

Industry Perspectives on ISP Immunity

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Statutes Reflect a “Blessed if you Do, Blessed if you Don’t” Perspective

- **Communications Decency Act**
- 47 U.S.C. 230(c)(1): ISP isn't deemed a publisher
- 230(c)(2): good faith take down of offensive material free of civil liability
- 230(e)(3): no liability may be imposed under state or local law inconsistent with the above
- But there is a statutory duty to inform customer that parental control protections are available
- **Digital Millennium Copyright Act**
- 17 U.S.C. 512(g): no liability for good faith take down of potentially infringing material

Regardless of Statutory Protections, Child Porn is a Real Problem

- Child pornography and other online abuses are real problems which industry takes very seriously
- Industry must continue to support law enforcement administration efforts and provide resources to LEAs and to customers
- And it involves all Internet sectors – social networking sites , ISPs, general content websites, search engines, software developers

Blocking Sounds Good but Raises Constitutional, Practical Problems

- Pa. Internet Child Pornography Act: *Required ISPs to remove or disable access to child porn items “residing on or accessible through its service” after AG notification*
- Violated first amendment, Center for Democracy & Technology v. Pappert, 337 F. Sup. 2d 606 (E.D. Pa. 2004)

First Amendment Issues:

- Over-inclusive: the methods used to comply
 - IP filtering: IP address, not effective, avoided with “fast flux” methods (keep switching addresses)
 - domain name filtering blocking a web site on an online community or web hosting service or a web host that hosts web sites as sub-pages under a single domain name -- resulted in over-blocking.
- Less Restrictive Alternatives: depends on test, but letting customer apply filter is less restrictive

Blocking Sounds Good but Raises Constitutional, Practical Problems

- Recall, the U.S. Supreme Court has struck down many child porn laws, especially on basis of being over-inclusive (e.g., “virtual”, or computer –generated child pornography)
- **Other practical problem:** jpg files change slightly, making blocking easily circumvented
- **And Slippery Slope problem:** offensive content, grey market goods could be added to list

Other Regulatory Concerns

- **Does ISP Blocking Violate Network Neutrality?**

- “Net neutrality” endorsed by Pres. Obama in campaign, cyberspace policy review May 29
- “No blocking” part of Commerce Dept Broadband Recovery Act funding requirements
- Hot issue in communications policy:
 - means many things but almost all parties believe blocking by ISPs of content is a bad idea.
 - For ISPs, there’s the question of lawful net management or other activities to enhance experiences, without blocking anyone.

What's Needed: Renewed Voluntary Efforts, More LEA Resources

- Vigilant Monitoring: e.g., Berkman Center at Harvard Report to State AGs (Dec. 2008): did not endorse one set of technologies to protect minors online. Instead, urged AGs to work with all stakeholders in multifaceted approach involving parents, internet community, child safety experts
- MySpace/NAAG Agreement (Jan. 2008): e.g., software to identify underage users, Task Force, parental control over setting up profiles.
- Cable Industry NCMEC Memorandum of Understanding (July 2008): ISPs will remove websites which they host and which NCMEC has identified as containing child porn
- Removal of newsgroups as a category; some were used to host child porn
- NCTA Member Pledge under *PointSmart.ClickSafe* program to provide free filters, educational resources, engage in partnerships, cooperate with law enforcement. Task Force Report due this month on website protections

Self Regulation

- While not perfect, it has worked to address internet evils like Spam, Spyware, Phishing
- As Internet develops, customers, ISPs learn best practices
 - Innocence of 2003 replaced with awareness of cookies, giving PII, emails
- Good models of a “clean” internet – China, Saudi Arabia – have obvious drawbacks
- Ever-evolving “best practices”, including improved technology, will help.
- Bottom line for industry: this is an ongoing issue that will require more resources to get at what works while preserving an open Internet

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