Before the
Federal Communications Commission
WASHINGTON, D.C. 20554

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

REPLY COMMENTS OF THE ELECTRONIC FRONTIER FOUNDATION

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Introduction

Congress has directed the Commission to study the use, availability, and deployment of certain blocking, rating, and parental control technologies in a variety of contexts, possibly including communications technologies that fall outside of the Commission's traditional jurisdiction. Some commercial commenters may hold out hope for a future windfall if their particular offerings are prominently or favorably treated in the resulting report. But most commenters have appropriately recognized the limitations of the process: the Commission has (correctly) not proposed new regulation or asserted or implied that it has regulatory authority in this area under CSVA or other jurisdictional theories. Nor has the Commission assumed at the outset that any particular government action will be necessary or appropriate.

Most institutional commenters have also agreed that the market already provides an enormous range of parental control technologies of the sorts discussed by the NOI. The Commission has a statutory obligation to investigate and report on the matter, but evidence already presented in response to the NOI shows *no reason to believe that government action is needed to encourage or support these technologies*. We also emphasize that, because these technologies involve restricting the flow of constitutionally protected speech, many sorts of government action to support them could raise constitutional problems.

Blocking technologies are widely available

Almost every commenter from an industry or advocacy organization characterized blocking technologies as numerous and widely available. Individual firms also described their blocking technology offerings in some detail. Adam Thierer, commenting on behalf of the Progress & Freedom Foundation, exhaustively described technologies and rating systems that are already available; he has also written a book-length report describing them[1]. The Center for Democracy and Technology, like Thierer, also emphasized that low adoption rates of certain blocking technologies need not mean that they are inadequate, unavailable, confusing, or poorly publicized; it may mean that many parents have

1 See Comments of Adam Thierer; Adam Thierer, *Parental Controls & Online Child Protection: A Study of Tools and Methods*, available at <http://www.pff.org/parentalcontrols/>.

deliberately chosen not to use them or have no interest in doing so[2]. (V-chips could be infrequently used, for example, not because they are complex or inadequately advertised, but because most TV owners simply don't want to use them.)

The record is abundantly clear that these technologies continue to be created, deployed, and extensively advertised; Thierer listed hundreds of such offerings and industry commenters described the resources they have committed to making these technologies easy to use and familiar for their customers[3]. There is simply no reason to think that blocking technologies require any sort of government encouragement.

Free expression rights of minors and older minors

Courts have recognized a category of speech that is considered "harmful to minors" (HTM) and suggested that the government has an interest in limiting minors' access to such speech. However, the HTM doctrine does not mean that minors (and would-be speakers to audiences of minors) have no First Amendment rights. In fact, courts have been careful to recognize that minors have constitutional rights to speak and to receive speech. These rights are not derivative of their parents' or guardians' rights, but are personal rights of individual minors. Minors "are 'persons' under our Constitution. . . . possessed of fundamental rights which the State must respect,"[4] and "are entitled to a significant measure of First Amendment protection."[5]

Moreover, common sense and caselaw tell us that there is a world of difference between 8- and 16-year-olds; "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (minors' right to abortion). Indeed, mature minors possess close to the "full capacity for individual choice which is the presupposition of First Amendment guarantees." *Bellotti v. Baird*, 443 U.S. 622, 635 n.13 (quoting *Ginsberg*, 390 U.S. at 649). See also Catherine Ross, *An Emerging Right for Mature*

2 Individual Comments of the Center for Democracy & Technology at 6 ("the reality that many parents are less concerned about television content than some advocacy groups (and some Members of Congress) are" may account in part for comparatively low rates of V-chip use).

3 See, among others, Comments of AT&T Inc.; Comments of Comcast Corp.; Comments of the Consumer Electronics Assn.; Comments of Cox Communications, Inc.; Comments of CTIA; Comments of Microsoft Corp.; Comments of Sprint Nextel Corp.; Comments of TiVo, Inc.; Comments of Verizon and Verizon Wireless; Supplemental Comments of the National Cable & Telecommunications Assn.

4 *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 511 (1969); see *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992) (parental consent statute must contain method by which minor can obtain abortion without parental consent); *In re Gault*, 387 U.S. 1, 13 (1967) (minors' right to criminal due process).

5 *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-213 (1975) (citation omitted).

Minors to Receive Information, 2 U. Pa. J. Const. L. 223 (1999).

In a case involving the constitutionality of regulating video games, Judge Richard Posner made clear that "children have First Amendment rights." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001). These rights, Posner noted, are the foundation for the very heart of First Amendment protection: an informed and critical electorate. *Kendrick*, 244 F.3d at 577.

Contrary to widespread belief, the HTM standard is narrow and is independent of what particular parents might believe is harmful or inappropriate for their children. Although parents' legal rights to attempt to control their children's access to information are broad, the state's ability to do so is sharply constrained. (Parents are also entitled to override government restrictions on their children's access to HTM speech. In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court explicitly noted that a constitutional flaw of the Communications Decency Act was that it applied even if parents consented to or participated in the speech, while the statute upheld in *Ginsberg* did "not bar parents who so desire from purchasing the magazines for their children." *Reno*, 521 U.S. at 865, quoting *Ginsberg v. New York*, 390 U.S. 629 (1968) at 639.)

Notably, speech can *only* acquire HTM status as a result of sexual content. Courts have repeatedly held that nonsexual depictions of violence are not covered by the HTM doctrine and are just as constitutionally protected for minors (against state action) as they are for adults. A series of court decisions, for example, has repeatedly invalidated state attempts to regulate minors' access to violent video games. In particular, *the courts have generally overturned video game regulations when they were based on content concerns other than the HTM standard, such as violence*. For instance, California's "violent video game" law was recently found unconstitutional in large part because violence is not part of the HTM doctrine. *Video Software Dealers Association v. Schwarzenegger*, 556 F.3d 950, 959-961 (9th Cir. 2009).

Perusing the categories and advertised criteria of private-sector rating and blocking systems – as well as individuals' comments in this docket – shows that many parents' objections to media programming and corresponding desire for parental control technologies goes far beyond the sexual nexus required by the HTM standard. Some parents want to block depictions of violence, or swearing, or religious blasphemy, or advocacy for or against particular religious beliefs or political views, or for or against homosexuality[6]. However, courts do not recognize *any of this material* as "harmful to

6 Cf. Comments of CustomPlay, LLC, at 1 (describing product's ability to block "Bigotry, Blasphemy, Bloodshed, Bodily Functions, Dishonor Flag, Dishonor Parent, Hideous, Mature Subjects, Nudity, Sex, Substance Abuse, Violence,

minors": under current caselaw, parents may try to block it from their children; the government may not do so.

Indeed, concepts familiar to First Amendment content regulation do not translate well into new media. Each mode of expression has its own unique characteristics, and each "must be assessed for First Amendment purposes by standards suited to it." *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 557 (1975). For instance, the notion of judging a work "as a whole is familiar in other media, but more difficult to define on the World Wide Web. It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites." *Ashcroft v. ACLU*, 535 U.S. 564, 592-593 (2002) (Kennedy, J., concurring).

We urge the Commission to thoroughly examine caselaw related to the scope of the HTM standard and minors' free expression rights[7]. This legal background is centrally relevant to the Commission's report, yet individual legislators are often dramatically unaware of it. At the state level, legislators have persisted in passing clearly unconstitutional video game regulations; by making the legal context clear, the Commission can perhaps reduce the temptation for Congress to do the same.

We also urge the Commission to pay close attention to the constitutional problems surrounding any attempt to use government power to enforce private ratings schemes. Since *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968), which struck down a state movie classification scheme very similar to that now used by the Motion Picture Association of America (MPAA), it is well settled that ratings that are not "narrowly drawn, reasonable, and definite" may not have the force of law. *Id*. at 690. Courts have found that the MPAA's scheme fails this test.[8] Ratings schemes given the force of law also raise

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Violence To Animals, and Vulgar Words"). Although no law limits parental use of such technology, the government would encounter constitutional difficulties in directly restricting minors' access to expression in most of these categories.

7 In 2007, the Commission suggested that Congress might constitutionally directly regulate violent expression if Congress made certain factual findings about the effects of such expression. Report in the Matter of Violent Television Programming And Its Impact On Children, FCC 07-50, MB Docket No. 04-261 (April 25, 2007). Commissioner McDowell worried, however, that the Commission had not fully grappled with the constitutional implications of such a proposal, warning that Congressional regulation of violent content, "although noble in its goal, will lead us through uncharted constitutional waters", *id*. at 38, and Commissioner Adelstein frankly noted the potentially quixotic nature of this proposal: "[T]his is a protected constitutional right under the First Amendment [...] The Commission has not been able to formulate and recommend a definition of violence that would cover the majority of violent content that is inappropriate for children, provide fair guidance to programmers, and stand a decent chance of withstanding constitutional scrutiny, in light of judicial precedent. While we may want to define prohibited-violence and regulate it in conformance with constitutional standards, the Report does not refer to any court or judicial scholar that has suggested such definition is available or probable. To the contrary, the Report diminishes the extent to which courts have either expressed serious skepticism or invalidated efforts to regulate violent content." *Id*. at 31 (internal footnotes omitted). The 9th Circuit's subsequent *Schwarzenegger* decision, although relating to a state's attempts to regulate violent content, confirms that Commissioners McDowell and Adelstein's constitutional concerns were abundantly justified.

8 "The manner in which the MPAA rates all films ... causes this Court to question the integrity of the present rating system.... The standard is not scientific ... nor is any professional guidance sought to advise the board members regarding any relative harm to minor children.... This Court concludes that reliance upon a non-professional rating board

"compelled speech" issues. *See Schwarzenegger*, 556 F.3d at 965-967 (rejecting California's violent video game labeling requirement even on the assumption that video game packaging was commercial speech).

Errors, overblocking, and nontransparency of blocking products

The Commission can also usefully consider blocking products' limitations. Some blocking products target works that have been rated by their creators, or by a third-party in a systematic way (for example, the MPAA or ESRB, or a volunteer or advocacy organization or a private firm that issues third-party ratings). When these rating values are available in a database or machine-readable form, blocking products are generally reasonably accurate (although the underlying ratings might have been applied in a capricious or nontransparent way by a rating authority[9]). This makes sense because the number of works potentially subject to these rating systems (commercially-released motion pictures or commercially-released video games) is comparatively small, and the content of these works normally does not change over time following their initial release. However, other blocking products, particularly Internet blocking software, target open-ended collections of media that are mostly entirely unrated. Because of the scale of the Internet and the rate at which new materials are published to it, most such blocking software no longer relies primarily on ratings by human raters[10]. Even where human raters are involved at some stage, their initial judgments are not necessarily reviewed regularly – if ever.

The ability of blocking software to achieve both substantial coverage of the Internet (to make a meaningful decision about whether or not to block particular web pages) and substantial accuracy (to

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is misplaced." *Miramax Films Corp. v. Motion Picture Ass'n of Am., Inc*., 560 N.Y.S.2d 730, 733-734 (1990); *Swope v. Lubbers*, 560 F. Supp. 1328, 1334 (D. Mich. 1983) ("it is well-established that the Motion Picture ratings may not be used as a standard for a determination of constitutional status.").

9 See Kirby Dick (director), *This Film is Not Yet Rated* (2006) (alleging inconsistencies and irregularities within MPAA's rating process).

10 Bennett Haselton, "Report on Accuracy Rate of FortiGuard filter", Sarah Bradburn *et al*. v. North Central Regional Library Dist., E.D.Wash. dkt. no. CV-06-326-EFS (expert report filed July 27, 2007). "One of the greatest sources of controversy has been how the different companies compile their lists of sites to be blocked. From about 1995 to 2002, it was common for blocking companies to claim that all of the sites on their lists had been viewed by employees ('human review') before being added to the database. However, for many of the major programs, critics produced hundreds of examples of sites that were listed in the database as 'pornography' even though no reasonable person could have viewed the sites and classified them as such. Several companies modified their claims to say that portions of their database were compiled by automated programs which searched the Web for new sites, applied a computer algorithm to the contents, and added the sites to the blacklist based on the output of that algorithm ('automated review'). Today, almost no blocking companies claim that their blacklists are compiled 100% by human review." *Id*. at 2.

have this decision be related by the correct application of published criteria to the content of the web page) is severely limited. Unsurprisingly, Internet blocking software has long been plagued with errors. Spot-checks or accuracy studies for some of the most popular blocking software have found embarrassingly high error rates, in addition to notable anecdotal reports of overblocking[11]. Internet blocking software often relies on automated keyword-based statistical classification techniques, which are prone to error[12].

Some products' blocking criteria are unpublished or are applied unevenly[13]. The accuracy and biases of Internet blocking software have been subjects of concern when such software is used or required by government entities. The Librarian of Congress twice recognized the importance of research into errors and biases in blocking software lists in approving exemptions to the Digital Millennium Copyright Act to protect this research[14]. These concerns are an important consideration for anyone trying to evaluate of blocking software. If the Commission's report examines Internet blocking software, it should also examine accuracy issues.

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11 See Marjorie Heins, Christina Cho, and Ariel Feldman, "Internet Filters: A Public Policy Report", Brennan Center for Justice, 2nd ed., May 2006, available at <http://www.fepproject.org/policyreports/filters2.pdf> (summarizing accuracy concerns and notable examples of erroneous classification). A recent example is Sarah Houghton-Jan, "Internet Filtering Software Tests: Barracuda, CyberPatrol, FilterGate, & WebSense", San José Public Library, April 2, 2008, available at <http://www.sjlibrary.org/about/sjpl/commission/agen0208_report.pdf>.

12 Search engines use related statistical techniques, but they also suffer from inaccuracy problems: they may fail to show some relevant search result for a particular query or mistakenly show results that are irrelevant. But the stakes are higher in the case of blocking software; if a site is erroneously excluded from search results, a user may learn about it some other way (such as a link from another site, a news report, or a friend's recommendation). If a site is erroneously blocked, a user may be prevented from viewing it at all.

13 "Almost all blocking companies encrypt the blacklists of sites used by their programs, so that customers cannot directly see what sites are on the list." Haselton, *id*. at 2. In 2000, Haselton showed that six leading blocking software companies (SurfWatch, Cyber Patrol, Net Nanny, Bess, WebSENSE, and SmartFilter) would block personal web sites containing "derogatory statements based on sexual orientation", but declined to block organizational web sites containing identical statements. See <http://www.peacefire.org/BaitAndSwitch>.

14 See Recommendation of the Register of Copyrights, 65 Fed. Reg. 64,564 (October 27, 2000); Recommendation of the Register of Copyrights (October 27, 2003) (available at <http://www.copyright.gov/1201/docs/registers-recommendation.pdf>). "The evidence tended to show that the incentive to continually verify the objectionable nature of the blocked sites appears lackluster at best – an important concern given the rapid pace and dynamic nature of the Internet – and is of less concern to filtering companies than is the concern for comprehensiveness. [...] Taken to an extreme, moreover, an obsession with comprehensiveness could lead to unnecessary or even harmful censorship of legitimate information that would adversely affect the usefulness of Internet research. While the marketplace might, in theory, limit excesses in the over blocking of legitimate information, the market can only correct problems that participants in the marketplace are aware of." *Id*. at 28 (internal footnotes omitted).

Limits of Commission authority under the CSVA

We join those commenters who commend the Commission for its restraint in carrying out the study ordered by Congress without asserting new regulatory authority. We agree that the Commission can and should study the topics contemplated in the CSVA and in the NOI, and that the Commission generally lacks other authority to act in this area. We also emphasize that traditional rationales for broadcast content regulation continue to be inapplicable to non-broadcast media, and, as several commenters observed, the existence of a wide variety of blocking technologies for new electronic media makes these rationales less and less applicable all the time. Congress or the Commission could quickly run into constitutional problems by acting to regulate content delivered through these media or by requiring a mandatory ratings system, even one that was initially developed by the private sector.

As industry commenters observed, and beyond potential constitutional concerns, it would also be a significant burden on the public and to require that blocking technologies, when present, be set to use restrictive defaults – e.g., requiring that devices be shipped with on-board screening technologies set to block any content rated above "G" for movies, "TV-Y" for television, or "E" for video games, which are the most restrictive rating designations in the most prevalent industry rating scheme for each type of media. It would be similarly burdensome to attempt to require personal computers or portable media devices to have filters embedded that were set by default to block objectionable content, however defined. Industry has reacted to clear commercial incentives and the overwhelming desire of most media consumers not to be subject to such restrictions by default.

Finally, as the Center for Democracy and Technology and Thierer have explained, the ubiquity of voluntary rating systems does not mean that government can take advantage of these systems for a government purpose (or convert voluntary rating systems into mandatory ratings). Government cannot co-opt a voluntary, private ratings system for its own ends[15].

Conclusion

Institutional commenters replying to the NOI are nearly unanimous on three fundamental points[16]:

15 See Individual Comments of the Center for Democracy & Technology at 11 ("Any requirement that a content creator, content provider, or service provider rate, flag, or tag online content would be plainly unconstitutional under the First Amendment. The government is without constitutional power to require content creators or providers to "label" or "rate" their content.") See also Joint Comments at 6, 11.

16 This docket also contains numerous individual comments, many of which are not directly responsive to the NOI. Many

- Blocking technologies are widely available in the market and do not require further government support.
- The Commission lacks authority to regulate in this area beyond the study required by CSVA.
- The government should not mandate particular ratings systems or standards.

In addition to these points, we urge the Commission to consider minors' free expression rights and other constitutional implications of any recommendation or proposed court of action. If the Commission's report examines Internet blocking software, we also urge it to examine the accuracy, evaluative criteria, and objectivity of software products or groups of products it discusses. We think these topics are clearly appropriate for the Commission's research because they provide an essential part of the context within which blocking and parental control technologies exist; fully understanding that context is particularly important for legislators such as the members of Congress who directed the Commission to perform this research.

We appreciate the opportunity to submit comments in this proceeding and we would welcome the opportunity to comment at a later stage in the Commission's work.

Respectfully submitted,

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of the individual comments we have examined simply express dissatisfaction with TV or Internet content. On the other hand, many individual commenters are enthusiastic customers of particular products like TVGuardian and wish that the Commission or Congress would support the availability of these products; some want them to be included with all televisions. But these customers generally do not describe difficulties in obtaining and using the blocking products of their choice. Their satisfaction with existing products is manifestly not a call for new government action.