

**Testimony of April Major**

**before the**

**Commission on Online Child Protection (COPA)**

**regarding**

**The Creation of a New Top Level Domain for Adult Content**

**June 8, 2000**

Chairman Telage and Members of the Commission:

Thank you very much for inviting me to discuss the creation of a new top-level domain for adult material. My name is April Major and for the past several years I have taught Internet-related courses at Villanova Law School including a course specifically on the subject of the First Amendment and regulation in cyberspace. I have also written an article regarding the creation of a new top-level domain for adult material in which I explore the First Amendment ramifications of creating "Internet red light districts." Before I proceed, I must point out that while I am currently an attorney with the Federal Trade Commission, the views I express today are my own and not the Commission's; I testify today in my personal capacity and not in my capacity as a Commission attorney.

When considering the creation of a new top-level domain for adult material, one necessarily must proceed through a legal and normative framework to determine the constitutional permissibility of such a scheme and the level in which it protects children. While doing this today I highlight the practical concerns and policy issues associated with this task.

### **Who are the Actors?**

Initially one must consider who will establish the domain to determine whether the undertaking implicates the First Amendment. Industry alone may create the new ".adult" domain, government alone may formulate law and enforce compliance, or both government and industry may collaboratively work together. I will discuss each approach, but only the latter two scenarios implicate the First Amendment due to government involvement.

Past practice demonstrates that business and consumers favor independent efforts by industry and view these efforts as successful in many circumstances. However, a formidable collective action problem often presents itself when industry acts alone without inherent economic incentives. The normative reality is that without powerful incentives, acting for the greater common good may not be enough to induce people to act when weighed against the personal sacrifices one makes when acting collectively. PICS is a good example of an effort undertaken by the private sector alone that faces the ambitious task of convincing sites to rate themselves. Without the lure of monetary gain, content providers have little incentive to burden themselves. Many critics feel that without the force of government action behind such an initiative, convincing the critical mass necessary to make a difference is nearly impossible.

Alternatively, the government alone could legally require the creation of the domain and enforce adult sites to relocate content with the threat of costly civil fines and/or significant criminal penalties. If government unilaterally takes this action, Internet users and content providers would most likely react unenthusiastically, and perhaps even negatively, due to a common sense of mistrust that unfortunately taints legislative

interference with business on the Internet. Consider the Communications Decency Act (“CDA”) of 1996 where regrettably online business and user norms were neither understood nor considered by government. The lack of industry’s involvement in Congress’ first attempt to protect minors from indecent material on the Internet proved particularly detrimental to the success of the legislation.

Since the CDA, government and industry have accomplished many cooperative and complementary efforts in the area of Internet regulation. The Internet policy community recognizes that without the dual strength of industry’s influence backed by government enforcement, individual indolence is far more likely in situations, such as the present, that are not market driven. Furthermore, in this situation, government and industry can together minimize the burden on content providers of moving to the new domain—an essential component of a smooth transition. Thus, the realization of a “.adult” domain initiative likely rests upon, among other things, the joint efforts of government and industry. If this is the case, we may confidently conclude that indeed this Commission must consider the First Amendment.

### **First Amendment Concerns**

At this point, let us consider the constitutional issues that accompany a “.adult” domain effort. Recall for the sake of completeness that First Amendment precedent treats indecency and obscenity very differently; obscenity remains unprotected by the First Amendment, while indecency enjoys free speech protection. The remaining provisions of the severed Communications Decency Act already make the knowing transmission of obscene messages to any recipient under 18 a crime.<sup>1</sup> Thus, the “.adult” proposal targets material the Supreme Court deemed harmful to minors (“HtM”) in *Ginsberg v. New York*<sup>2</sup>-- or in other words, indecency. The First Amendment protects indecent material for adults, but not for children because community standards and precedent determined its inappropriateness and harm to minors. The First Amendment permits regulation of indecent speech, but only if the government satisfies certain criteria. The appropriate criteria depend upon one’s approach to the issue--a content-neutral zoning approach or a content-based perspective. I discuss each separately below.

#### ***Zoning Approach***

A zoning approach or a “reasonable time, place and manner restriction” avoids First Amendment strict scrutiny because of content-neutrality. Reasonable time, place

---

<sup>1</sup> 47 U.S.C.A. s 223(a)(1)(B)(ii).

<sup>2</sup> 390 U. S. 629 (1968).

and manner restrictions are constitutionally permissible provided government justifies the restrictions without reference to the content of the regulated speech, government narrowly tailors the restriction to serve a significant governmental interest and the restriction leaves open ample alternative channels for communication.<sup>3</sup> For instance, in *City of Renton v. Playtime Theaters*<sup>4</sup>, the Supreme Court held that the ordinance mandating that adult theaters not locate within 1000 feet of each other was an appropriate form of time, place and manner regulation. The Court acknowledged that city government aimed the ordinance at preventing the secondary effects of the presence of these theaters in close proximity of each other, such as crime, prostitution and decreased property value, and was not content-based. Thus the Court found the ordinance constitutional as long as it served a substantial state interest and did not unreasonably limit alternative avenues of communication.

One could analogize the creation of a new top-level domain to a city zoning adult theaters and stores. However, a zoning rationale for the domain initiative would probably not survive First Amendment scrutiny. In order for government to create Internet red light districts, precedent requires that government concentrate the zoning effort on ridding the community of the secondary effects that result from sex shops and adult movie theaters such as increased crime, decreased property values and prostitution. Congress created the COPA Commission for the very purpose of protecting children and thus one could hardly contend that an initiative recommended by the COPA Commission targets the secondary effects of indecent material and not the content itself.

Furthermore, one is hard pressed to come up with secondary effects of adult material on the Internet. The Internet has no geographic proximity. While a web community could feasibly deteriorate if a member began posting pornographic content, in general the only way web pages are “near” one another are through links--and typically adult sites only link to each other. My article maintains that a feasible secondary effect might be the general deterioration of the commercial and educational value of the Internet or a broad deterrence of Internet growth, but as many authors, I have seen my theory disproved over the past several years. E-commerce firms thrive side-by-side with online pornography in the .com domain and I have yet to hear of any negative secondary effects. This lack of secondary effects combined with the recognition that the business and policy communities instinctively relate a “.adult” domain effort with protecting minors on the Internet, ensures little chance of success for a content-neutral zoning approach.

Finally, in *Schad v. Borough of Mount Ephraim*<sup>5</sup>, the Supreme Court declared unconstitutional a local time, place and manner ordinance that banned all adult theaters from every commercial district in the city. While the Court recognized the necessity of local police power, the Court noted in this case that local governments must exercise their

---

<sup>3</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

<sup>4</sup> 475 U.S. 41 (1989).

<sup>5</sup> 452 U.S. 61 (1981).

authority within Constitutional limits. An unsettling similarity exists between preventing all adult web site operators from publishing in the .com domain and preventing all adult theaters from every commercial district in a city. This analogy provides a sound argument for adult web site operators who are against moving their materials out of the .com domain.

### ***Content-Based Approach***

Thus, if a zoning framework does not satisfy First Amendment scrutiny due to a lack of content-neutrality, one may squarely approach a domain initiative as content-based regulation and thus subject to strict judicial scrutiny. The Court applies its most rigorous level of scrutiny, known as strict scrutiny, when the government regulates based on the content of speech. Under strict scrutiny, the Court determines whether the government has a compelling interest and if so, whether the regulation at issue is the least restrictive means for satisfying that interest. The Supreme Court in *Ginsberg* clearly acknowledged that protecting children from harmful materials is a compelling interest.<sup>6</sup> Thus, opponents of a new “.adult” domain would focus their efforts on showing that a new domain is not the least restrictive method of protecting children from harmful content. Instead, they would likely argue that filtering alone is less restrictive than filtering with the aid of a “.adult” domain. Admittedly filtering alone is less restrictive, however those in favor of the domain may challenge the current effectiveness of filtering technology alone. Supporters might point out that the new domain is simply a tool for parents to enable effective filtering of content that is harmful to their children. Ultimately the court decides whether such an effort survives strict scrutiny, but while opponents have solid arguments against government intervention, my impression is that supporters may very well convince the Court that a new domain is the least restrictive means for protecting minors from harmful content.

### **Content**

Next, we must determine the content that belongs in the new domain. At this point I emphasize the necessity of an international scheme in order for the effort to succeed and provide an effective tool for parents. The U.S. cannot create a system alone and expect any level of efficacy due to the well-known fact that much pornographic content on the Internet originates from overseas. However, the U.S.’ participation in an international effort may not infringe upon constitutionally protected speech or undercut the First Amendment rights of its citizens. In other words, if an international agreement adopts a broader definition of HtM than provided in *Ginsberg*, the U.S. may not constitutionally adhere to the agreement because it would restrict protected speech. Thus, such an agreement may adopt the *Ginsberg* test or a less restrictive definition to evaluate content and remain constitutionally permissible.

---

<sup>6</sup> 390 U.S. 629, 646

Recall that the Ginsberg definition of HtM is the Miller obscenity test with “as to minors” tagged onto each prong.<sup>7</sup> Applying this test to the Internet is extraordinarily difficult, if not impossible because, among other things, it considers “community standards.” While in real space it might make sense to allow communities autonomy in determining what they consider “appeals to the prurient interest,” virtual space does not lend itself to evaluating geographic community norms. Thus, an international agreement would have the best chances of succeeding if it adopted a per se rule, as advocated by Bruce Taylor in the past, that allows for greater certainty and better notice to online content providers.<sup>8</sup>

## **Conclusion**

Given the current inadequacies with filtering technology, I have no doubt that if the domain were in place, parents could more effectively control the content children view on the Internet. While I believe there are serious concerns involved in creating a “.adult” domain, I do not believe they are insurmountable. With careful planning, collaboration between the private and public sector, consideration of the norms of cyberspace, and coordination with foreign governments, I believe a “.adult” domain may succeed in protecting minors from harmful content while providing First Amendment protection of speech for adults.

---

<sup>7</sup> In *Miller v. California* the Supreme Court defined obscenity as (1) whether the average person, applying contemporary community standards, would find that the work taken as a whole, appeals to the prurient interest; and (2) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; (3) and whether the work taken as a whole lacks serious literary, artistic, political or scientific value. 413 U.S. 15 (1973).

<sup>8</sup> Grouping a good deal of content into one category is an impending issue that raises constitutional concerns. Certainly differences exist in what is harmful to a 6 year old and what is harmful to a 16 year old. My sense is to leave this to parents who many adjust the granularity, if you will, of their filtering software as their child grows older, perhaps allowing their child more access to “.adult” as the child grows older.