Testimony of Robert Corn-Revere

Before the

COPA Commission

Legal and Policy Implications of "Cyberzoning"

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Mr. Chairman and Members of the Commission. Thank you for this opportunity to address the significant issues that you are charged with investigating. My testimony reflects only my own views on the issues; I am not testifying on behalf of any organization or client.

I have been asked to discuss the legal and policy implications of "cyberzoning." By this term I mean the creation of designated zones on the Internet for the labeling and possible segregation of "adult" material. One potential mechanism for such zoning would be the creation of a new top level domain ("TLD") in order to provide a distinctive Internet address for specified types of sexually-oriented materials (e.g., ".xxx," ".sex" or ".adult") as opposed to the familiar .com, .net and .org generic domains. This is viewed by some as a less restrictive way of preventing access by children to sexually-oriented materials than the use of direct penalties for the display or transmission of such materials.

As I explain below, such proposals frequently are more complicated than they seem at first glance, especially with respect to speech on the

Internet. While it may be tempting to apply the concept of real world zoning metaphorically to online speech, there are fundamental differences between the types of "zoning" envisioned for these distinct spaces, both in terms of the purposes to be served and in their operation and effect. In addition, there are practical difficulties associated with the use of the global domain name system as an instrument of domestic policy.

I. BACKGROUND

In 1997 the Supreme Court invalidated key portions of the Communications Decency Act, the federal government's first attempt to regulate "indecent" speech on the Internet. Reno v. ACLU, 521 U.S. 844 (1997). In doing so, the Court identified the ways in which the Internet is fundamentally different from previous mass media. It described the Internet is a unique and wholly new medium of worldwide human communication that is located in no particular geographical location and has no centralized control point; a medium that is available to anyone, anywhere in the world with access. Accordingly, the Supreme Court found that the information available on the Internet is as "diverse as human thought." Id. at 850-852.

Although the Court was unanimous in striking down on First Amendment grounds those provisions of the CDA that prohibited the "display"

of "indecent" materials, Justice O'Conner, joined by Chief Justice Rehnquist, dissented in part and suggested that certain methods of segregating adult materials might be permissible. They described the CDA as an attempt to "create 'adult zones' on the Internet" and suggested that future laws might survive constitutional review so long as they do not "stray from the blueprint our prior cases have developed for constructing a 'zoning law.'" Id. at 886 (O'Connor, J., concurring in part and dissenting in part). Noting that the Court previously addressed only laws that operate in the physical world, Justice O'Connor observed that "[c]yberspace is malleable" and that "it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and, consequently, more amenable to zoning laws." Id. at 890. The dissenting Justices recognized that the technology for such zoning was at an early stage of development but described the necessary preconditions for its effectiveness: (1) a uniform code for designating content, and (2) widely available (and widely used) technology that could recognize the code and restrict access for certain users. Id. at 891.

Congress attempted to correct the constitutional deficiencies of the CDA when it adopted the Child Online Protection Act ("COPA"), codified at 47 U.S.C. § 231. The stated purpose of the law was to restrict the availability

to children of "harmful to minors" material on commercial websites. However, for reasons that echo the Supreme Court's decision in *Reno v. ACLU*, enforcement of COPA has been enjoined by the United States District Court for the Eastern District of Pennsylvania. *ACLU v. Reno*, 31 F. Supp.2d 473 (E.D. Pa. 1999). Appeal of that decision currently is pending in the United States Court of Appeals for the Third Circuit.

During the legislative debates that led to the passage of COPA, Congress considered – and rejected – a number of zoning techniques designed to "effectively place[] the seller of pornography in a red-light district in cyberspace." H. Rep. 105-775, 105th Cong., 2d Sess. 17-20 (Oct. 5, 1998) ("HOUSE REPORT"). The analysis included such methods as tagging websites, voluntary rating systems, blocking or filtering technologies and domain name zoning. Generally, these alternatives were not embraced because it was believed that they would not protect children adequately while raising "a host of additional issues that jeopardize their success and effectiveness." *Id.* at 17.

According to the congressional analysis, a scheme of mandatory tagging or rating "would raise additional First Amendment issues because entities such as online newspapers could be asked to rate their content." *Id.* at 18. In addition, the House Report concluded that such zoning methods would

be ineffective unless they were combined with some form of blocking or filtering technology. It pointed out that without the use of technology to restrict access, such methods "could actually help a minor find adult material." Id. at 18. With respect to domain name zoning, the House Report concluded that simply creating an adult domain without mandating uniform blocking techniques would be ineffective. In addition, it noted that changes in the DNS "will have international consequences" and it suggested that "the United States should not act without reaching broad industry and international consensus." Moreover, Congress expressed its reluctance "to begin regulating the computer industry." Id.

Following judicial prohibition on the enforcement of COPA, it has been suggested that new legislative proposals to mandate some form of cyberzoning might be introduced. So far as I am aware, none of the zoning measures has yet materialized, so it is not possible to address specific proposals at this time. However, there has been some discussion of various cyberzoning approaches by academic writers that provide some basis for analysis. 1/

1/ E.g., Lawrence Lessig, CODE AND OTHER LAWS OF CYBERSPACE 173-182 (Basic Books: New York 1999) ("CODE AND OTHER LAWS"); Lawrence Lessig, G-

Professor Lawrence Lessig, for example, has written that technology permits Internet browsers to be configured for individual users, so that minors could be restricted to what he describes as "G-rated surfing." To accomplish this, however, inappropriate materials would be excluded "only if servers cooperated," so that it would be necessary to adopt what he describes as "a simple law", which would provide that "[i]f a client signals gSurfing, then a server may not transmit material 'harmful to minors.'" 2/ Lessig explains that "with zoning, people are filtered; with filtering, the listener zones speech," and he asserts that zoning based on identifying children and excluding them from "Ginsberg speech" would be constitutional. See CODE AND OTHER LAWS, supra note 1 at 176.

To accomplish this objective at the client level may involve the government "requiring browser manufacturers to modify their browsers to permit users to set up profiles" which would include a check-off box for the user

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Rated Browsers, THE STANDARD, Dec. 3, 1999 ("G-Rated Browsers") (http://www.thestandard.com/article/display/0,1151,8035,00.html); April Mara Major, Internet Red Light Districts: A Domain Name Proposal for Regulatory Zoning of Obscene Content, 16 John Marshall J. Computer & Info. 21, 30 (1997) ("A Domain Name Proposal for Regulatory Zoning").

2/ See G-Rated Browsers. The "harm to minors" standard refers to the variable obscenity test articulated by the Supreme Court in Ginsberg v. New York, 390 U.S. 629 (1968), which is described more fully below.

to signal he is a minor. If this box is checked on a given machine, "the other profiles on the machine would require a password." Id. When such a browser is used to surf the web, the "kid ID" would be transmitted when an attempt is made to access a web site. To be effective, "[t]his scheme would require that the web site block Ginsberg speech to any self-identified minor." Id.

On the content side, this proposal "requires those who have zonable speech to place that speech behind walls." Id. Accordingly, under Lessig's suggested "simple law," certain designated speakers on the Internet "are zoned into a space from which children are excluded." Id. at 175. One possible "space" to which "Ginsberg speech" could be relegated under such a plan, would be a separate, restricted TLD under the domain name system. In this regard, the HOUSE REPORT on COPA noted that "there are no technical barriers to creating an adult domain, and it would be very easy to block all websites within an adult domain." HOUSE REPORT at 18.

II. LEGAL ANALYSIS OF CYBERZONING

The typical legal analyses of the various cyberzoning proposals attempt to apply First Amendment concepts developed in tangible space to cyberspace. On one level, this makes good sense, in that traditional legal principles are applicable to speech on the Internet. As the Supreme Court

established in Reno v. ACLU, 521 U.S. at 870, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." But where efforts to place certain types of speech "behind walls" are based on legal theories built on particular physical or geographical assumptions, the analogy breaks down. In a nutshell, cyberzoning is a very different thing than zoning in real space.

A. Zoning "Adult" Businesses

The most obvious – and least appropriate – analogy is to compare cyberzoning to restrictions placed on certain types of adult businesses in the physical world. Zoning restrictions may impose certain requirements on such businesses, such as limiting their location in a community or hours of operation, just as most businesses must comply with land use requirements in physical space. For businesses that are engaged in expressive activities, certain special zoning requirements have been approved by the courts where the restrictions are designed to address "secondary effects" that may be associated with the business, including crime, prostitution, urban blight or similar problems. This

"secondary effects" theory is derived from a series of cases involving the zoning of adult bookstores, movie theaters and night clubs. 3/

In defending the CDA the federal government argued that restrictions on Internet speech could be upheld under this theory. The Solicitor General's brief to the Supreme Court in *Reno v. ACLU* took the position that indecent speech may be regulated as if it were a "secondary effect," and the CDA's restrictions may be characterized as content-neutral "cyberzoning." Similarly, Professor April Major has suggested that Internet zoning using the DNS could be supported using a "secondary effects" analysis. The "secondary effect" to be addressed by such regulation would be the possibility that the Internet may "lose legitimacy" as a "communication and information medium" absent adult "zones." See A Domain Name Proposal for Regulatory Zoning, *supra* note 1.

Such analyses misapprehend the meaning of the secondary effects theory. Secondary effects, by definition, are physical effects. A Renton-type analysis can apply only to real space because it is predicated on combating physical problems that may be associated with certain businesses. In this

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3/ E.g., *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*,

respect, the Supreme Court has held repeatedly that Renton "secondary effects" analysis does not apply where regulation of adult businesses is based on "the content of the films being shown inside the theaters." 4/ As the Supreme Court very recently reaffirmed in United States v. Playboy Entertainment Group, Inc., 2000 WL 646196 *8 (May 22, 2000), zoning cases are irrelevant to content-based regulations of speech because "the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech."

Any effort to "zone" information on the Internet can only be understood as a decision to restrict material because of its content, for there is no physical presence in cyberspace. Accordingly, the Supreme Court foreclosed the use of a "secondary effects" analysis for Internet speech in Reno v. ACLU. It held that efforts to limit access by children to "indecent" speech were based

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Inc., 427 U.S. 50 (1976).

4/ Boos v. Barry, 485 U.S. 312, 320-321 (1988) ("Regulations that focus on the direct impact of speech on its audience . . . are not the type of 'secondary effects' we referred to in Renton."); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134-136 (1992). See also Erznoznik v. City of Jacksonville, 422 U.S. 205, 214-215 (1975); Schneider v. New Jersey, 308 U.S. 147, 162-163 (1939).

on concern about the "primary effects" of that speech, rather than the secondary effects, and that any restrictions "cannot be 'properly analyzed as a form of time, place, and manner regulation.'" *Reno v. ACLU*, 521 U.S. at 868. And the Court brushed aside as "singularly unpersuasive" the suggestion that the Internet was subject to regulation on the theory that sexually-oriented material would cause the medium to lose legitimacy. *Id.* at 885 ("The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention."). From the perspective constitutional law, real world zoning is a metaphor that simply is inapplicable to cyberspace.

B. Regulating "Ginsberg Speech"

Another approach is to zone speech considered "harmful to minors" on the Internet in order to enable browsers to block access to such speech by children. According to Professor Lessig, this would require content providers on the Internet to designate what he calls "Ginsberg speech" with code that would be read by browsers enabled with a "kids ID." This would entail passage of what is described as a "simple law" requiring the segregation of proscribed material. As I explain below, however, such a "simple law" in theory would be far from simple to implement in practice. Leaving aside any technical questions that undoubtedly would arise from enabling (or forcing) parents to use password-

protected browsers with multiple "personalities," the problem of identifying and zoning "Ginsberg speech" would be highly problematic. Speaking as a former FCC official who often was required to evaluate the content of broadcast speech, I can tell you that it is not possible to neatly categorize "zonable speech," as if our task was to separate red stones from blue stones from a common pile, and to tell our children that they mustn't touch the red stones. This is particularly true if the goal is to place certain types of speech on the Internet "behind walls."

The "harm to minors" standard articulated in *Ginsberg v. New York* at least has the virtue of being more analytically rigorous than the indecency standard that was thoroughly deconstructed by the Supreme Court in *Reno*. Generally, courts have limited regulation in this area to "borderline obscenity" or to material considered to be "virtually obscene." *Virginia v. American Booksellers Assn*, 484 U.S. 383, 390 (1988). In order to be harmful to minors, the material must lack serious literary, artistic, political or scientific value for "a legitimate minority of normal, older adolescents." *American Booksellers Assn. v. Virginia*, 882 F.2d 125, 127 (4th Cir. 1989). Thus, as a general matter "if any reasonable minor, including a seventeen-year-old, would find serious value,

the material is not harmful to minors.'" 5/ If applied strictly, this constitutional standard decreases the range of material that could be considered harmful to minors. 6/

But it must be kept in mind that any "harm to minors" test necessarily is based on local community standards. As the Supreme Court stated when it adopted the "community standards" test in Miller v. California, 413 U.S. 15, 20, 30-33 (1973), "[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. . . .[O]ur nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50

5/ American Booksellers v. Webb, 919 F.2d 1493, 1504-05 (11th Cir. 1990); Davis-Kidd Booksellers, Inc.v. McWherter, 866 S.W.2d 520, 528 (Tenn. 1993).

6/ Webb, 919 F.2d at 1504-05. See Rushia v. Town of Ashburnham, 582 F. Supp. 900 (D. Mass 1983) (town bylaw not sufficiently limited); American Booksellers Ass'n. v. McAuliffe, 533 F. Supp. 50 (N.D. Ga. 1981) (statute prohibiting sale or display to minors of material containing nude figures held overbroad); Allied Artists Pictures Corp.v. Alford, 410 F. Supp. 1348 (W.D. Tenn. 1976) (ordinance prohibiting exposing juveniles to offensive language held invalid); American Booksellers Ass'n.v. Superior Court, 129 Cal. App. 3d 197, 181 Cal. Rptr. 33 (2d Dist. 1982) (photographs with a primary purpose of causing sexual arousal held not to be harmful to minors); Calderon v. City of Buffalo, 61 A.D.2d 323, 402 N.Y.S.2d 685 (1978) (ordinance restricting sales to juveniles held to be overbroad); Oregon v. Frink, 60 Or. App. 209, 653 P.2d 553 (1982) (statute prohibiting dissemination of nudity to minors is overly broad).

states in a single formulation, assuming the prerequisite consensus exists." Professor Lessig notes that "Ginsberg speech" is defined by "[l]aws in many jurisdictions," CODE AND OTHER LAWS, supra note 1 at 173, evidently without acknowledging the import of that observation.

The significance of this point is that, for purposes of information on the Internet, "Ginsberg speech" is not a single standard. It is not surprising then, that different communities will have very different views on what information might be deemed "harmful to minors." For example, an Ohio court held that the books One Flew Over the Cuckoo's Nest and Manchild in the Promised Land violated the state "harmful to juveniles" law. Grosser v. Woollett, 341 N.E.2d 356, 360-361 (Ohio Ct. Common Pleas 1974).[7] The court found that the books "have no literary, artistic, political or scientific value whatsoever" and "were designed by the authors to appeal to the base instincts of persons and to shock others for the purpose of effectuating sales." Id. at 367. The dissenters in Reno v. ACLU foreshadowed such differing standards, observing that "discussions about prison rape or nude art . . . may have some

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[7] Although this decision was issued before the Supreme Court addressed the "harm to minors" standard in American Booksellers Association, the Ohio legislature cited Grosser v. Woollett as an appropriate source of guidance when it was considering passage of new Internet regulations in 1998.

redeeming education value for adults, they do not necessarily have any such value for minors." 521 U.S. at 896 (O'Connor, J., concurring part, dissenting in part).

Nevertheless, federal courts that have invalidated state "harm to minors" laws governing Internet speech have expressed great concern about the fact that standards vary significantly among different communities. 8/ The district court in Pataki cited numerous examples of meritorious works that would be placed at risk under a "harmful to minors" standard, including "[f]amous nude works by Botticelli, Manet, Matisse, Cezanne and others." It noted that some communities have acted to protect their youth from I Know Why the caged Bird Sings, by Maya Angelou, Funhouse, by Dean Koontz, The Adventures of Huckleberry Finn, by Mark Twain, and The Color Purple, by Alice Walker. Pataki, 969 F. Supp. at 179-180. In Engler, the court expressed concern that a "harm to minors" standard would threaten the free flow of information to teenagers about premarital sex (including such topics as contraceptives and abstention) and sexually transmitted diseases. Engler, 55 F. Supp.2d at 749.

The nature of Internet communication brings these differing community standards into sharp focus. As the Supreme Court noted, "when the UCR/California Museum of Photography posts to its Web site nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore, and New York City, but also in Cincinnati, Mobile, or Beijing – wherever Internet users live. Similarly, the safer sex instructions that Critical Path posts to its Web site, written in street language so that the teenage receiver can understand them, are available not just in Philadelphia, but also in Provo and Prague." Reno, 521 U.S. at 854 (citation omitted). Given the standards of the many communities that will be reached, publishers on the Internet must anticipate what might be considered "harmful to minors" in each of them and to "zone" their speech accordingly. This is particularly problematic if speakers face any type of sanction if they fail to "properly" label or zone their expression. I would expect many to comply either by zoning speech according to their best guess as to the standard of the least tolerant community, or simply to restrict what information they make available.

8/ ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999); Cyberspace Communications, Inc. v. Engler, 55 F. Supp.2d 737 (E.D. Mich. 1999); ALA v.

There are further complications as well. How much of a website must be zoned? Or, to frame the question in the context of constitutional law, what constitutes the work "as a whole?" Are parts of websites to be placed in a different "zone" from the home page? How would this work if zoning is to be accomplished through the creation of a new TLD? These and other questions suggest that real world "harm to minors" laws, that primarily require adult magazines to be placed behind "blinder racks," do not translate easily to cyberspace.

For those who suggest that cyberzoning is nothing more than an exercise in labeling, and therefore constitutionally benign, I suggest reading Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968), decided by the Supreme Court the same day as Ginsberg v. New York. There, the Court struck down on First Amendment grounds a local ordinance that required films to be classified as either "suitable," or "not suitable for young persons."[9] The ordinance did not preclude the showing of "not suitable" films – it merely

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Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997).

[9] The classifications were further defined by reasonably detailed criteria that required the classification board to consider films "as a whole," and to determine, among other things, whether "its harmful effects outweigh artistic or educational values such film[s] may have for young persons." 390 U.S. at 681-682.

required the distributor to get a special permit. The Court held that the local standard was unconstitutionally vague, in large part because it was being considered as a model for other communities, each of which might adopt their own variations. It reasoned that if film distributors are unable to determine what the standard means they "run[] the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public. Rather than run that risk, [the distributor] might choose nothing but the innocuous, perhaps save for the so-called 'adult' picture." Id. at 684. The end result for the medium, according to the Court, is that "[t]he vast wasteland that some have described in reference to another medium might be a verdant paradise in comparison." Id.

The lesson to be drawn from this is that there is nothing simple about a "simple law" to zone speech in cyberspace.

III. OTHER POLICY AND PRACTICAL CONSIDERATIONS

There are other significant issues associated with any zoning proposal that would be implemented using the domain name system. I will touch on this only briefly in deference to other participants on this panel. My main concern, however, is that content-based "zoning" by domain name would compromise the function of the DNS. The DNS is a technical system for

managing Internet addresses, and it is not well-suited to the task of implementing national policies. It has become involved to a certain extent in facilitating dispute resolutions involving intellectual property issues, but that is a far different matter from adopting a uniform system to restrict access to content. If there is any type of "mission creep" that involves domain name registries in assessing what type of content is appropriate for a given domain, the system would break down. The DNS is – at least ostensibly – a privately run system, and it is far from clear how any type of legislative mandate would work in this context.

It is also vital to keep in mind that any such zoning approach would be imposed on a global medium. The international nature of the DNS makes it particularly unsuited as a vehicle for national content control policies. The 243 ccTLD managers would be unlikely to agree to become instruments of U.S. policy, no matter how meritorious it may seem. And if they decline to participate, any plan for mandatory zoning will be ineffective. Moreover, any effort to use the DNS to further U.S. policies would undoubtedly add to existing tensions as the relationships among international participants are still being defined.

Conclusions

Because there is no current legislative proposal for cyberzoning, this testimony represents my preliminary views on the subject. However, I believe that proposals to "zone" Internet speech are far more complicated than they often are portrayed, and, if implemented, would almost certainly cause adverse unintended consequences.