rating system). *See also* Balkam, *supra* note 6 (providing a detailed history of RSAC and the RSACi rating system). In order to help ensure that website authors rate their sites accurately, the RSACi system requires the author to enter into a contractual agreement with RSAC. *See id.* The contract subjects the content provider to legal liability if the provider "willfully misrepresent[s]" the content of a website. *Id.* Additionally, random websites are selected every day and undergo a complete evaluation so that RSAC can verify that the label accurately reflects the content. *See id.*

48. *See* Hiawatha Bray, *Rated P for Preemptive: System to Shield Kids From Adult Web Material Also Seeks to Keep Censors Off Net* (July 25, 1996) <<http://www.rsac.org/press/960725.html>> (reporting on the RSACi rating system and its general background).

49. *See id.*

50. *See* Balkam, *supra* note 6 (providing a detailed history of RSAC and the RSACi rating system). RSACi also allows individual websites that contain more than one document to carry individual labels for each unique document. *See id.* "Thus the Playboy site could rate their Jimmy Carter interview of 1976 differently than the January Playmate of the Month." *Id.*

51. *See* *ACLU v. Reno*, 929 F. Supp. 824, 839 (E.D. Pa. 1996), *aff'd* *Reno v. ACLU*, 117 S. Ct. 2329 (1997). *See also* Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT. L.J. 453, 472-74 (1997) (providing an overview of unrated sites in relation to self-rating systems, particularly, RSACi and SafeSurf).

## B. THE FIRST AMENDMENT AND CONTENT BASED REGULATIONS

### 1. *Scope of First Amendment Protections*

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."<sup>52</sup> The primary purpose of the First Amendment is to protect the public's right to participate in the free exchange of ideas.<sup>53</sup> Accordingly, speech should not be threatened by government censorship.<sup>54</sup> Similarly, the public must be free to express their ideas without excessive and intrusive regulation.<sup>55</sup>

However, the First Amendment does not protect all forms of expression.<sup>56</sup> This principle is clearly illustrated in *Miller v. California* where the Supreme Court held that obscene material does not receive First Amendment protections.<sup>57</sup> Unlike obscene speech, indecent speech does

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52. U.S. CONST. amend. 1. The full text of the First Amendment is as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people to peaceably assemble, and to petition the government for a redress of grievances." *Id.*

53. See *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50, 76 (1976) (noting that the First Amendment ensures "there be full opportunity for expression in all its varied forms to convey a desired message"). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (noting that First Amendment protections of speech do not depend on "truth, popularity, or social utility of the ideas being offered").

54. See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (noting that the "First Amendment . . . does not countenance governmental control over the content of messages expressed by private individuals"). See also *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (noting that censorship is only tolerated by the First Amendment where the expression constitutes "a clear and present danger" which the government has a right "to prevent and punish").

55. See *Roth v. United States*, 354 U.S. 476, 484 (1957) (noting that the First Amendment protects the "unfettered" exchange of ideas in order to bring about social and political change). See also *Barnette*, 319 U.S. at 641-42. The court stated:

[w]e can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes . . . [b]ut freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

*Id.*

56. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-46 (1974) (holding that libelous statements against private citizens are treated more severely than libelous statements directed towards public figures); *Miller v. California*, 413 U.S. 15, 23 (1973) (holding that obscene speech may be wholly prohibited and receives no First Amendment protections); *New York Times*, 376 U.S. at 269 (holding that libelous speech is not protected by the First Amendment); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (holding that the First Amendment allows the government to forbid speech that constitutes fighting words); *Schneck v. United States*, 249 U.S. 47, 52 (1919) (holding that speech constituting a "clear and present danger," such as "shouting fire," may be restricted).

57. *Miller*, 413 U.S. at 23. In *Miller*, the Supreme Court established a three-pronged test to determine whether a given work is obscene and therefore not protected by the First Amendment. *Id.* The *Miller* test is intended to assist state courts in determining obscenity

receive First Amendment protection.<sup>58</sup> Indecent speech is presumed to have some social value, even if the speech lacks literary, political, or scientific value.<sup>59</sup> Although indecent speech receives constitutional protection, the state may regulate the content of indecent speech where that speech could affect children.<sup>60</sup>

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based on local community standard rather than a cohesive national standard. *See id.* at 32. The Court held that the test should 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.

*Id.* at 24. This standard replaces the earlier obscenity analysis that required a work to be "utterly without redeeming social value . . ." *Id.*

58. *See Sable Communications v. FCC*, 492 U.S. 115, 126 (1989); *see Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) (noting that "where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression").

59. *See FCC v. Pacifica Found.*, 438 U.S. 726, 746-48 (1978). The *Pacifica* Court noted "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed . . . [this] is a reason for according it constitutional protection." *Id.* at 745. Although the Court categorized patently offensive speech as having only "slight social value," it is nevertheless afforded constitutional protection. *Id.* at 746. However, patently offensive indecent speech may have more social value in different contexts necessitating different levels of First Amendment protections. *See id.* at 746-47. The Court reasoned that "[w]ords that are commonplace in one setting are shocking in another." *Id.* at 747. *See, e.g., Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that the state may not ban offensive political speech in a public forum); Dyson, *supra* note 45 (advocating that government regulation cannot encompass the diversity of ideas that abound on the Internet). Dyson recognizes that:

In a large number of areas of human activity, individual tastes legitimately vary. Some people find certain language offensive; others find it refreshing. Some like to maintain their privacy; others are happy to share their secrets with the world. Some like religious imagery; others find it offensive. Some expect to have others look out for their welfare; others reject paternalism. Some like risky investments such as Netscape and Yahoo!; others prefer the safety(?) of AT&T and IBM. In the world at large, we often have to live with others' preference: no Christmas trees in the town square during the holidays, but secular advertisements all over the place.

*Id.*

60. *See Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968). In *Ginsberg*, the Supreme Court upheld a New York statute prohibiting the sale of obscene materials to minors. *Id.* at 637. The Court noted that states may regulate in certain areas to protect the well-being of minors. *See id.* at 639. The Court further noted that indecent "sex material" could be limited for two reasons. *Id.* First, parents have traditionally been given the ultimate authority to raise their children as they see fit and are entitled to the support of the law to facilitate that goal. *See id.* Second, the state has an independent interest to protect the well-being of minors and shield them from abuse. *See id.* at 640. The obscene material referred to in *Ginsberg* consisted of adult magazines portraying female nudity. *See id.* at 634. Such materials would not be considered obscene according to the *Miller* standard. *See supra*, note 57. *Cf. Reno v. ACLU*, 117 S. Ct. 2329, 2347-51 (1997) (holding, in part, that the government's interest in protecting children from harmful materials on the Internet was not justified because the CDA was not narrowly tailored); *Sable*, 492 U.S. at 126 (hold-

## 2. *The Strict Scrutiny Standard of Review*

Any government legislation that regulates the content of protected speech will be subject to a strict scrutiny standard of review.<sup>61</sup> In order to surmount the strict scrutiny standard, “the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”<sup>62</sup>

Due to the importance of freedom of expression in our constitutional scheme, the Supreme Court looks to two doctrines of strict statutory analysis to ensure that freedom of expression receives the protection it deserves. First, a statutory regulation will be facially invalid if the regulation is “overbroad” in its application.<sup>63</sup> A statute is overbroad if it not only proscribes speech that may be constitutionally forbidden, but also sweeps within its coverage speech that is constitutionally protected.<sup>64</sup> Additionally, an overly broad statute may have a “chilling effect” on protected speech.<sup>65</sup> That is, when an overly broad criminal statute is involved, the threat of criminal prosecution may actively encourage speakers to remain silent rather than express ideas that could be swept within the coverage of the statute.

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ing that the state interest in protecting minors from indecent telephone messages was not justified because the total ban prohibited adults from receiving protected speech).

61. See *Simon & Schuster Inc. v. New York*, 502 U.S. 105, 118 (1991).

62. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) quoted in *Simon & Shuster*, 502 U.S. at 118.

63. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1979).

64. See *Broadrick*, 413 U.S. at 612-13 (1979). The overbreadth doctrine recognizes that a broad-ranging restriction on speech may deter parties not before the court from engaging in protected speech. See *id.* at 612. This notion provides an exception to the traditional rule that a person must have ‘standing’ in order to be heard in federal courts. See *id.* Thus, the Supreme Court allows “[l]itigants . . . to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.” *Id.* However, the *Broadrick* Court partially limited the overbreadth doctrine by requiring that the overbreadth be “substantial.” *Id.* at 615. The Court necessitated this requirement because the overbreadth doctrine is “manifestly, strong medicine.” *Id.* at 613. See also *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (noting that an overbreadth challenge is permissible where the challenged regulation is so broad that a substantial amount of protected speech is penalized); *Reno v. ACLU*, 117 S. Ct. 2329, 2350 (1997) (holding that the CDA was an overbroad content-based regulation).

65. *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting) (articulating the chilling effect that an overbroad statute would effectuate on free speech). Justice Marshall commented that an overbroad statute:

hangs over [people’s] heads like a sword of Damocles . . . . That this Court will eventually vindicate [a person] if his speech is constitutionally protected is of little consequence—for the value of a sword of Damocles is that it hangs—not that it drops. For every [person] who . . . test[s] the limits of the statute, many more will choose the cautious path and not speak at all.

*Id.*

Second, if a statute survives an overbreadth attack, it may still be held unconstitutional on its face as unduly vague. A regulation is vague when its prohibitions are not clearly defined leaving those affected by the statute uncertain as to what conduct is proscribed.<sup>66</sup> A vague statute may have a chilling effect on protected speech.<sup>67</sup> Hence, a person may choose to remain silent when there is uncertainty whether conduct or speech will be constitutionally protected.<sup>68</sup> Moreover, a vague statute is susceptible to arbitrary and discriminatory enforcement.<sup>69</sup>

### C. MEDIA SPECIFIC FIRST AMENDMENT ANALYSIS

In applying the strict scrutiny standard to content based regulations, the Supreme Court considers the context in which the protected speech is communicated.<sup>70</sup> That is, the Supreme Court applies different levels of First Amendment protection to the various forms of mass communication.<sup>71</sup> The Court determines the level of First Amendment protection by considering the unique technological characteristics of the medium of expression sought to be regulated.<sup>72</sup> The Court has indicated that different forms of mass media such as broadcasting, telephone communications, and Internet communications pose unique First Amendment problems.<sup>73</sup>

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66. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Supreme Court requires that any statute be narrowly tailored so that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* This standard is important so that the innocent have notice regarding precise statutory prohibitions. See *id.* at 109.

67. See *Reno v. ACLU*, 117 S. Ct. at 2344 (finding that "[t]he vagueness of [the CDA] raises special First Amendment concerns because of its obvious chilling effect on free speech").

68. See *Grayned*, 408 U.S. at 109.

69. See *id.* Laws must not only provide fair warning to the innocent, they must also "provide explicit standards for those who apply them." *Id.* at 108. Vague statutes run the risk of arbitrary enforcement because they may be subjectively and selectively enforced by the police and judges. See *id.* at 109.

70. See *FCC v. Pacifica Found.*, 438 U.S. 726, 747-48 (1978).

71. See *ACLU v. Reno*, 929 F. Supp. 824, 873 (E.D. Pa. 1996), *aff'd*, *Reno v. ACLU*, 117 S. Ct. 2329 (1997). Addressing the Internet as a new form of mass communication, the District Court noted that "differential treatment of the mass media has become established First Amendment doctrine." *Id.* Such medium specific analysis stems back "[n]early fifty years ago, [when] Justice Jackson recognized that '[t]he moving picture screen, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself.'" *Id.* (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)).

72. See *id.*

73. See *Pacifica*, 438 U.S. at 748.

### 1. *Print Media*

Traditionally, the Supreme Court has granted the print media the most First Amendment protections.<sup>74</sup> For example, in *Miami Herald Publishing Co. v. Tornillo*,<sup>75</sup> the Supreme Court invalidated a Florida statute that required newspapers to print replies of political candidates whom the newspaper criticized.<sup>76</sup> The Court held the statute unconstitutional because it compelled newspaper editors to publish "that which 'reason' tells them should not be published."<sup>77</sup> In simple terms, the First Amendment does not tolerate intrusion into the function of newspaper editors.<sup>78</sup> Thus, the choice as to what material will be published in the print media stems from the uninhibited exercise of editorial judgment and control, not intrusive government regulation.<sup>79</sup>

### 2. *Broadcast Media*

Conversely, broadcast media receives the most limited First Amendment protection.<sup>80</sup> In *FCC v. Pacifica*, the Supreme Court held that, in some cases, the FCC may regulate the time at which indecent speech is broadcast on the radio.<sup>81</sup> In determining the level of First Amendment

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74. See *ACLU v. Reno*, 929 F. Supp at 873.

75. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

76. See *id.* at 258.

77. *Id.* at 256.

78. See *id.* at 258.

79. See *id.*

80. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

81. *Id.* In *Pacifica*, a young child listened to an afternoon broadcast of a monologue performed by an American radio personality named George Carlin. *Id.* at 729-30. The monologue was 12 minutes long and entitled, "Filthy Words." *Id.* at 729. The content of the monologue referred to words that are not appropriate to say in public. See *id.* The child's father complained to the Federal Communications Commission ("FCC"). See *id.* at 730. The FCC issued a declaratory order granting the complaint. See *id.* The order stated that the WBAI broadcast was "patently offensive" and subject to sanctions. *Id.* The FCC found its power to regulate indecent broadcasts pursuant to 18 U.S.C. § 1464 (1976) "which forbids 'any obscene, indecent, or profane language by means of radio communications,'" and 47 U.S.C. § 303(g), which required the FCC to "encourage the larger and more effective use of radio in the public interest." *Id.* at 731. Although the FCC did not issue formal sanctions, the complaint was associated with WBAI's license file to determine future sanctions pursuant to further complaints. See *id.* at 730.

The Supreme Court held that the Communications Act of 1934 ("Act") did not vest the FCC with the power to subject broadcast content to scrutiny prior to its release. See *id.* at 735. However the Act granted the FCC with the "'undoubted right' to take note of past program content when considering a licensee's renewal application," which did not amount to censorship. *Id.* at 736. Further, the Court held that the content of the WBAI broadcast was 'indecent' within the meaning of 18 U.S.C. 1464. *Id.* at 741. Since the content of the broadcast was indecent and not obscene, it was entitled to the protection of the First Amendment. See *id.* at 745-46. However, the Court found that the constitutional protection afforded to indecent speech "need not be the same in every context." *Id.* at 747.



protection for the radio broadcast in *Pacifica*, the Court looked to the technological characteristics of the broadcast medium.<sup>82</sup> First, the Court found that broadcast media constitutes a pervasive presence in the homes of its listeners.<sup>83</sup> Radio broadcasts of patently offensive speech not only confront the listener in public, but also in the privacy of the home.<sup>84</sup> Since listeners are constantly tuning in and out, prior warnings regarding offensive speech are inadequate to warn the broadcast audience of unexpected program content.<sup>85</sup> Second, the Court found that patently offensive speech was "uniquely accessible to children" through the broadcast medium.<sup>86</sup> The Court reasoned that children could not be protected from offensive broadcasts unless the broadcasts were limited to times when children would be less likely to be in the listening audience.<sup>87</sup> Thus, the Court upheld the statute allowing the FCC to limit the broadcasting of patently offensive material as an effective means to protect children listeners.<sup>88</sup>

## 2. *Wire Communications*

Wire communications receive more First Amendment protections because the medium is less pervasive and the user exercises significant control over the receipt of messages.<sup>89</sup> For example, in *Sable v. FCC*, the Supreme Court held as unconstitutional a federal statute which prohibited all indecent and obscene telephone communications directed to both adults and children regardless of age.<sup>90</sup> Notwithstanding a compelling

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82. *Id.* at 748-50.

83. *See id.* at 748.

84. *See id.*

85. *See id.*

86. *Id.* at 749

87. *See id.* at 750.

88. *See id.*

89. *See Sable Communications v. FCC*, 492 U.S. 115 (1989).

90. *Id.* In *Sable*, Sable Communications offered dial-a-porn services. *Id.* at 117-18. Such services consist of pre-recorded sexually oriented telephone messages. *See id.* In order to access the messages, customers called the service number and were charged a fee. *See id.* at 118. Sable Communications brought suit seeking declaratory and injunctive relief from enforcement of 47 U.S.C § 223(b) of the Communication Act of 1934, as amended in 1988, which placed a blanket prohibition on all indecent or obscene interstate telephone messages regardless of the age of the recipient. *See id.* at 117-18. The Supreme Court held that the prohibition of obscene messages was constitutional because obscene speech receives no First Amendment protection. *See id.* at 124. However, the Court found that total ban on indecent messages was overbroad because it not only banned indecent messages directed to minors, but also adults. *See id.* at 130-31. The statute prohibited the transmission of indecent speech that adults have a constitutional right to receive. *Id.* at 130. Moreover, the Court found that the total ban on indecent telephone communications was not the least restrictive means to regulate in the interest of children because the FCC already had in place credit card verification, access codes, and scrambling rules. *See id.* at 128. The

state interest in protecting minors from indecent phone messages, the Court overruled the statute because it was overbroad and not the least restrictive means available to achieve the goal of protecting minors.<sup>91</sup> In making this determination, the Court distinguished the technological characteristics of broadcasting found in *Pacifica* and telephone dial-in services.<sup>92</sup> The Court found that dial-in phone services do not constitute a pervasive presence in the privacy of the home because the dial-in customer must take affirmative steps to access the service.<sup>93</sup> Those who reach out and contact the service are willing listeners and not considered a "captive audience."<sup>94</sup> The Court noted that "[t]he context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message."<sup>95</sup> As a result, dial-in services are not uniquely accessible to children and are entitled to more extensive First Amendment protections than the radio broadcast addressed in *Pacifica*.<sup>96</sup>

### III. ANALYSIS

Both industry leaders and legislators want to protect minors from indecent material on the Internet. Although their intentions are well-meaning, neither a rating system nor heavy handed government regulation are viable solutions to the problem.

This Analysis demonstrates that the RSACi rating vocabulary<sup>97</sup> is not capable of labeling Internet content that consists primarily of text or contains artistic messages.<sup>98</sup> Furthermore, this Analysis argues that the RSACi rating vocabulary cannot produce consistent labels because the rating system does not account for cultural diversity among raters.<sup>99</sup> Moreover, content providers will have few incentives to rate their con-

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Court reasoned that the existing FCC rules were a "feasible and effective" means to protect children from accessing the indecent messages. *Id.*

91. *See id.* at 132 (indicating that the *Sable* Court applied a strict scrutiny standard in making its ruling).

92. *See id.* at 127-28.

93. *See id.*

94. *Id.* at 128 (noting that "[p]lacing a telephone call is not the same as turning on the radio and being taken by surprise by an indecent message").

95. *Id.*

96. *See id.*

97. *See Beeson & Hansen, supra* note 12 (noting that the RSACi rating system is quickly becoming the "de facto industry standard rating system"). *See also Weber, supra* note 3 (reporting that the RSACi rating system is the industry favorite).

98. *See infra* notes 107-20 and accompanying text for an argument regarding the inherent technical flaws in the RSACi system.

99. *See infra* notes 121-26 and accompanying text for an argument regarding the cultural deficiencies of the RSACi system.

tent in a voluntary rating scheme.<sup>100</sup>

Next, this Analysis discusses recently introduced federal legislation requiring that blocking software be installed on all new computers.<sup>101</sup> Similarly, Congress will likely pass legislation requiring content providers to rate their websites.<sup>102</sup> Such legislation will criminalize the act of misrating a website.<sup>103</sup> However, Internet regulation will be unconstitutional because it will compel content providers to speak where they would otherwise remain silent.<sup>104</sup> Furthermore, content providers will be forced to associate themselves with ideas with which they do not agree.<sup>105</sup> Any regulation of this type will amount to a content based regulation that will run afoul of the First Amendment under a strict scrutiny standard.

#### A. LIMITATIONS OF RATING SYSTEMS

##### 1. *Technical Limitations of the RSACi Vocabulary*

PICS based voluntary rating systems are not viable alternatives to government censorship. Although the RSACi rating vocabulary is considered an industry favorite, it is riddled with flaws and is incapable of rating Internet content in a manner satisfactory to many content providers.<sup>106</sup> Limitations of the RSACi rating system stem from the fact that RSAC developed the RSACi rating vocabulary directly from its rating

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100. See *infra* notes 127-31 and accompanying text for a discussion regarding the lack of incentives for content providers to self rate in a privatized, voluntary rating system.

101. See Family Friendly Internet Access Act of 1997, H.R. 1180, 105th Cong. (1997); Internet Freedom and Child Protection Act of 1997, H.R. 774, 105th Cong. (1997).

102. See Senator Patty Murray Press Release, *supra* note 18 (outlining proposed Internet regulation).

103. See *id.*

104. See *infra* notes 146-61 and accompanying text for a discussion of First Amendment protections against compelled speech.

105. See *infra* notes 162-68 and accompanying text for a discussion focusing on why the government cannot force a speaker to associate with an idea in which the speaker does not agree.

106. See Beeson & Hansen, *supra* note 12 (discussing how self-rating systems will suppress controversial Internet speech). The ACLU notes that websites such as the "Critical Path Aids Project" encounter difficulties rating content. *Id.* Critical Path's webpage includes safe sex educational materials written in street language so teenagers will understand the message. See *id.* The author of Critical Path, Kiyoshi Kuromiya, does not want to rate his own speech as "explicit" or "crude" according to the voluntary rating vocabularies. *Id.* If Kuromiya does so, his website will be filtered out by blocking software in the same manner a pornographic magazine would be blocked. See *id.* If Kuromiya does not rate his site, then it will be blocked automatically by the blocking software as an unrated site. See *id.* Either way, Critical Path cannot reach its intended audience to deliver an educational message. See *id.*

system for video games.<sup>107</sup> RSAC transposed many of the ratings categories and descriptive language vocabularies directly from its video game rating system to its Internet rating system even where “completely inappropriate.”<sup>108</sup>

The most glaring deficiency resulting from the video game standard is that the RSACi system cannot distinguish between images and text.<sup>109</sup> The entire RSACi questionnaire assumes that violence, nudity, sex, and language will be depicted in a visual manner.<sup>110</sup> Naturally, this assumption would make sense for a video game, but it cannot be reconciled with the diversity of content on the Internet. Thus, content providers will encounter difficulty rating the subtleties of textual messages using an image based rating system.

Additionally, the RSACi system is seriously flawed because it cannot evaluate content for artistic, literary, political, educational, or social value.<sup>111</sup> As a result of this flaw, content providers cannot distinguish between an educational message regarding safe sex, for example, and

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107. See Donald F. Roberts, *Media Content Rating Systems: Informational Advisories or Judgmental Restrictions?* (Aug. 28, 1996) <<http://www.rsac.org/roberts1.html>> (providing a detailed background of RSAC's video game rating system).

108. Weinberg, *supra* note 51, at 467 n.65 (noting that the RSACi rating system is flawed due to its adaptation from RSAC's video game rating standard). See also Roberts, *supra* note 107 (discussing the development of the RSACi rating system).

109. See Charlie Stross, *RSACi Ratings Dissected* (visited Nov. 6, 1997) <<http://www.antipope.org/charlie/nonfiction/rant/rsaci.html>> (providing a critical account of one website author's experience using the RSACi rating system). Most of the definitions contained in the RSACi questionnaire are visually oriented. See *id.* For example, the definition of “Blood and Gore” consists of a “[v]isual depiction of a great quantity of a Sentient Being's blood or what a reasonable person would consider vital body fluids, or a visual depiction of innards . . .” *Id.* (emphasis added). Such a visually oriented rating system is difficult to apply to the Internet which contains vast quantities of text. See also Electronic Frontier Foundation, *Public Interest Principles For Online Filtration, Ratings and Labeling Systems* (Feb. 28, 1997) <[http://www.eff.org/pub/Net\\_info/Tools/Ratings\\_filters/eff\\_filter.principles](http://www.eff.org/pub/Net_info/Tools/Ratings_filters/eff_filter.principles)> (discussing contextual, factual, and cultural sensitivities in relation to blocking software and rating systems). In a draft version of its position paper on Internet rating systems, the Electronic Frontier Foundation advocates that:

Content control systems must consider among the rating/labeling/blocking criteria, whenever possible, the context in which the material is found, and whether it is presented as fact or fiction, textual or graphical, advocacy or reportage, etc. Content control systems must take into account whenever possible the literary, artistic, journalistic, educational or other value of the material to be labeled, rated or blocked.

*Id.*

110. See Stross, *supra* note 109 (noting that the RSACi rating system is visually oriented causing strange results in the rating process).

111. See *id.* (noting that the RSACi system does not accommodate variations in the context or content of Internet messages).

hard core pornography.<sup>112</sup> The unwanted result is that the RSACi system forces a safe sex message to be grouped along side websites that display explicit sexual material or gratuitous violence.<sup>113</sup> Such labels, regardless of content, will be blocked. These problems arise every day in the on-line world.<sup>114</sup> Many website authors feel that it is unconscionable to pool artistic material into the same category as pornography that contains no artistic value for child viewers.<sup>115</sup>

Dealing with this crude rating system has even caused problems for RSAC itself. RSAC is faced with the dilemma of assigning labels to "news" sites.<sup>116</sup> Due to the limitations of its own rating system, RSAC recently implemented an "RSACNews" rating which exempts news orga-

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112. See Roberts, *supra* note 107 (noting that contextual factors affect how children perceive television content). The National Cable Television Association ("NCTA") recently conducted a three year study of media violence called the National Television Violence Study of 1996. See *id.* The NCTA research indicates that contextual factors in media content affect how a child perceives the content. See *id.* The research demonstrates that violence, for example, can be portrayed in different ways so that it may increase or decrease negative effects on a child viewer. See *id.* Similarly, contextual factors may also influence how a child perceives educational materials dealing with violence, nudity, sex, or gambling among others. See *id.* Accordingly, artistic or educational Internet messages that pertain to these topics may not merit an arbitrary "adults only" label because the message, as perceived by children, is not harmful in every instance. *Id.*

113. See generally *supra* note 106; *infra* note 114 (providing examples of website authors' who do not want to rate their speech).

114. See generally Jonathan Wallace, *Why I Will Not Rate My Site* (visited Nov. 6, 1997) <<http://www.spectacle.org/cda/rate.html>> (providing a website author's perspective on self-rating Internet content). Wallace publishes a website called "An Aushwitz Alphabet" which contains historical material about the holocaust including testimonials of Jewish survivors. *Id.* The website also contains excerpts of books by Nazi doctors detailing castration and ovary removal procedures performed on concentration camp prisoners. See *id.* Although the material may be graphic to some people, it has strong literary, social, and historical value. See *id.* Yet, Wallace feels that he will be forced to rate his site along with websites that contain sexual material with no scientific, literary, artistic, or political value. See *id.* Ultimately, Wallace states that material such as "An Aushwitz Alphabet" should not be rated at all and be available to anyone who cares to see it, including children. *Id.* Cf. *RSACi-About*, *supra* note 47 (providing general information regarding the RSACi rating system). The RSAC website does not address the types of problems encountered by "An Aushwitz Alphabet." RSAC merely encourages commercial sites and other content providers to self-rate if their content contains little or no "objectionable material." *Id.*

115. See Stross, *supra* note 109 (discussing a further example of a content provider encountering difficulty in rating subjective content).

116. Joseph D. Lasica, *Ratings Today, Censorship Tomorrow* (visited Nov. 6, 1997) <<http://www.salonmagazine.com/july97/21st/ratings2970731.html>> (providing a critical discussion of rating systems and the prospect of self-imposed and government regulation of Internet content). The news is representative of Internet content in general. Difficulties arise when rating current events like the murder of Gianni Versace. See *id.* News coverage of this event was not only violent, but often mentioned the sexual orientation of the victim as well as the killer. See *id.* Similarly, difficulties may arise in assigning a label to stories about Bosnian war victims or the Oklahoma City bombing. See *id.* The actual pres-

nizations from having to rate their own webpages.<sup>117</sup> Parents who utilize blocking software will be given the option to receive all unrated "RSACNews" or no news at all.<sup>118</sup> RSAC's all or nothing method of dealing with the diverse and critically important content of news is a "tacit admission" by RSAC that their own rating vocabulary cannot rate any Internet content that contains scientific, literary, artistic, or social value.<sup>119</sup> This critical flaw is due to the fact that news programs are often violent and graphic, yet obviously contain serious political and social value that both adults and children can appreciate.

The shortcomings of the RSACi system regarding "news" sites is equally applicable to any website that contains similar, subjective, content. Pursuant to RSAC's scheme, a child could view an on-line RSACNews program regarding the spread of HIV through intravenous drug use and unprotected sexual contact. However, the RSACi rating system would likely force a content provider to rate the same information as not suitable for children if it were posted on an a website. The website would receive such a label because the RSACi system cannot distinguish the educational message (as well as contextual factors) from other websites that glorify these topics and are not suitable for child viewers.

## 2. *Cultural Limitations of the RSACi Vocabulary*

The RSACi rating vocabulary lies squarely grounded in American culture and values.<sup>120</sup> Donald F. Roberts, the creator of the RSAC video game vocabulary touts the RSAC system as "[a] highly reliable system mean[ing] that any two individuals using the procedures correctly will

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entation of the news presents problems in determining exactly where the news begins and ends. *See id.*

117. *Id.* In order to determine which websites should be categorized as a "news" site, RSAC works in conjunction with the Internet Content Coalition whose members include the Wall Street Journal, MSNBC, Sony, Prodigy, Playboy, Ziff-Davis, Ad Week, CNET, Wired and others. *Id.* These groups will subjectively determine which websites qualify as legitimate. *Id.* "Thus, mainstream news organizations will sit in judgment of small, alternative, activist publications." *Id.*

118. *Id.* Microsoft intends to incorporate the RSACNews category into its Internet Explorer 3.0 web browser. *See id.*

119. *Id.*

120. *See Stross, supra* note 109 (providing a critical discussion of a website author's experience using the RSACi self-rating system). Throughout the RSACi questionnaire, various icons of American culture are used to help the website author rate Internet content. The RSAC questionnaire includes the following: Lex Luther, space aliens, Bugs Bunny, Wily E. Coyote, Elmer Fudd, R2/D2, Batman, the Three Little Pigs, transporters, cloaking devices, John Wayne, Frankenstein, Bart Simpson, Klingons, Romulins, Chewbacca, C3PO and others. *See id.*

rate a game identically."<sup>121</sup> However, RSAC's enthusiasm and reasoning behind their system is flawed.

In order to provide consistent and objective informational labels, all raters must interpret the RSACi questionnaire in a substantially similar manner before any two different people could rate content in exactly the same way. The RSACi rating vocabulary is incapable of achieving such broad ranging consistency for two reasons. First, cultural values within the borders of the United States vary tremendously. There can be no doubt that the rating process will be skewed when content providers interject their personal cultural, religious, and moral values into the RSACi rating scheme. As a result, two people, who cherish different cultural ideologies, will likely rate content differently.

Second, Internet content originates from every corner of the world, bringing with it diverse cultural viewpoints.<sup>122</sup> As a result, only those foreign content providers who are highly familiar with American culture and mass media will have the possibility of producing consistent ratings.<sup>123</sup> Consequently, the usefulness of the RSACi system substantially decreases when the person rating the content is unfamiliar with Ameri-

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121. Roberts, *supra* note 107 (discussing the origins of the RSAC video game rating system). The RSACi system is an informational system rather than a judgmental system. *See id.* A judgmental system makes a subjective judgment as to what children in general should see. *See id.* Parents often object to judgmental ratings because many children are not as mature as their age indicates and material may be inappropriate for them despite an age level rating. *See id.* On the other hand, an informational system attempts to provide objective information regarding content. *See id.* Informational ratings provide parents with information regarding the subject matter of the content. *See id.* The informational rating enables parents to make more informed decisions regarding what their child will view. *See id.* RSAC modeled its informational rating system after America's food labeling system. *See id.* American food labels display nutritional information about the ingredients in a package. *See id.* In this way, consumers are able to view the nutritional information and decide whether to buy the product. *See id.* Cf. Beeson & Hansen, *supra* note 12 (criticizing the RSACi rating system). The ACLU argues that the analogy between food labels and Internet ratings is misplaced. *See id.*

Food labels provide objective, scientifically verifiable information to help the consumer make choices about what to buy, e.g. the percentage of fat in a food product like milk. Internet ratings are subjective value judgments that result in certain speech being blocked to many viewers. Further, food labels are placed on products that are readily available to consumers—unlike Internet labels, which would place certain kinds of speech out of reach of Internet users.

*Id.*

122. *See* ACLU v. Reno, 929 F. Supp. 824, 848 (E.D. Pa. 1996), *aff'd*, Reno v. ACLU, 117 S. Ct. 2329 (1997) (finding that roughly forty percent or more of all Internet content originates from outside of the United States).

123. *See* Beeson & Hansen, *supra* note 12 (criticizing Internet rating systems). The ACLU fears that rating systems may create borders around America in cyberspace which will filter out foreign created speech. *See id.* The ACLU points out the difficulties involved in rating an anthropology paper concerning ritualistic self-mutilation of teenagers in New Guinea. *See id.* This raises the crucial question of whether a person rating the paper

can culture. These cultural deficiencies are problematic for foreign content providers because they must rate using RSAC's arbitrary standards if they want to reach American homes that utilize blocking software that operates the RSACi rating system.

Rather than endure the inconvenience of labeling websites with unfamiliar and ambiguous terminology, foreign and domestic content providers may simply choose not to rate their websites and forego American viewers who utilize blocking programs.<sup>124</sup> Additionally, content providers may choose not to rate their websites if their on-line messages are not directed towards children or the type of people who utilize blocking software.<sup>125</sup> If content providers choose not to rate their on-line speech, then the website will be blocked by as an "unrated" site by PICS compatible blocking software.<sup>126</sup> Consequently, there are few incentives to rate potentially controversial Internet speech because that speech will be blocked whether it is rated or not.<sup>127</sup>

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should, "look at [the content] through the eyes of an American and rate it as 'torture,' or would you rate it as 'appropriate for minors' for the New Guinea audience?" *Id.*

The RSACi system does not provide an answer to the above question. However, the absence of an answer provides evidence that two different individuals cannot rate the same content in exactly the same way. All human beings are fundamentally different. People from around the world hold different religious, political, moral, and ideological viewpoints. *See id.* RSAC makes a fatal assumption that every unique Internet user, from every corner of the world, will rate content in the exact same way using the RSACi rating system. *See id.* RSAC's assumption is simply not tenable. *See also* Stross, *supra* note 109 (indicating that the RSACi questionnaire contains a 'country' box, but "no use of it is made later in the rating system in order to localize or internationalize the ruleset applied to the [web]site").

124. *See The Net Labeling Delusion: Protection or Oppression - Page 2* (visited Nov. 6, 1997) <<http://www.thehub.com.au/~rene/liberty/label2.html#risk>> (providing a discussion of rating systems from those in Australia who oppose Internet regulation). Technical difficulties also deter website authors from rating their sites. Recently, the Australian Broadcasting Authority rated its website using the RSACi rating system. *See id.* Soon after, PICS compliant web browsers set up to filter using the RSACi vocabulary blocked their entire website, except for the front page. *See id.* This is a curious dilemma; "[i]f the Australian Broadcasting Authority, soon to gain responsibility for Internet content related issues, are unable to properly rate their site, how on earth can they require anyone else to?" *Id.* Similarly, America Online blocked all of its users' home pages when it attempted to rate their own website. *See id.* Compuserve also blocked its own pages in a misguided attempt to rate their website. *See id.*

125. *See* Weinberg, *supra* note 51, at 473 (noting that many website authors possess few incentives to self-rate Internet content).

126. *Id.* at 471-72 (noting that rating systems can only filter content effectively if all unrated sites are blocked).

127. *See* Wallace, *supra* note 114 (providing an example of a website author who opposes self-regulation of Internet content).



B. GOVERNMENT REGULATION OF RATING SYSTEMS AND THE  
CONSTITUTIONAL IMPLICATIONS

In order to facilitate participation in a "voluntary" rating system, the Federal government will likely pass legislation to regulate current industry efforts. The 105th Congress took the first step to initiate this process by introducing legislation requiring installation of PICS compliant blocking software on all new computers or having PICS be provided by Internet access providers.<sup>128</sup> Once the majority of homes possess the ability to filter content, the government will pass legislation requiring Internet content providers to rate their websites.<sup>129</sup> More importantly, these laws will criminalize the act of misrating a website.<sup>130</sup>

Recently, Senator Patty Murray proposed "The Child Safe Internet Act" under the common rubric of protecting children.<sup>131</sup> The Senator's bill would make "voluntary" labeling mandatory, along with parental warnings, filtering software, and prison sentences for those who misrate their websites.<sup>132</sup> Similarly, SafeSurf also proposed the "Online Cooperative Publishing Act" which would require ratings and penalties for those who misrate.<sup>133</sup> This legislation was proposed in an attempt to protect children from gaining access to harmful materials on the In-

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128. See Family Friendly Internet Act of 1997, H.R. 1180, 105th Cong. (1997) & Internet Freedom and Child Protection Act of 1997, H.R. 774, 105th Cong. (1997) (providing examples of legislation that will require Internet Service Providers to provide blocking software to customers).

129. See Beeson & Hansen, *supra* note 12 (predicting that the federal government will attempt to regulate Internet content). See also Balkam, *supra* note 6 (providing a detailed history of RSAC and the RSACi rating system). Stephen Balkam, the executive director of RSAC, points out that the government should regulate an area if private industry fails to regulate itself.

Congress can persuade an industry to take action itself or suffer the consequences . . . [a]nd if, after months (and often years) of making their point, the government still cannot bring an industry group to act, then it is very much in the public's interest to legislate. It is then up to the courts to decide if the regulator[y] scheme created through central government legislation is constitutional.

*Id.*

130. See Senator Patty Murray Press Release, *supra* note 18 (outlining proposed Internet regulation).

131. *Id.*

132. *Id.*

133. *The Online Cooperative Publishing Act (SafeSurf's Proposal for a Safe Internet Without Censorship)* (visited Jan. 14, 1998) <<http://www.safesurf.com/online.htm>> (outlining proposed Internet regulation). The SafeSurf proposal requires content providers to rate using a PICS compliant rating system. See *id.* The proposal makes it a crime to recklessly mislabel a site. See *id.* The proposal imposes criminal sanctions on those who choose not to rate their sites if the site is accessed by a child and it contains harmful material. See *id.* Moreover, the proposal imposes civil liability on those who do not rate their sites if the parents feel that their children were harmed in any way. See *id.* Under the proposal, parents are not required to prove to a court that their child was harmed at all. See *id.*

ternet. More specifically, the proposals' sponsors will argue that mandatory self regulation will shield minors from indecent Internet speech. Notwithstanding a state interest in protecting the well being of minors, such legislation will compromise content providers' right to freedom of speech. Indeed, these proposals seek to do indirectly, what the CDA could not do directly. Therefore, both proposals, if ever enacted into law, will be held unconstitutional under a strict scrutiny standard as a content based regulation.

1. *Medium Specific Analysis of the Internet and First Amendment Protection*

The Supreme Court traditionally looks to the technological characteristics of mass communication mediums in order to determine the level of First Amendment protection afforded the medium. This tradition must continue and be applied to the Internet as a new form of mass communication. Taken in this light, courts must consider Internet's unique characteristics independently of its past medium specific determinations. The various doctrines of First Amendment protection as applied to print, broadcast, dial-in phone services, cable television, commercial advertising, etc. are not individually applicable to the Internet because the Internet encompasses all of these mass communications mediums simultaneously. The Internet, based on its own unique characteristics, must be afforded the highest level of First Amendment protection.

Judge Dalzell, one of the District Court judges who decided the constitutionality of the CDA simply held that "Congress may not regulate indecency on the Internet at all."<sup>134</sup> Moreover, Judge Dalzell concluded that after "examination of the special characteristics of Internet communication, and review of the Supreme Court's medium-specific First Amendment jurisprudence, . . . the Internet deserves the broadest possible protection from government imposed, content-based regulation."<sup>135</sup> This holding was squarely based on the underlying technology of the Internet.

The Internet is deserving of full First Amendment protection because of the incredibly diverse amount of information that freely flows through cyberspace. There are four characteristics of Internet communication that support such protection.<sup>136</sup> First, the diversity of Internet content stems from its low barriers to entry.<sup>137</sup> The Internet provides a single user the ability to reach millions of listeners at a cost that is sig-

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134. *ACLU v. Reno*, 929 F. Supp. 824, 877 (E.D. Pa. 1996), *aff'd*, *Reno v. ACLU*, 117 S. Ct. 2329 (1997).

135. *Id.* at 881.

136. *See id.* at 877.

137. *See id.*

nificantly less than other forms of mass communication.<sup>138</sup> Second, low “barriers to entry are identical for both speakers and listeners.”<sup>139</sup> As a result, an Internet user may utilize different forms of Internet communication to become a speaker and listener simultaneously.<sup>140</sup> Third, ease of access results in the publishing of an incredibly diverse amount of information.<sup>141</sup> Fourth, the Internet creates a “relative parity among speakers” because all who wish to comment on a subject may freely communicate through the medium.<sup>142</sup> The scope and diversity of Internet communication mirrors the very purpose of the First Amendment; to preserve the free flow of information in a marketplace of ideas. As such, the Internet must receive the highest level of constitutional protection in order to repel any government interference that would suppress Internet speech.

*a. Regulation of Rating Systems Will Constitute a Content-Based Regulation of Free Speech*

A constitutional analysis of any regulation that compels participation in a self regulatory scheme must be based on the premise that the First Amendment not only guarantees adults the right to speak freely, but also the right not to speak at all.<sup>143</sup>

Mandatory rating legislation will force content providers to rate their websites using rating vocabularies such as RSACi.<sup>144</sup> However, these rating vocabularies do not identify or rate content for scientific, literary, artistic or political value.<sup>145</sup> Thus, website authors will be forced to rate their speech using the limited capabilities of existing rating vocabularies producing labels with which they do not agree. In essence, the government will compel website authors to make statements, in the form of inaccurate ratings, that they otherwise would not make. Website authors will be coerced to make such utterances under the threat of criminal prosecution which could yield long prison sentences. A speaker’s only other option would be to not publish speech on the Internet at all.

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138. *See id.* at 843.

139. *Id.* at 877.

140. *See id.* at 843.

141. *See id.* at 877.

142. *Id.*

143. *See Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985) (noting that the First Amendment protects against improper restraint of free speech including the right to speak publicly and “a concomitant freedom not to speak publicly”).

144. *See* Senator Patty Murray Press Release, *supra* note 18 (outlining proposed Internet regulation). Senator Murray’s proposal mentions RSACi by name indicating that her legislation may require website authors to rate using RSACi alone. *See id.*

145. *See supra* notes 107-20 and accompanying text (discussing the technical limitations of the RSACi rating system).

In *Riley v. National Federation of the Blind*,<sup>146</sup> a North Carolina statute required fund-raisers to disclose to potential donors the actual percentages of donations given to charities.<sup>147</sup> The Supreme Court held that the government cannot mandate that a person speak where the person would otherwise remain silent.<sup>148</sup> The Court ruled that the disclosure law would “clearly and substantially burden the protected speech” of fund-raisers.<sup>149</sup> Furthermore, the Court held that a government regulation that mandates speech constitutes a content based regulation and is subject to a strict scrutiny analysis.<sup>150</sup> In this case, the Court held that North Carolina’s interest in informing donors regarding how much of their donation would be given to charity was not compelling.<sup>151</sup> Moreover, the Court found that the statute was not narrowly tailored because legitimate fund-raisers would be discouraged from soliciting donations.<sup>152</sup>

Similarly, in *McIntyre v. Ohio Election Committee*,<sup>153</sup> the Supreme Court held that compelled disclosure of the names and addresses of persons distributing election materials was unconstitutional.<sup>154</sup> Despite

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146. *Riley v. National Fed. of the Blind, Inc.*, 487 U.S. 781 (1988).

147. *See id.* at 784-85.

148. *See id.* at 796-97. In *Riley*, the Supreme Court held that a statute requiring fund-raisers to disclose to potential donors the actual percentages of donations given to charities was unconstitutional. *Id.* at 784.

149. *Id.* at 798. The Court found that the statute burdened speech in two ways. *See id.* at 799-800. First, the statute discriminated against small or unpopular charities because such entities usually employ professional fundraiser who charge a fee for their services. *See id.* at 799. Consequently, a small charity’s fundraising campaigns have a high cost resulting in unfavorable disclosures and fewer donations. *See id.* at 799. Second, the Court found that professional fundraisers may choose to avoid solicitation in North Carolina altogether because of unfavorable disclosures. *See id.* at 800.

150. *See id.* at 798. The Court noted that any law compelling disclosure substantially burdens free speech. *See id.* 797-98. Moreover, the court held that the mandatory disclosure law was a content based regulation subject to exacting judicial scrutiny. *See also* *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (holding that a Florida statute requiring newspapers to provide free space for replies to those they criticize was unconstitutional).

151. *See Riley*, 487 U.S. at 798. Here, the Court found that North Carolina’s primary interest in enacting the law was to “dispel the alleged misperception” that charities receive a significant percentage of charitable donations. *Id.* The Court held that this was not a compelling state interest. *See id.* The Court characterized the law as a “prophylactic rule of compelled speech.” *Id.*

152. *See id.* at 798-800.

153. *McIntyre v. Ohio Election Comm.*, 514 U.S. 334 (1995).

154. *See id.* at 345. In *McIntyre*, an Ohio statute prohibited the distribution of anonymous election materials. *Id.* at 338 n.3. In this case, McIntyre distributed anonymous pamphlets opposing a local tax levy. *See id.* at 337-38. The Ohio Elections Committee fined McIntyre \$100.00. *See id.* at 338. The Supreme Court held that the right to publish anonymously is protected by the First Amendment. *See id.* at 341-43. The Court also held that the statute was a content based regulation of political speech and subject to strict

the fact that the disclosures were factual and even assisted the voters, the Court held that the disclosures were a content based regulation.<sup>155</sup> As in *Riley*, the Supreme Court applied a strict scrutiny analysis.<sup>156</sup> The Court held that the State's interest in preventing fraudulent and libelous statements was not compelling because the state had other laws prohibiting such conduct.<sup>157</sup> Furthermore, the Court held that the statute was not narrowly tailored because the compelled disclosure of names would apply to all election materials that are not false or misleading.<sup>158</sup>

Moreover, Internet regulation will be unconstitutional on another front. The First Amendment restricts the government from forcing a person to associate with an idea that the person does not agree.<sup>159</sup> In *Wooley v. Maynard*,<sup>160</sup> the Supreme Court held that the government cannot force a person to advocate a "public adherence to an ideological point of view he finds unacceptable."<sup>161</sup> However, mandatory ratings will force

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scrutiny. *See id.* at 345. The Court held, in part, that providing additional information to voters was not a compelling state interest sufficient to suppress a long held First Amendment right. *See id.* Lastly, the Supreme Court held that the Ohio statute was not narrowly tailored. *See id.* at 351-53. The Court reasoned that Ohio's interest in preventing fraudulent and libelous statements or in providing voters with accurate information did not justify a ban on free speech. *See id.*

155. *See id.* at 348.

156. *See id.* at 347.

157. *See id.* at 349-51.

158. *See id.* at 351-53.

159. *See, e.g., Pacific Gas and Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 9-17 (1986). For over sixty years Pacific Gas included a newsletter in its billing envelopes. *See id.* at 5. A third party group felt that the utility should not use billing envelopes to disseminate political messages. *See id.* The California Public Utilities Commission then ordered the privately owned utility to include a third party newsletter in billing envelopes. *See id.* at 6. Pacific Gas did not agree with the speech in the third party newsletter. *See id.* The Supreme Court held that the Pacific Gas newsletter was entitled to full First Amendment protections. *See id.* at 8. The Court further held that the State of California could not compel Pacific Gas to disseminate a newsletter that contained the views of a third party. *See id.* at 11. The Court reasoned that forcing Pacific Gas to include the third party newsletter penalized the utility's freedom to express its particular points of view. *See id.* at 9. Moreover, Pacific Gas was effectively forced to alter its speech to conform to an agenda it did not set. *See id.* at 15. *See also Keller v. State Bar*, 496 U.S. 1 (1990). In *Keller*, the California State Bar required its member attorneys to pay dues as a pre-condition of practicing law in the state. *Id.* at 4-5. The Bar used the dues to further its statutory mission to "promote the improvement of the administration of justice." *Id.* at 5. In furtherance of their mission, the Bar lobbied the legislature regarding various issues, filed amicus curiae briefs, and debated current legal issues. *See id.* A group of State Bar members filed suit claiming that the Bar Association compelled payment of dues and expended those dues in furtherance of political and ideological causes with which the members did not agree. *See id.* at 5-6. The Supreme Court held that the expenditure of dues for political or ideological purposes violated the Bar Association members' First Amendment rights. *See id.* at 12-14.

160. *Wooley v. Maynard*, 430 U.S. 705 (1977).

161. *Id.* at 715. In *Wooley*, a New Hampshire statute forbade citizens from covering up the words "Live Free or Die" on state issued license plates. *Id.* at 707. The Supreme Court

content providers to publicly adopt arbitrary and inaccurate labels that are associated with their speech. Content providers will be subject to criminal liability if they choose not to adopt government labels and instead self-rate according to their own opinions regarding the content of their speech.

Recently, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*,<sup>162</sup> the Supreme Court reaffirmed the First Amendment right of a speaker to tailor the content of one's message.<sup>163</sup> The Court extended this ruling to encompass the holdings in *McIntyre* and *Riley*.<sup>164</sup> Thus, the right to be free to tailor one's speech precludes the government from coercing a speaker to associate with an unacceptable ideal or be forced to make "statements of fact the speaker would rather avoid."<sup>165</sup>

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held that the state cannot compel a citizen to associate with an ideological message in which the person does not believe. *See id.* at 715. The Court noted that "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority" and the state cannot command that individual to foster an idea the person finds "morally objectionable." *Id.* *See also* *West Virginia State Board of Edu. v. Barnette*, 319 U.S. 624, 641-42 (1943). In *Barnette*, a state statute required public school students to salute the American flag and say a pledge. *Id.* at 626. Failure to comply resulted in expulsion of the student and the possibility of criminal prosecution of both the child and the parents. *See id.* at 625. In this case, a group of children who were Jehovah's Witnesses refused to participate in the pledge. *See id.* at 629. The Supreme Court held that the statute was unconstitutional because the government cannot force its citizens to affirm a belief held by the government. *See id.* at 641-42. The Court noted that the statute compelled students to declare a belief held by the government. *See id.* at 631. The Court stated that "[w]e set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent." *Id.* at 641. As such, the Court stated that the mandatory flag salute "transcends constitutional limitations." *Id.* at 642.

162. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 573-74 (1995).

163. *See id.* at 573-74. In *Hurley*, a group of gay, lesbian, and bisexual individuals of Irish descent petitioned to march in a privately sponsored St. Patrick's Day parade in Boston. *Id.* at 561. Parade organizers refused to allow the group to march in the 1991 parade. *See id.* However, the group obtained a state court order which allowed the group to march in the 1992 parade. *See id.* In 1993, the parade organizers again did not allow the group to march in the parade. *See id.* In response to the 1993 denial, the group filed suit against the parade organizers. *See id.* at 561. The group alleged violations of the state and federal constitutions, and the state's public accommodation law. *See id.* The public accommodation law prohibits discrimination based on sexual orientation regarding admission to any public accommodation, resort, or amusement. *See id.* The Court confronted the issue of whether the state can require private organizers of a parade to include an idiosyncratic group whose message the organizers do not wish to publicly convey. *See id.* at 559. The Supreme Court held that the organizers had a First Amendment right to tailor their speech. *See id.* at 573. Tailoring one's speech allows a speaker "the autonomy to choose the content of his own message." *Id.* This autonomy includes the rights not to associate with a belief the speaker disagrees. *See id.* Similarly, the government cannot force a person to speak where the speaker would otherwise remain silent. *See id.* at 573-74.

164. *See id.* at 573-74.

165. *Id.*

These cases will directly apply to any law mandating that content providers rate their websites using substandard rating vocabularies.<sup>166</sup> Such legislation will amount to a content based regulation because the government will compel website authors to publish content based ratings and publicly adopt the validity of such statements. Based on the precedent of *Riley*, *McIntyre*, *Wooley* and *Hurley*, Congress is simply forbidden from forcing anyone, content providers included, to rate their speech. Content providers' First Amendment right to tailor their speech should be unquestioned. A content provider is not unlike a newspaper publisher. As seen in *Miami Herald Publishing Co. v. Tornillo*, the First Amendment grants newspaper editors unfettered control over the content their publications to preserve the quality of public debate. Internet content providers must receive the same autonomy in order to preserve the unprecedented global conversation in cyberspace.

*b. Government Regulation Will Not Survive Exacting Judicial Scrutiny*

Government regulation of Internet content will not survive a First Amendment strict scrutiny analysis. First, Senator Murray's proposal will necessarily be overbroad in its application. Under Murray's scheme, mandatory ratings will serve to protect the well being of minors by shielding them from indecent and harmful speech. However, every content provider that publishes a website will be amenable to prosecution. Therefore, any content provider who misrates a website, regardless of the content, could be sent to prison. Such a statute would sweep within its coverage those who misrate protected speech that is not harmful to children. Any prosecution of this kind will not serve the state interest in protecting children.

Moreover, an overly broad statute will undoubtedly lead to arbitrary and discriminatory enforcement. Clearly, those who misrate indecent or similar speech will be prosecuted because it is in the best interest of the state to protect the health and well-being of minors. However, law enforcement and prosecutors may not prosecute those who misrate content that does no harm to children, or is even beneficial to child viewers. Prosecution of such offenders would not serve the legislative goal of the statute; to protect children.

Additionally, an overly broad statute will create a chilling effect on constitutionally protected Internet speech. Existing rating vocabularies, such as RSACi, will contribute to this effect for three reasons. First, many content providers will be unable to rate speech containing scientific, literary, artistic, or literary value. Taken to its logical conclusion, such content will always be misrated because the attached rating is inac-

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166. See Weinberg, *supra* note 51, at 474.

curate, subjecting its author to the penalties of Senator Murray's scheme. In this circumstance, the content provider may choose not to publish the message out of fear of a criminal prosecution. Second, if rating vocabularies cannot produce accurate labels, then content providers may choose to alter their speech to conform to the rating vocabulary. Third, potential Internet speakers may simply choose not to publish any speech on the Internet.

Therefore, Senator Murray's proposed legislation will not surmount the strict scrutiny standard because it is not narrowly tailored.<sup>167</sup> Legislation that arbitrarily imposes criminal penalties on website authors is not the least restrictive means available to protect children from indecent material.<sup>168</sup> In this situation, content providers may simply choose not to publish their thoughts and ideas on the Internet.<sup>169</sup> In the alternative, content providers may self-censor their own speech. However, the First Amendment does not encourage self-censorship in any mass communication medium because it results in a chilling affect on the free flow of ideas that are constitutionally protected.<sup>170</sup> The unwanted result is that children and adults will be denied access to constitutionally protected speech. The intrusiveness of Senator Murray's scheme upon content providers' freedom of speech will be repugnant to the First Amendment. The state's interest in protecting minors from indecent or harmful Internet material, whatever its strength, cannot outweigh content providers' right to tailor their own speech.

#### IV. PROPOSAL

As a whole, society has a legitimate interest in protecting children from dangers of all kinds.<sup>171</sup> Indeed, dangers do exist in cyberspace.

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167. See *supra* notes 62-70 and accompanying text (discussing the strict scrutiny standard). See also *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2385 (1996) (noting that the "[g]overnment may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on [free] speech").

168. See *Reno v. ACLU*, 117 S. Ct. at 2344.

169. See *id.*

170. See *id.*

171. Protecting minors from harm is often found to be a legitimate state interest justifying regulation in certain areas. See *e.g.* *N.Y. v. Ferber*, 458 U.S. 747, 756-57 (1982) (upholding a New York child pornography law based on New York's compelling state interest in "safeguarding the physical and psychological well-being of a minor."); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1943) (upholding a Massachusetts law prohibiting minors from selling magazines on the street based on Massachusetts' interest in protecting minors from "crippling effects of child employment."); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968) (upholding a New York statute protecting minors from exposure to nonobscene materials based on New York's "independent interest in the well-being of its youth"). See generally *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (holding that the FCC has the au-



However, blanket government regulation is not a tenable solution to objectionable Internet content. Traditionally, parents are charged with the primary responsibility for protecting their children.<sup>172</sup> In order to provide effective protection from various forms of Internet content, parents must be empowered with effective tools to filter content at the user end; in their living rooms.<sup>173</sup> User control of Internet content, coupled with existing laws that allow prosecution for crimes committed against children,<sup>174</sup> are an adequate means to protect America's youth from the dangers that lurk in cyberspace.<sup>175</sup>

Parental empowerment tools are available today. Particularly, stand-alone blocking software allows the user (parents) to block unwanted Internet content upon receipt.<sup>176</sup> This technology assists parents in controlling accessible Internet content in their own home without compromising the content provider's First Amendment right to freedom of speech. However, blocking software as it currently exists must be modified in order to provide users, and particularly parents, with more control over the accessibility of Internet content.<sup>177</sup> Greater user control will make blocking software a more effective and attractive alternative to broad reaching government regulation.

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thority to impose time, place, and manner restrictions on indecent broadcasting in order to protect the well-being of minors).

172. See *Ginsberg*, 390 U.S. at 639 (noting that "constitutional interpretation has consistently recognized the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"); *Prince*, 321 U.S. at 166 (noting that "it is cardinal with us that custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder").

173. Center for Democracy and Technology, *supra* note 42.

174. There are several federal statutes that address the distribution of obscene materials. See, e.g., 18 U.S.C. § 1460 (1994) ("possession with intent to sell, and sale of obscene matter on Federal property"); 18 U.S.C. § 1461 ("mailing obscene or crime-inciting matter"); 18 U.S.C. § 1462 ("importation or transportation of obscene matter"); 18 U.S.C. § 1464 ("broadcasting obscene language"); 18 U.S.C. § 1465 ("transportation of obscene matters for sale or distribution"); 18 U.S.C. § 1466 ("engaging in the business of selling or transferring obscene matter"); 47 U.S.C.A. § 223 ("prohibiting obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications").

Additionally, forty-five states currently have laws that address obscenity. See Robert A. Jacobs, *Dirty Words, Dirty Thoughts and Censorship: Obscenity Law and Non-Pictorial Works*, 21 Sw. L. Rev. 155, 171-72 n.110-12 (1992) (providing a comparative list of state obscenity laws).

All fifty states have laws addressing child pornography. See, e.g., ILL. ANN. STAT. CH. 720 § 5/111-20.1 (Smith-Hurd 1997) (providing a comparative list of state child pornography laws).

175. See Center for Democracy and Technology, *supra* note 42.

176. See *supra* notes 41-46 and accompanying text (providing a discussion of stand alone blocking software).

177. See Beeson & Hansen, *supra* note 12 (urging blocking software companies to maximize user control over accessible Internet content).

Unfortunately, most blocking software companies arbitrarily block websites.<sup>178</sup> Moreover, these companies do not disclose their lists of blocked websites.<sup>179</sup> This practice allocates power in the blocking software companies to conclusively determine what Internet content will be accessible to its customers. In order to avoid such moralistic monopolies, these "block lists" must be disclosed.<sup>180</sup> In addition to such disclosures, the software must afford its users the capability to unblock websites that the software company deems inappropriate with the concurrent ability to block additional websites.<sup>181</sup> Following this approach, parents can tailor the accessibility of Internet content in accord with family values and the maturity level of their children.<sup>182</sup> Parents will then be empowered to make meaningful choices regarding the filtration of material they find to be inappropriate.

There are three distinct advantages to blocking software that make its use more preferable than any statute that would criminalize on-line speech. First, blocking software is available from several different companies at little or no cost.<sup>183</sup> Second, the software can filter across jurisdictional boundaries.<sup>184</sup> Such capabilities allow the user to block offensive Internet content that originates not only domestically, but from anywhere in the world.<sup>185</sup> Yet, the software concurrently allows the user to access foreign created content that is deemed appropriate.<sup>186</sup> Third, the First Amendment right to free speech is better served by user based filtering programs rather than any form of government regulation requiring the sender to self-rate Internet content.<sup>187</sup> The integrity of this approach is manifested in the fact that content providers will not be required to classify their speech using deficient rating standards or alter their speech in any way. Taken to its logical conclusion, the content provider remains free to publish speech in an unadulterated fashion, however, the user ultimately decides whether to view the content.

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178. See *supra* note 43 (noting that blocking software companies arbitrarily block websites for illegitimate reasons).

179. See Beeson & Hansen, *supra* note 12.

180. *Id.*

181. See *id.*

182. See *id.*

183. See Center for Democracy and Technology, *supra* note 40 (providing a list of eight major service providers that offer filtering software and a list of 248 local and regional service providers that offer filtering software). See also *Netparents.org: Stand Alone Blocking Software* (visited Jan 15, 1998) <<http://www.netparents.org/software/>> (providing hyperlinks to seventeen blocking software companies).

184. See Center for Democracy and Technology, *supra* note 40.

185. See *id.*

186. See *id.*

187. See *id.*

## V. CONCLUSION

A quick and easy techno-fix is not the answer to offensive Internet content. A voluntary self rating system that is enforced through government regulation will suppress many forms of Internet speech. Under such a system, Internet speakers, including many small and independent content providers, will choose not to publish their ideas in cyberspace. As such, the American public, and the world, will be deprived of otherwise valuable information. Rating vocabularies, such as RSACi, cannot rate all Internet content accurately. Until the technology to do so is available, self rating of Internet content will alter the free flow of ideas in cyberspace as we know it.

In the meantime, parents and law enforcement should accept the responsibility traditionally afforded to them to protect children from harmful materials. Parents must take responsibility for what Internet content is accessed in their living room. Government imposed, politically correct regulation is not a viable solution.

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