

### Testimony of Kermit Roosevelt III

Thank you for giving me the opportunity to present this testimony. I am a fellow with Yale Law School's Information Society Project, an organization devoted to the promotion of democratic values in the information society. I received an A.B. from Harvard in 1993 and a J.D. from Yale in 1997. I have published articles in numerous law reviews and recently coauthored (with J.M. Balkin and Beth Noveck) a report on Internet filtering systems. None of this testimony should be taken to reflect the views of any of my employers.

The Internet is very large, and it is not organized territorially. These two features make it virtually impossible to control content either unilaterally (by individual end-users without the cooperation of content providers) or by legislation. Most unilateral filtering systems consist of blacklists of prohibited websites. These are invariably underinclusive; that is, they do not block all of the sites that end-users would want blocked. They tend also to be overinclusive; that is, they often block sites that end-users would not want blocked. Beyond these practical failings, unilateral filters by their nature force end-users to accept the judgment of third parties as to what is or is not acceptable. Worse still, since the value of unilateral filtering systems consists primarily in their lists of unacceptable sites, these lists are often treated as proprietary information and concealed from end-users. Thus end-users are typically denied the information necessary to decide whether a particular unilateral filter conforms to their preferences or not.

Attempts to control content via legislation face equally serious difficulties. Constitutional problems aside, legislation that affects the behavior only of content providers within the United States will tend to be ineffective, since it is just as easy to access content originating in foreign countries as it is to access American content. But legislation with an international reach is not the answer either. Whether the U.S. government has the power to punish foreign website operators for failing to comply with U.S. law is far from clear as a legal matter; what is clear is that the practical difficulties are in any case overwhelming.

I believe that the only solution that has a chance of working is a multilateral one that relies on cooperation between content providers and end-users. The solution to the problem of size is to rely on content providers to label their content in a way that gives end-users the ability to screen according to criteria they select. Giving this choice to end-users likewise solves the problem of placing access decisions unreviewably in the hands of third parties, as unilateral filtering systems do.

The Information Society Project has recently written a best practices model that discusses these issues in more depth and proposes a design for a filtering system. (I am glad to see that this paper is available on the COPA Commission website.) That model relies on cooperation between content providers and end-users; it also envisions a role for third-party organizations in tailoring a generic filtering system to suit individual preferences. This system is not only more effective than legislation or unilateral filtering in practice; it is also more responsive to First Amendment concerns.

The problem that the multilateral solution faces is that it will be effective only if a sufficiently large percentage of content providers take the necessary step of rating their content. Implementation of the model filtering system is currently in the hands of ICRA, and Stephen Balkam is certainly a better source of information on how many sites are currently cooperating in the labeling project. But it is my impression that there is substantial resistance to self-labeling, due in part to a pervasive libertarian ethos. I have serious doubts as to whether this resistance can be overcome if the issue continues to be cast in terms of protecting children from material that is harmful to minors. Legislation requiring labeling of content is a superficially attractive solution, but it would certainly face constitutional challenges in the U.S. Though it is possible that the challenges would fail (labeling content may be best understood not as compelled speech but as a technological means to prevent distribution of certain content to those who, by using filtering systems, have indicated a desire not to receive it) the territorial limitations on legislative jurisdiction would likely render it ineffective in any case.

I think that the best hope for widespread acceptance of a labeling system lies in making labeling attractive to content providers. As things stand, content providers have little incentive to label (though this would change if a high percentage of end-users employed a filtering system that blocked unlabeled sites).

They will have an incentive to label if it brings them more traffic. And it will bring them more traffic if many or most search engines read labels.

But there will be little point in search engines reading labels if labels correspond only to undesirable content, e.g., the categories of sex, violence, and offensive language. There is unlikely to be much end-user demand for search engines specializing in that sort of content. And more significantly, with such a restricted range of labels, the vast bulk of useful websites will reap no benefit at all from labeling. If they do not label, then end-users will be forced to make large sacrifices if they want to block unrated sites.

By contrast, if labels describe a broader range of content, then search engines are likely to rely on them, and content providers will have incentives to label (and to label accurately). This is the most important point I have to make, and the point that I think current approaches to filtering miss most seriously: what makes something filterable also makes it searchable. Indeed, filtering and searching are two sides of the same coin. Content providers may not want their sites to be filterable, but they do want them to be searchable. Current search engines tend to use the presence of particular words on a web page. This gives very coarse searching; it produces the equivalent of text-based filtering systems, which are notoriously ineffective. The use of labels that describe the content of a website in a machine-readable manner will make searching much more efficient; it will also make filtering much more practical. I doubt that adoption of labeling on the scale necessary for effective filtering can be achieved by a focus on filtering; there is too much instinctive resistance and too little payoff for content providers to comply. But content providers have the opposite reaction to improved searching; they are eager to cooperate. If machine-readable labels are introduced as a means for more efficient searches, they are much more likely to catch on. But in order for that to happen, labeling must embrace a wider perspective than concern about harm to children. Broadening the focus is the best hope for widespread acceptance of labels.