Regulating Objectionable Content in Multimedia Platforms: Will Convergence Require a Balance of Responsibilities Between Senders and Receivers?

Otilio Gonzalez

Follow this and additional works at: http://digitalcommons.law.scu.edu/chtlj

Part of the Law Commons

Recommended Citation

Available at: http://digitalcommons.law.scu.edu/chtlj/vol20/iss3/2
REGULATING OBJECTIONABLE CONTENT IN MULTIMEDIA PLATFORMS: WILL CONVERGENCE REQUIRE A BALANCE OF RESPONSIBILITIES BETWEEN SENDERS AND RECEIVERS?

Otilio Gonzalez†

I. INTRODUCTION

National attempts to control, or at least limit, transmission of objectionable speech in the electronic media might result in failure because the absence of physical frontiers in the new electronic media, coupled with the current patterns of convergence, make regulations aimed at the speaker very difficult to enforce. An option is to shift from the traditional regulatory model based on the speaker to a paradigm based both on electronic media speakers and receivers. The United States might be in the threshold of such a regulatory shift, as more regulations addressing the availability of objectionable programming depend on technology-based blocking mechanisms controlled by the receiver of the information: the end user of the new electronic media.

This paper addresses constitutional and policy implications of such a regulatory transition. First, a definition of objectionable speech is provided, along with a discussion of how traditional content regulations have attempted to provide constitutional solutions to the problems associated with the exposure of minors to that content. Second, the paper takes a brief look at how the elements of convergence and transnationalism of electronic media affect the implementation of traditional regulatory approaches based solely on the speakers. Finally, the paper suggests that a variable approach, which balances responsibility between speakers and receivers for

† Associate Professor, Department of Communications, University of Puerto Rico in Arecibo; Ph.D., College of Journalism and Communications, University of Florida; J.D., University of Puerto Rico. I would like to thank Dr. Bill Chamberlin, Joseph L. Brechner Eminent Scholar in Mass Communications, University of Florida, and Dr. Milagros Rivera-Sanchez, Associate Professor, National University of Singapore.
exposure of minors to objectionable content in the electronic media, might assist policy-makers in their interest in protecting minors from harm. It is argued that the United States might be taking the initial steps in that direction, relying on end user-controlled blocking mechanisms that allow parents and other guarding adults to pre-determine content to be accessed by minors under their care. However, gaps in technology might delay full implementation of such an approach.

II. REGULATION OF OBJECTIONABLE SPEECH IN THE ELECTRONIC MEDIA

Regulation of objectionable content in the electronic media has usually attracted the attention of policy makers. A definition of what constitutes objectionable content is no easy task because it is accompanied by moral, religious and personal beliefs and tastes. For the purposes of this paper, a definition that can be applied to the United States legal and political framework considers objectionable content as the origination and transmission of illegal and controversial materials over the electronic media. This definition is expanded in the next subsections.

Speech Declared Illegal

The legal protection provided to any form of speech will depend on the political, social, and moral values assigned to it.\(^1\) In the United States, the Supreme Court has held that the government can prohibit materials that are not protected by the free speech clause of the First Amendment of the Constitution. Examples of speech not garnering constitutional protection include false or misleading advertising,\(^2\) and fighting words—the expressions that "inflict injury or tend to incite an immediate breach of the peace."\(^3\) Pornographic content classified

---

1. In Argentina, for example, broadcasters are required to transmit programming which promotes the "cultural enrichment and the moral elevation of the population, . . . and the rules of the Christian moral." Law No. 22285, Sept. 15, 1980, [XXXVII] Anales de Legislacion Argentina [A.D.L.A.] 21 (Arg.). See also Scott L. Goodroad, The Challenge of Free Speech: Asian Values v. Unfettered Free Speech, an Analysis of Singapore and Malaysia in the New Global Order, 9 IND. INT'L & COMP. L. REV. 259, 261–62 (1998) (noting how several unique Asian values, such as strong family connections, the predominance of the community rights over the individual rights, and the need to maintain a well ordered society, affect the interpretation of free speech laws in several countries of East and South East Asia, including Malaysia and Singapore).


as obscene is also outside the scope of this constitutional protection.\(^4\) The availability of pornography in mass media has been a constant cause of concern for regulators.\(^5\) Although it is difficult to provide a definition of "pornography" because multiple definitions of the term are closely related to social expectations of individuals and groups,\(^6\) the definition usually includes erotic depictions of human nudity and images of sexual intercourse.\(^7\) Regardless of calls for a total ban on pornographic images in the media made by some religious and family organizations, the erotic depiction of these pornographic images does not constitute a form of illegal content unless it can also be defined as obscene content.\(^8\)

Foreign legal systems punish objectionable speech based on their countries' sociopolitical contexts. Like in the United States, the transmission of sexually explicit materials is a cause of concern in several nations, and some have even declared that their citizens do not have a right to see pornographic materials.\(^9\) Nonetheless, in a number of countries certain forms of speech that are constitutionally protected

\(^4\) In *Miller v. California*, the Court established three criteria for identifying obscene materials:

\[
\ldots (a) \text{ whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.}
\]

413 U.S. 15, 24 (1973) (citation omitted).


\(^6\) The use of the term "pornography" presents a definition problem, as it is usually the lay person's way of referring to nudity, sexual or excretory images or expressions, by applying individual standards. Rather than relying on the individual definitions, the courts will rely on the definitions provided by the Supreme Court for obscenity. *See Miller*, 413 U.S. at 24; *Stanley v. Georgia*, 394 U.S. 557, 559–63 (1969); *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966); *Roth v. United States*, 354 U.S. 476, 489 (1957). *See also Regina v. Hicklin*, 3 L.R.-Q.B. 359, 369 (1868).

\(^7\) Pornography is defined here as follows:

Written, graphic, or oral depictions of erotic subjects intended to arouse sexual excitement in the audience. Pornography is commonly divided into two categories: soft-core, in which the erotic material is more titillating than explicit; and hard-core, in which erotic content is explicit and intense . . . . Historically, most objections to pornography have been based on religious grounds.


\(^9\) In Singapore, for example, there is no constitutional right to view or hear pornographic materials. *See Goodroad*, supra note 1, at 275.
in the U.S. might constitute a form of illegal speech. Examples of these variable international standards include the following prohibitions: hate speech against ethnic or racial groups, web sites containing Nazi items, speech that is contrary to national moral customs and traditions, and speech considered to be offensive to religious values.

**Controversial Speech**

Controversial speech is defined here as legally protected speech that can be considered "offensive and disagreeable" by some recipients. In the U.S., the courts have mentioned various types of speech that could be classified as controversial, including: blasphemous and profane speech, racist and other hate speech, threats and other forms of harassment, indecent and other sexually


13. *Id.* For example, Singapore, Malaysia, Brunei, Indonesia, Philippines, Thailand and Vietnam have agreed to block access to Web sites containing speech that is considered to be against "Asian values." Siegel, supra note 10, at 391–92.


16. Originally a religious crime, blasphemous speech refers to speaking maliciously and contemptuously of God and religion. The courts have considered the constitutionality of state and municipal statutes prohibiting profanity or profane swearing and in a number of cases it has been held that state statutes prohibiting the use of profane language in a particular locale is not a violation of the First Amendment. See 12 AM. JUR. 2D *Blasphemy and Profanity* §§ 1, 7 (1997).

17. The definition of hate speech, originally limited to speech offensive to races or "group libel" has been expanded to include not only offensive speech as to racial or ethnic groups, but also speech regarded as offensive to other social components, such as religious groups and women. See generally Siegel, supra note 10.

18. Compare Chaplinsky v. New Hampshire, 315 U.S. 568, 572–73 (1942) (noting that fighting words aimed at provoking an average person to fight are not protected by the First Amendment) with Gooding v. Wilson, 405 U.S. 518, 524–25 (1972) (striking down a Georgia statute that prohibited abusive language tending to breach peace as unconstitutionally vague and overbroad; noting that fighting words must cause violence on an individual, not on a group) and Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d. 21, 23–24 (Ill. 1978) (affirming that
explicit materials,\textsuperscript{19} and transmission of violent content or images.\textsuperscript{20} Some of these categories of speech might be considered illegal elsewhere, but the U.S. constitutional framework classifies such speech as permissible, though offensive.\textsuperscript{21} The Supreme Court has insisted that the government's role is not to protect citizens who might find a message offensive:

\[\text{The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.}\textsuperscript{22}\]

Because of this constitutional protection, an individual facing controversial speech that he wants to avoid shall either listen to the speech, or move away from it.\textsuperscript{23} An exception to this "walk-if-you-don't-like-what-you-hear" rule occurs when an individual is a "captive audience" with no opportunity to ignore a message.\textsuperscript{24} If

---

\textsuperscript{19} In \textit{Ginsberg v. New York}, 390 U.S. 629, 636–37 (1968), the Supreme Court held that sexually explicit material which is not obscene, but rather indecent, may be withheld from minors without restricting the expression at its source. In \textit{FCC v. Pacifica Found.}, 438 U.S. 726, 732, 748 (1978) the Supreme Court affirmed an administrative decision of the Federal Communications Commission that defined indecency as language that describes sexual or excretory activities and organs in a "patently offensive" manner as measured by contemporary community standards for the broadcast medium, at times of the day when there is a reasonable risk that children may be in the audience.


\[\text{A communication may be offensive in two different ways. Independently of the message the speaker intends to convey, the form of his communication may be offensive—perhaps because it is too loud or too ugly in a particular setting. Other speeches, even though elegantly phrased in dulcet tones, are offensive simply because the listener disagrees with the speaker's message. The fact that the offensive form of some communication may subject it to appropriate regulation surely does not support the conclusion that the offensive character of an idea can justify an attempt to censor its expression.}\textsuperscript{22}\]

\textsuperscript{22} \textit{Pacitica}, 438 U.S. at 745–46.

\textsuperscript{23} In many locations outside the home individuals are expected to simply avoid the speech they do not want to hear. See, e.g., \textit{Erznoznik v. City of Jacksonville}, 422 U.S. 205, 210–11 (1975). See also \textit{Cohen v. California}, 403 U.S. 15, 21–22 (1971).

audiences are considered to be captive, then the controversial messages can be regulated as intrusive but the regulation cannot result in a total ban of the protected speech. The Supreme Court has warned that Congress or the states cannot use the protection of minors as a justification for prohibiting a constitutionally protected form of speech because such an action would result in limiting adults to only what is fit for children.

Controversial Speech Deemed "Harmful to Minors"

In a sense, minors are treated as captive audiences when it comes to certain controversial materials. Actions resulting in regulations aimed at avoiding exposure of minors to certain controversial speech based on its harmful effects on minors are justified by a compelling interest of the state in protecting minors from harm. It has been suggested that controversial materials that are "harmful to minors" include the presence of content that disseminate "information and propaganda promoting racism, anti-Semitism, extremism, and how-to manuals on everything from drugs to bombs." Notably, the interest of policy makers has centered on a smaller scale on violent programming and on a larger scale on indecent materials.

Social science researchers have considered the harmful effects associated with exposure of minors to violent speech more often than the effects of other forms of speech. A Surgeon General's report released in January 2001 summarized the major findings of scientific research associated with violent speech and concluded that there is a correlation between exposure of minors to violent images and potential harms, mainly the shaping of aggressive behavior in minors. The American Academy of Pediatrics (AAP) agrees that

Whether an audience can be considered as "captive" depends on the options that members of the audience may have to avoid the message. *Consol. Edison*, 447 U.S. at 542 ("Passengers on public transportation... or residents of a neighborhood disturbed by the raucous broadcasts from a passing sound truck may well be unable to escape an unwanted message."). See also *Lehman v. Shaker Heights*, 418 U.S. 298, 301-02 (1974) (plurality opinion) (noting that passengers in a streetcar are a captive audience because they cannot avoid billboards posted on the streetcar).

25. *See Pacifica*, 438 U.S. at 748-50 (holding that the impossibility to avoid intrusive broadcasts justify nuisance regulations adopted by the FCC requiring broadcasters to channel indecent materials to hours when children were not expected to be in the audience).


27. *Ginsberg*, 390 U.S. at 639-40. See *Sable Communications*, 492 U.S. at 126.


exposure to violence has "a clear and reproducible effect on the behavior of children." 30

Although considerable debate has accompanied the definition of what constitutes "harm" in exposing minors to sexually explicit materials, a position accepted by a congressional committee suggests that exposing minors to pornography "distorts the natural sexual development that should occur gradually throughout childhood." 31 "Harmless" sexual materials, however, remain fully protected by the Constitution.

Sexually explicit materials that are not considered to be obscene under the test developed by the Supreme Court in Miller v. California might be classified as indecent. 32 Indecent materials can include various forms of speech that, although offensive to some, have social value and may include information related to topics such as abortion, childbirth or any aspect of human sexuality. 33 When considering minors' access to indecent speech, the Court has affirmed the validity of state actions regulating the distribution of content which is protected for adults, but is harmful to minors because the state has an interest in protecting the health, safety, welfare and morals of children. 34 As a result of that constitutional interpretation, there are regulations requiring broadcasters to channel indecent speech to a safe harbor period when minors are less expected to be among the audiences. 35 Although the Supreme Court requires the use of local contemporary community standards for identification of obscene

---


31. As a consequence, it is argued, minors develop "distorted beliefs about human sexuality" which might include a perception that "pathological behavior is normal, is common, hurts no one, and is socially acceptable, the female body is for male entertainment, sex is not about intimacy and sex is the basis of self-esteem." S. REP. NO. 106-141, at 3 (1999) (notes of Mary Anne Layden, Director of Education, Center for Cognitive Therapy, University of Pennsylvania) (explaining that "[m]any people—including children and adolescents—learn about sex through pornography; it shapes their beliefs, attitudes, and expectations .... The prevalence of violent, abusive, and degrading pornography can induce beliefs that practices are not only common, but acceptable.").


materials, such a standard has not been applied to indecent speech. The Federal Communications Commission (FCC) developed the only standards to regulate indecent speech, which provide for the identification of indecent materials using broader "national" standards. The FCC defines indecency in broadcasting as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs," and has said that its primary regulatory interest lies in protecting children from "language which most parents regard as inappropriate for them to hear." The FCC developed a similar standard for indecency on cable television, but the Commission has not applied national standards to other electronic media. Congress, however, adopted a local standard for transmission of materials that are "harmful to minors" on the World Wide Web in the Children Online Protection Act of 1998 ("COPA"), and for the development of Internet library policies blocking access of minors to harmful content online in the Children Internet Protection Act of 2000 ("CIPA").

36. Id. at 740–41.

37. The transmission of indecent materials, as well as the broadcast of profane or obscene materials by means of radio communication, constitutes a criminal offense. 18 U.S.C. § 1464 (2000) (also incorporated in the Communications Act of 1934, 47 U.S.C. § 312(a)(6)). In interpreting these provisions, the FCC defined indecent speech in broadcasting as language that is patently offensive by contemporary community standards in the broadcast medium, and is utterly without redeeming social value. See In re WUHY-FM, Eastern Education Radio, 24 F.C.C.2d 408, 412 (1970); In the Matter of a Citizen’s Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 98 (1975) (noting that the concept of indecency was intimately connected with the exposure of children to patently offensive language that describes sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience).

38. See Citizen’s Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d at 98.


Traditional Regulations Follow a Sender-Based, Medium-Specific Approach

Regulations of content in the electronic media targeting controversial speech—including speech that is harmful to minors—are content-based restrictions of speech that traditionally target the sender, rather than the receiver of the information. A long history of policy-making efforts for the electronic media has resulted in the application of different standards for content-based regulations in the electronic media, based on the economics and technology of each medium. Broadcasting, for example, might endure more severe content restrictions than other electronic media because the natural scarcity of the airwaves requires broadcasters to serve as fiduciaries for the public, who must present the “views and voices” that represent their communities. Also, the government might impose more restrictions on broadcasters because the broadcast media have established a “uniquely pervasive presence in the lives of all Americans.” More regulations could be imposed on broadcasting because radio and television are “uniquely accessible to children, even those too young to read.”

Regulatory treatment of other electronic media will depend on a medium-specific approach considering scarcity and pervasiveness. With each new electronic medium, Congress, and the FCC have struggled to apply traditional broadcast regulations to the new technologies, but the Supreme Court has established that special characteristics of each electronic medium might require different regulatory treatment. Therefore, the limited First Amendment


47. Id. at 749.


49. See Pacifica, 438 U.S. at 748 (noting that each method of communications or medium
protection for broadcasting cannot automatically be extended to other electronic media because they might not be relying on scarce resources, or might not be as pervasive and intrusive as broadcasting. For example, the Court has noted that differences in cable television technologies separate this medium from broadcasting. The Court distinguished cable television from broadcasting because there is potential for an unlimited availability of channels provided by cable platforms, and there is no physical interference between a speaker and a cable system because of cable’s capacity “to block unwanted channels on a household-by-household basis.”

The Supreme Court has also provided another important distinction between broadcasting and electronic media that requires users to engage in specific acts to access the messages, like the Internet. Before sustaining the constitutionality of nuisance restrictions on controversial speech in other electronic media the courts will consider the pervasiveness—or intrusiveness—of each electronic medium affected by content-based regulations. Such a determination requires a careful assessment of the interaction between the medium sending the information and the receiver of the information. However, as it will be discussed in the next section, the increasing technological convergence of the electronic media

50. However, the compelling interest of the government in protecting minors from harm remains a valid concern for all electronic media. See Playboy, 529 U.S. at 811; Denver Area Educ. Telecomms. Consortium, 518 U.S. at 747; Reno, 521 U.S. at 865. See also Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); ACLU v. Reno, 217 F.3d 162, 173 (3d Cir. 2000), vacated sub nom. by Ashcroft v. ACLU, 535 U.S. 564 (2002); Action for Children’s Television v. FCC, 58 F.3d 654, 661 (D.C. Cir. 1995).


52. Turner, 512 U.S. at 639.

53. Playboy, 529 U.S. at 815.

54. Controversial speech can be regulated in the broadcast media by principles analogous to the law of nuisance. See Pacifica, 438 U.S. at 731. A nuisance rationale for content-based regulations follows an approach similar to the “time-place-manner” content-neutral restrictions, which speaks of channeling a behavior rather than actually prohibiting it. “Time-place-manner” restrictions allow states to regulate content restricting the time of the speech, the place where it occurs, or even how it happens. See generally Ward v. Rock Against Racism, 491 U.S. 781, 790–91 (1989).

55. Sable Communications, 492 U.S. at 120–21; Reno, 521 U.S. at 876.
might make this medium-specific approach useless, as the new multimedia platforms allow receivers of the information to access different media through single electronic devices.

III. THE NEW ELECTRONIC MEDIA MIGHT REQUIRE NEW APPROACHES TO REGULATE ACCESS OF MINORS TO OBJECTIONABLE CONTENT

The electronic media is in a stage of transition, from apparently disconnected elements separated by the paths of transmission (airwaves, lines, satellites, etc.) into electronic multimedia platforms. Reliance on television and radio for information is now accompanied by an increasing use of other electronic media. From cable television to satellite television and radio, from new telephone-based information services to the ever-increasing number of services provided by the Internet, users now access information from alternative sources. New media and old media are merging to provide access and content to an advanced information network, where end users go for information and entertainment. These patterns of convergence are present both as a result of technological innovations that allow for multimedia platforms, as well as changes in ownership promoted by the Telecommunications Act of 1996, which fostered a wave of mergers and acquisitions among electronic media industries.

As a result of these changes, mass communications in the United States are in a state of "massive transition" that might lead into a "single electronic pipe" where print, video and sound will be digital, indistinguishable from one another. These changes are also reshaping traditional perceptions of the electronic media. As a recent industry report suggests, convergence will probably result in end users moving "seamlessly from one medium to another on the same delivery platform—TVs or PCs."


59. DIZARD, supra note 57, at 193.

How to Regulate Objectionable Content in a Converged Electronic Media?

The U.S. legal system is struggling with the rapidly changing new electronic media environment. Convergence of the electronic media poses a formidable task to regulators. As different media transmit their content across multimedia platforms, regulators face a complicated regulatory scenario that challenges the validity of traditional medium-specific regulations. Each medium is regulated differently, but end users receive messages from diverse electronic media in the same receiving device. As a result, as one researcher puts it, under the current system of regulations, a radio program can be prohibited at certain times of the day if transmitted over the airwaves, but a simultaneous transmission on the Web cannot be regulated. Obvious constitutional questions arise, because, at least in theory, it is possible to anticipate that a speaker wanting to transmit a message across converged platforms would have to adapt to the most stringent medium-specific regulation. For example, if a broadcast speaker delivers his messages both through the airwaves and through the Internet, he might be compelled to adapt his speech to the broadcast standards, even if the Internet enjoys a more relaxed regulatory environment.

On the other hand, a prohibition of transmission of illegal speech might be easier to enforce in traditional electronic media, such as radio and television. But in a new electronic media environment


where end users might be able to move from one medium to another through the same receiver without major complications, enforcement of an absolute ban presents regulators with jurisdictional problems.\textsuperscript{65} The transnational nature of this new electronic media environment challenges the ability of national governments to enforce content-based regulations, in particular those regulations based on local legal and moral values. Enforcement of national laws targeting objectionable speech is easier in traditional electronic media, such as broadcasting and cable television, because the senders of the information are located within the territorial boundaries of the state and must adhere to the local laws or else risk losing whatever authorization is required to operate.\textsuperscript{66} However, the effectiveness of national laws aimed at the sender of the information is challenged when the lack of jurisdiction over speakers transmitting from another nation diminishes the ability of the state to prosecute those engaged in transmission of the material from another jurisdiction where the material is not considered illegal.\textsuperscript{67} Threats of local judicial actions in several jurisdictions could impose a burden on speakers of content classified as controversial in a jurisdiction, but illegal in another.\textsuperscript{68}

Recent judicial determinations in Europe demanding that Yahoo! limit access of local end users to sites containing hate speech, a category considered illegal in many countries, is an early example of one problem associated with the delivery of controversial content across media platforms capable of reaching audiences from abroad.

Convergence of the electronic media might force a revision of the medium-specific approach that provides different regulatory treatment to each electronic medium. The Supreme Court has recognized that the dynamic changes in the electronic media, promoted by their evolving technological nature, require evolving


\textsuperscript{66} An exception can be made here of stations operating in the frontiers of two or more countries. See generally Konate A. Modibo, Regulatory Aspects of Creating Private Audiovisual Communication Services, at http://www.itu.int/ITU-R/conferences/seminars/bamako-99/docs/4-konate.doc (last visited Feb. 26, 2004).

\textsuperscript{67} See Wu, supra note 65, at 655–56.

\textsuperscript{68} See generally Lyombe Eko, Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation, 6 COMM. L. & POL'Y 445 (2001).
regulatory solutions. As the Court noted, "solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."69

IV. REGULATORY RESPONSE: A VARIABLE APPROACH BASED ON SENDERS AND RECEIVERS

Policy-makers must balance society’s interests in protecting minors from harmful materials and other speech considered illegal or offensive that are available in the electronic media with the right of individuals to receive information.70 This right to receive information, embedded in the First Amendment of the Constitution is not extended to minors because the Supreme Court has noted that the state has a compelling interest to protect minors from the harmful effects of objectionable materials.71 But the constitutional right to receive information and ideas "regardless of their social worth" is a fundamental right in society.72

An approach that considers the right of individuals to receive information, and which could assist regulators in controlling access of minors to the controversial content in the electronic media impacted by convergence is the adoption of regulations that focus on the receiver as well as on the sender of the information. This regulatory shift might be possible thanks to technological innovations in the electronic media.

New technologies are available that allow end users to block unwanted electronic media messages in their homes, which might alter the "intrusive" nature of the electronic media. Blocking mechanisms reliant on technology include channel-blocking devices that allow parents to lock out pre-determined cable television channels with a key or private code,73 electronic chips capable of blocking unwanted programming in television based on a system of

ratings,\textsuperscript{74} and content filters that allow end users to block Web sites, words or images in the Internet.\textsuperscript{75}

A regulatory alternative focused on both sender and receiver of information might take the form of a legislative mandate to adopt a blocking system designed to help parents and other adults screen speech according to pre-assigned categories and labels attached by others.\textsuperscript{76} This mode of regulation could protect those uninterested adults and minors from the harmful effects of offensive—but constitutionally protected—speech available in the electronic media, while at the same time preserve the interested adults' rights to receive such information. It could also assist adults in blocking illegal speech from entering their homes.

At least in theory, in a blocking system end users determine what messages they receive. In such a system, a government does not need to eliminate certain forms of controversial content for the sole purpose of protecting segments of an audience from the alleged harmful effects of any messages transmitted.\textsuperscript{77} Parents would be empowered to block the controversial content that they want to withhold from their children.\textsuperscript{78} Probably unaware of it, policy makers in the United States might be taking the initial steps for such a regulatory approach, relying on blocking mechanisms for limiting access of minors to controversial speech in separate electronic media.

\textit{Regulating Objectionable Content in the Electronic Media Through Blocking Mechanisms.}

In the United States, Congress has legislated to promote the use of blocking mechanisms controlled by end users. The earliest legislative effort took place in 1984, with the passing of the Cable Act of 1984, which included a provision mandating cable operators to provide a channel blocking device, called a lockbox, to requesting subscribers.\textsuperscript{79} More than a decade later, with the V-Chip system and Internet filtering software, Congress relied again—more than

\textsuperscript{74} See generally Glen Dickson, \textit{How's It Work?}, \textit{Broadcasting \& Cable}, Feb. 12, 1996, at 24 (explaining that the basic technology used for the V-chip is the same as that used for closed-captioning).


\textsuperscript{76} Ross, supra note 15, at 439.


\textsuperscript{78} See Edwards \& Berman, supra note 43, at 1514.

once—on blocking mechanisms for regulating objectionable speech in the electronic media.  

Lockboxes.

The first U.S. regulatory experience with an end-user-controlled blocking mechanism intended to assist in regulating access to objectionable materials in the electronic media occurred with the adoption of a congressional provision, as part of the Cable Communications Policy Act of 1984 ("CCPA"), that mandated cable operators to provide a channel-blocking device—by sale or lease—to requesting subscribers.

Congress approached a public controversy surrounding the availability of controversial speech in cable TV—and in particular the availability of sexually explicit materials on cable’s leased access channels—by adopting two different regulatory strategies in the CCPA. First, Congress granted power to local authorities to regulate leased access programming that the franchising authority would consider to be "obscene, or [was] in conflict with community standards in that it [was] lewd, lascivious, filthy, or indecent or [was] otherwise unprotected by the Constitution of the United States." The second approach was the adoption of the lockbox provision. It establishes the following:

In order to restrict the viewing of . . . programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

The device was commonly known as the lockbox. Although not the only blocking devices available for controlling access of

82. Leased access channels are set aside by a cable operator for use by unaffiliated commercial programmers. 47 C.F.R. § 76.701 (2002).
83. Cable Communications Policy Act, 47 U.S.C. § 532(h) (2000) (allowing franchising authorities and cable operators to prohibit as a condition in a franchise the transmission of obscene cable services, or services which are otherwise constitutionally unprotected). See also Stephen R. Ross and Barrett L. Brick, The Cable Act of 1984—How Did We Get There and Where are We Going?, 39 FED. COMM. L.J. 27 (1987).
85. Id. § 544(d)(2).
minors to objectionable speech on cable television, a lockbox allows parents to restrict children’s access to selected channels whether or not they are “physically present and actively supervise.” In essence, lockboxes are opt-out devices that allow a subscriber to block controversial programming from entering into his or her home.

Cable subscribers could block cable channels on a voluntary basis by acquiring any of several channel-blocking devices available in the market before 1984. But the availability of obscenity, indecency and other objectionable content on Cable TV, “such as ‘fighting words’ and speech which presents a ‘clear and present danger’ to public order” resulted in the legislation mandating cable operators to provide requesting customers with lockboxes by sale or lease. Legislators saw the lockbox as “one means to effectively restrict the availability of such programming, particularly with respect to child viewers, without infringing the First Amendment rights of the cable operator, the cable programmer, or other cable viewers.”

The lockbox provision was the first congressional output based on an end user controlled blocking mechanism. It accompanied other state and municipal initiatives relying on end user controlled blocking mechanisms that addressed local concerns of access of minors to harmful speech on cable television. It is significant to point out that Congress did not assess the effectiveness of existing lockboxes at the time of the CCPA’s adoption. Congress did not include as part of the legislation a mandate to evaluate the effectiveness of the lockbox provision, nor did it delegate to an administrative agency, like the

---

93. Prior to 1984, a few local franchising authorities were demanding cable operators to provide free lockboxes to requesting subscribers as part of their franchising agreements. See, e.g., Marcia Slacum Greene, Cable TV Plans for District, THE WASH. POST, July 19, 1984, at D.C.3; Rushworth M. Kidder, Cable TV: Do Bostonians Care Enough to See the Very Best?, THE CHRISTIAN SCI. MONITOR, June 5, 1981, at 1; Tom Sherwood, City Amends Cable Rules on Minorities, THE WASH. POST, Apr. 7, 1982, at C1. A few states were also considering the adoption of regulations mandating the distribution of lockboxes to cable subscribers. See, e.g., Maggie Kleinman, State Seeks Rules for ‘Hard R’ Cable TV, N.Y. TIMES, Nov. 8, 1981, § 11, at 36; Sally Bedell Smith, Channel J Pornography is Cause of Lockout Law, N.Y. TIMES, Mar. 5, 1984, at C16.
FCC, the evaluation of the provision. The FCC undertook a rule making proceeding to clarify the extent of the legislation.\textsuperscript{94}

Channel blocking devices are criticized by those who claim that parents must be on the lookout for programming in a specific channel before blocking the channel, and still risk the chance that the cable operator might alter the allocation of channels in the system, and leave the technological protection useless.\textsuperscript{95} There is no information available on the number of households with channel-blocking devices, and no data appears to be available on the use of those channel-blocking devices in American households. As for lockboxes, there have been no formal evaluations on the effectiveness of the regulation, but the lockbox provision remains in effect.

**V-chip/ Television Parental Guidelines.**

The second U.S. attempt to rely on an end user controlled blocking mechanism took place in compliance with the Telecommunications Act of 1996, when all television manufacturers were required to install a V-chip in every TV set—13 inches or larger—to be sold in the United States.\textsuperscript{96} Following a Canadian initiative, Congress adopted the new V-chip technology, which allows viewers to block certain types of undesired programming, such as violent, sexually explicit, or other indecent programming, regardless of the channel or hour of transmission.\textsuperscript{97} As a result of the extensive findings included in Section 551 of the Telecommunications Act of 1996 with respect to the influence of television on children and the need to provide parents with useful tools for blocking harmful programming,\textsuperscript{98} Congress called for the establishment of guidelines and recommended procedures for rating and encoding programs that contain violent, sexually explicit or other indecent materials about which parents should be informed before they are presented to children. Subsection 551(2) orders the FCC to supervise the implementation of this provision.


\textsuperscript{98} Telecommunications Act § 551.
Additionally, Congress enacted the Technology Fund Act of 1996, which established a national policy to encourage the development of technology "which would empower parents to block programming they deem inappropriate for their children and to encourage the availability thereof to low income parents," and also to "establish and promote effective procedures, standards, systems, advisories, or other mechanisms for ensuring that users have easy and complete access to the information necessary to effectively utilize blocking technology."\(^9\)

As a result of the technology selected,\(^10\) a common system of ratings had to be adopted, to be used both by programmers to encode the content labels, and by viewers to activate the V-chip options available in their TV sets.\(^10\) The Television Parental Guidelines ("TVPG") was the system of ratings selected. The entertainment industries agreed in 1996 to develop and implement the ratings, in part because of the enormous pressure both from the White House and Congress.\(^10\) The initial system was designed by Jack Valenti, executive director of the Motion Picture Association of America ("MPAA"), and jointly submitted by the National Association of Broadcasters ("NAB"), the National Cable Television Association.

---


100. Transmission of the program rating information is embedded in each frame of the television program in the VBI, or the portion of the scanning not used for any audio or video purposes. The FCC adopted as the common blocking technology standard the Electronics Industry Association’s (EIA) 608 standard, "Recommended Practice for Line 21 Data Service" which incorporated EIA-744 standard "Transport of Content Advisory Information Using Extended Data Service (XDS)." See In the Matter of Implementation of Section 551 of the Telecommunications Act of 1996; Video Programming Ratings, 13 F.C.C.R. 8232 (1998) [hereinafter FCC Report 1998].

101. The need to apply a system of ratings originally appeared as part of a 1993 agreement between broadcasters and congressional leaders to avoid legislation addressing violence on television. 142 CONG. REC. S1611, S1631 (daily ed. Mar. 7, 1996) (joint standards on violence). The networks announced the support to the joint standards on violence in 1992 and established a parental advisory system in the summer of 1993. Under the agreement, broadcasters and cable programmers began to air specific information in the form of parental advisories at the beginning of some programming. See Paul Farhi, Clinton to Pursue Advisories for TV; Ratings Would Be Similar To Those Used for Movies, THE WASH. POST, Jan. 31, 1996, at D01. These early warnings were transmitted mostly on made-for-TV movies and theatrical releases that contained acts of violence or sexual situations. Id.

The new system, submitted to the FCC in 1996, consisted of an age-based system of ratings modeled after the MPAA system. The entertainment industries began implementation of the TVPG in early January 1997. An administrative procedure that promoted participation from public advocacy groups resulted in the addition of guidelines containing content indicators. In October of 1997, the revised TVPG system was adopted and implemented by television broadcasters and networks, cable programmers and operators, and television program producers. It included six descriptive labels indicating the appropriateness of video programming to children according to age and/or maturity, and content indicators concerning sexual situations, violence, language or dialogue.

Though the encoded ratings and descriptive labels accompany an entire program, the rating icons and associated content symbols of the TVPG appear only for 15 seconds at the beginning of all rated programming, for parental guidance. Cable networks and television stations agreed to provide rating information to newspapers and publishers of printed and electronic program guides, and also to request that these publishers include the appropriate information in their guides. The voluntary system of ratings became a form of state-sponsored self-regulation of broadcasting and cable TV. The TVPG


107. Regardless of claims by advocacy groups to the FCC calling for systems that would accommodate alternative rating systems, the FCC did not direct television manufacturers to accommodate alternative systems, but limited itself to "encouraging" manufacturers to "design TV receivers to provide for additional ratings systems to the extent practical." Id. The FCC reasoned that Section 551(e) contemplated only a voluntary system developed by the industry, and that the congressional action "did not intend that we mandate accessibility to alternative ratings systems." Id.
applies to all video programming except for news, sports, commercial advertisement, station promotions, and unedited MPAA rated movies on premium cable channels. Networks and producers of each show determine the television rating system. An Oversight Monitoring Board, established by the entertainment industries, supervises and assists in the development of the content rating system.

Initial FCC surveys show compliance with the installation requirement by electronics manufacturers, and compliance with the ratings, labeling and encoding of information in television programming by the cable and broadcast television industries. Mass media consumption studies evaluating the acceptance of the V-chip technology in American homes show that an increasing number of parents are relying on the TVPG for information purposes, but usage of the V-chip blocking capabilities remain low. Because studies show that parents still support the V-chip initiative, these low numbers can be justified by a prevailing lack of understanding among parents on how the V-chip/Television Parental Guidelines system

108. The Telecommunications Act of 1996 made no reference to commercial advertising or in-station promotions, but stations are not encoding or rating these categories. Nonetheless, the FCC noted that failure to rate advertisements individually will not defeat the purpose of Congress in enacting Section 551. See FCC Report, supra note 100. The FCC also considered that it was not unreasonable for the Industry to exempt sports and news programming. Id.


110. The Board evaluates criticisms of ratings, to ensure the accuracy of the system. It includes a chairman and 23 members (six members each from the broadcast television industry, the cable industry, and the program production community, and five from public advocacy groups, selected by the Chairman). See generally FCC Report 1998, supra note 100. See also NAB, About the TV Ratings and V-Chip, supra note 109.


Supporters of the system call for better educational efforts targeting parents, and insist on the need to provide more time before the system achieves higher levels of understanding and usage. Critics have contended that the V-chip/TVPG system is not being widely accepted by the general population because it is subjective, confusing, and it does not cover certain forms of content, such as sports, advertisements, station promotions, or newscasts, which could include materials that some end users might find controversial.

Internet Filters.

Congress is relying on software filters as part of its attempt to prevent children from accessing sexually explicit content and other objectionable materials on the Internet. There are different types of Internet filters, also known as content software filters. Computer Professionals for Social Responsibility, a public-interest alliance of computer scientists involved in research in software filters, defines a content software filter as "one or more pieces of software that work together to prevent users from viewing material found on the Internet." The process of filtering can take place at different levels on the Internet, though there are three major points: (1) at the sender's level, also referred to as the server-level, which is the place of origination of the speech (the web site containing the objectionable speech); (2) at the Internet Service Provider's level (ISP); or (3) at the receiver's or end user's level. Filtering at the server-level requires web site creators or operators to install filtering devices in their sites.
capable of identifying visitors who do not comply with age requirements established for their site.\textsuperscript{118} Filtering at the ISP’s level requires ISPs to install filtering software and block the objectionable speech coming into or departing from their servers. A number of ISPs in the United States provide filtered Internet access to their clients.\textsuperscript{119} Finally, filtering software at the end user’s level acts as a personal technological gatekeeper, excluding materials at the end users’ level rather than at the point of origin or points of retransmission.

There are several types of end user controlled content filters. The first ones in the market were stand-alone systems, which included both the filtering software and the technical mechanisms for determining which web sites should be blocked. A single vendor sold both items.\textsuperscript{120} These early filters were criticized heavily for relying on words, and sequences of words, which resulted on sites being blocked even if they contained valuable information, for the simple presence of one of the words included in the vendor’s black list.\textsuperscript{121} Early filters were also criticized for depending on the judgmental value of the vendor, who at times would not even disclose the list of objectionable terms to the public.\textsuperscript{122} As a result, critics argued that the use of filtering software could represent a form of private censorship.\textsuperscript{123}

The enormous growth of the Internet promoted the appearance of several options for the end users.\textsuperscript{124} Although most content filters are focused on the Web, some systems claim that they can filter other modes for communicating on the Internet, such as Newsgroups, Chat

\textsuperscript{119} For a discussion of internet services providing filtered internet access, see Steve Watters, New Internet Services Help Parents Protect Children From Online Porn, at http://www.family.org/cforum/citizenmag/features/a0001556.cfm (last visited Mar. 9, 2004).
\textsuperscript{120} Hochheiser, supra note 116, at 4.
\textsuperscript{121} Lawrence Lessig, What Things Regulate Speech: CDA 2.0 vs. Filtering, 38 JURIMETRICS J. 629, 654 (1998). “The blocking effected by these systems is crude, and the effect of the blocking created is far too broad.” Id.
\textsuperscript{122} See generally Junichi P. Semitsu, Burning Cyberbooks in Public Libraries: Internet Filtering Software vs. The First Amendment, 52 STAN. L. REV. 509 (2000).
rooms, e-mails, and the like.\textsuperscript{125} Although stand-alone systems are still available, newer systems of filtering software have appeared, promoted by the development of a common protocol for recognizing ratings online. The Platform for Internet Content Selection ("PICS")\textsuperscript{126} was developed by the WWW\textsuperscript{3} Consortium, an organization encompassing various Internet organizations that was concerned with the increasing Congressional attempts to regulate content online.\textsuperscript{127} PICS is a content-neutral protocol that allows end users to select the type of content that they do not want to see displayed on their computers or, most probably, on their children's computers.\textsuperscript{128} PICS operates under two main components: a ratings system and software that uses the ratings systems to filter content.\textsuperscript{129} PICS works together with a system of ratings that must be encoded in the web site by the web page developer or by a third party providing ratings of Internet pages.\textsuperscript{130}

Several of the most popular filtering software on the market today is "PICS compatible." This software has the potential of adapting itself more precisely to the needs of end users than stand-alone filtering software because, as an open standard, PICS can be used for various categories of objectionable speech.\textsuperscript{131} With PICS, an interested parent can determine, for example, that in the same computer her 16-year-old daughter might access most web sites, with the exception of sites promoting drugs or containing sexually explicit images, while her 7-year-old son will not be able to access sites containing partial nudity, alcohol, indecent language or other types of controversial information. The interested parent selects the levels of

\begin{itemize}
\item \textsuperscript{125} Hochheiser, supra note 116.
\item \textsuperscript{126} Paul Resnick, Filtering Information on the Internet, at http://www.hackvan.com/pub/stig/articles/trusted-systems/0397resnick.html (Mar. 1997). PICS was developed by James Miller of MIT and Paul Resnik of AT&T Research. The system provides for a standard platform so other filtering software and ratings provided by web page creators can interoperate within a single standard. See also R. Polk Wagner, Filters and the First Amendment, 83 MINN. L. REV. 755, 764 (1999).
\item \textsuperscript{127} World-Wide-Web Consortium PICS Home Page, at http://www.w3.org/PICS (last visited Feb. 19, 2004).
\item \textsuperscript{128} Hochheiser, supra note 110.
\item \textsuperscript{129} \textit{Id.} Each request done by the user is evaluated by the filtering software and "[i]f the resource is on the 'not allowed' list, or if it does not have the proper PICS rating, the filtering software tells the user that access has been denied and the browser does not display the contents of the web site." \textit{Id.}
\item \textsuperscript{130} \textit{Id.} (noting that content in web sites is categorized using judgmental values of those designing the ratings).
\item \textsuperscript{131} See Semitsu, supra note 122, at 517.
\end{itemize}
access for each user and keeps the passwords for security purposes so the children cannot circumvent the filtering device.

Users of PICS software are not tied to the judgments of the software vendor, and the descriptions of the criteria used by the ratings systems are publicly available. Nevertheless, users still have to rely on ratings provided by third party companies, which might include their share of biases and viewpoints, or on the voluntary ratings provided by web page creators, which could be subjective.

Properly implemented, the Internet can accommodate multiple filtering systems, giving users and parents the opportunity to select and block information based on a true diversity of information. Use of filtering software at the end user’s level has become quite frequent in schools and libraries where filters are used as a means to keep minors from accessing objectionable materials while surfing the Net.

Regulating Speech Online While Promoting End User-Controlled Filters.

Congress has attempted to regulate the access of minors to objectionable speech online in three instances. The first partially aborted policy output took place with the passing of the Communications Decency Act (CDA). The CDA—also a part of the Telecommunications Act of 1996—was an extensive piece of legislation introduced as an attempt to protect children and families from the threat of sexually explicit communications online. Parts of the CDA criminalized the “knowing” transmission of “obscene or indecent” messages over the Internet to any recipient under 18 years.

133. Ratings are essential to operate. The Internet Content Rating Association (ICRA) is an international organization that claims that effective PICS based filtering software protect children from potentially harmful materials and protect free speech on the Internet. ICRA does not rate the content, thus avoiding value judgments about sites. The Internet Content Rating Association homepage, at http://www.icra.org/ (last visited Feb. 19, 2004). ICRA provides electronic questionnaires for web page authors to rate their web pages and label their sites so PICS software can recognize them and act upon the rating provided. Id. The categories measure the nudity and sexual content of a site, the violence depicted on the site, and other objectionable content available, such as gambling, drugs and alcohol. Id.
134. Hochheiser, supra note 116.
136. See generally Rappaport, supra note 11.
of age. Among the list of affirmative defenses for web content providers included in the Act, was protection for those who embraced blocking technologies at the server’s level, such as filtering software. The CDA also included Section 509, entitled Online Family Empowerment, which established a new national policy for the Internet encouraging the development of filtering technologies “that empower parents to restrict their children’s access to objectionable or inappropriate online material.” Congress did not mandate the use of filtering technologies in the CDA, but it embraced the benefits of filtering technologies both by the end user and the content provider.

In Reno v. ACLU, the Supreme Court held that CDA’s anti-indecency provisions abridged the free speech clause of the First Amendment. The Court noted the existence of less restrictive alternatives to the criminal provisions contained in the CDA and among those alternatives mentioned reliance on end user-based filtering and blocking mechanisms. The application of strict scrutiny for the Internet constituted an important element in the Reno decision. In Reno, the Court said, in reference to content-based online restrictions, if a less restrictive alternative would serve the government’s purpose, the legislature must use that alternative. Neither the “family empowerment” provisions of CDA, nor the affirmative defenses for content providers were challenged in the courts and remain valid today.

137. See 47 U.S.C.A. § 223(e)(1)–(6) (West Supp. 1997). The CDA also prohibited the “knowing” sending or displaying to a person under 18 of any message “that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.”

138. See Id.


140. 521 U.S. 844, 874 (1997) (holding that the Act “suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another”).

141. Id. This action by the Court has been criticized by some who say that it was based on technologies not proven at the time: The success in Reno then came from convincing the Court that there were other less restrictive means—that techniques did exist for keeping kids from porn—and that these other techniques would be less burdensome on speech. The success was to convince the Court to err on the side of activism—to force Congress to wait, to see what alternatives might develop. Let the market, let the code, let the parents, let something else make sure that porn is kept from kids. It’s too early, the Court was convinced, to call in the marshal.

142. Reno, 521 U.S. at 844.

143. Id. at 874–75.
The second Congressional policy output took place in 1998 when Congress passed the Children Online Protection Act ("COPA"). The law makes it a crime to put sexually explicit material for commercial purposes that can be viewed by minors on the World Wide Web. COPA differs from the CDA in its focus on commercial web content providers, and in its definition of indecency, for which it applies a test similar to the obscenity community standards developed by the Supreme Court in *Miller*. The new statute makes reference to filtering and blocking technologies because like the CDA, COPA includes affirmative defenses to prosecution based on technological measures, including server-side filtering mechanisms. COPA has never been fully implemented. In 1998, the statute was challenged in court by a group of organizations claiming that the law constituted a violation of their First Amendment rights because of the application of local community standards contained in the Act. Nevertheless, the Supreme Court already rejected that local standards for determination of certain objectionable content in the Internet made COPA unconstitutional. With its third attempt, Congress followed other state and local initiatives to regulate access of minors to harmful speech online while using computers in schools and public libraries. The Children's

145. Id.
148. ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000), vacated sub nom. by Ashcroft v. ACLU, 535 U.S. 564 (2002). The Court of Appeals for the Third Circuit affirmed a preliminary injunction by the U.S. District Court for the Eastern District of Pennsylvania noting that the statute required every Internet content provider subjected to the statute to abide by the most restrictive and conservative state's community standards in order to avoid criminal liability. Because of the inability of Web publishers to restrict access to their Web sites based on the visitor's geographic location, the statute imposed an impermissible burden on protected speech. *Id.*
149. The Supreme Court decided in *Ashcroft* that COPA was not unconstitutional because of its application of local community standards for the Internet, but issues surrounding the effectiveness of blocking mechanisms were not considered by the Court. 525 U.S. at 564.
150. These initiatives include the following: ARIZ. REV. STAT. § 34-502 (2000); ARK. CODE ANN. § 6-21-111 (2001) (public school Internet filters); ARK. CODE ANN. § 13-2-104 (repealed 2003) (computer use policy); COLORADO REV. STAT. § 24-90-404 (2001); LA. REV. STAT. ANN. § 17:100.7 (West 2001) (policies; governing authorities of public elementary and secondary schools; Internet and online sites; access by students and employees; exceptions); MD. CODE ANN. [STATE FINN. & PROC.] § 3-409 (2001); S.C. CODE ANN. § 10-1-206 (2000) (library pilot program for internet filtering software); S.D. CODIFIED LAWS § 22-24-55 (Michie 2001) (public schools to restrict access to obscene materials on public access computers); VA. CODE ANN. § 22.1-70.2 (Michie 2001) (acceptable Internet use policies for public and private schools).
Internet Protection Act ("CIPA"), passed in December 2000, requires schools receiving certain federal funds to certify that they have implemented a policy for Internet safety for minors in all elementary and secondary schools.\textsuperscript{151} The policy adopted must include operation in all computers with Internet access of a "technology protection measure" to block access to objectionable content online, which could mean the installment of filtering software.\textsuperscript{152} If the school does not comply with the requirement, it will not benefit from the federal funds.\textsuperscript{153} Another provision of the Act conditions the use by libraries of other federal funds, this time those assigned by the Museum and Library Services Act.\textsuperscript{154} The Act requires local policies to be adopted, which should include technology-based protection measures that can block access to obscene materials as defined in Section 1460 of the criminal code,\textsuperscript{155} child pornography, as defined in Section 2256 of the criminal code,\textsuperscript{156} sexual acts and sexual contacts, as defined in Section 2246 of the criminal code,\textsuperscript{157} and content that is harmful to minors.\textsuperscript{158} Unlike other blocking legislative initiatives, CIPA orders the study of filtering technologies, and it provides for an assessment of the effectiveness of the Internet policies adopted in accordance with the law.\textsuperscript{159} The CIPA places the determination of what

\textsuperscript{152} Id.
\textsuperscript{153} 47 U.S.C. § 254(h) (providing libraries and schools with discounted rates for access to telecommunication services, including local and long distance telephone service, high speed Internet access and internal network connections. There are up to $2.25 billion available to eligible schools and libraries). See also 47 C.F.R. § 54.507 (2002).
\textsuperscript{156} Id. § 2256.
\textsuperscript{157} Id. § 2246.
\textsuperscript{158} See 106 H.R. 5666 § 1703(b)(1) (2000).
\textsuperscript{159} Id. at (b)(2).
\textsuperscript{159} Id. at § 1703(a)(1)–(3). The National Telecommunications and Information Administration (NTIA) will engage in an evaluation process to determine "whether or not currently available technology protection measures, including commercial Internet blocking and filtering software, adequately addresses the needs of educational institutions." Id. NTIA is expected to make "recommendations on how to foster the development of measures that meet such needs," and to evaluate "the development and effectiveness of local Internet safety policies that are currently in operation after community input." Id.
constitutes material that is "inappropriate for minors" in the hands of the local authorities. CIPA was challenged on constitutional grounds.

Constitutionality of Regulations Based on End User-Controlled Blocking Mechanisms.

State actions promoting or mandating the use of blocking mechanisms reliant on technology have the potential of becoming a less restrictive alternative for regulation of content that is harmful to minors in a new electronic media environment. The Supreme Court has said that a content-based speech restriction can stand only if it satisfies strict scrutiny, so the statute must be narrowly tailored to promote a compelling government interest. If there is a less restrictive alternative that would serve the government’s purpose, then that alternative must be used. "To do otherwise," as Justice Kennedy wrote for the Court in United States v. Playboy Entertainment Group, "would be to restrict speech without an adequate justification, a course the First Amendment does not permit." The Court has stated that the government has a compelling interest in protecting minors from the harmful effects of media content. But, the Court has refused to hold state actions that limit the adult population only to content that is fit for children as constitutionally valid.

Narrowly tailored regulations promoting or mandating the use of blocking mechanisms to address the compelling interest of assisting parents in protecting children from the harmful effects of predetermined forms of objectionable materials over a converged

160. Accompanying the CIPA, Congress also passed the Neighborhood Children’s Internet Protection Act (NCIPA). Id. at §§ 1731 et seq. NCIPA requires as part of schools and libraries’ Internet safety policies to address access by minors to inappropriate matter on the Internet, including the World Wide Web, and the safety and security of minors when using electronic mail and chat rooms. Id.


164. Reno v. ACLU, 521 U.S. 844, 874 (1997); Sable Communications, 492 U.S. at 126.

165. Playboy, 529 U.S. at 813.


electronic mass media transmitting in multiple platforms, some of which transcend territorial boundaries—should satisfy a court's application of strict scrutiny.

So far, the Supreme Court has suggested that blocking mechanisms reliant on technology might be more effective for electronic media that is not as invasive as broadcasting, such as Internet and Cable television. First, in Denver Area Educational Telecommunications Consortium v. Federal Communications Commission, the Court highlighted the potential benefits of blocking mechanisms in the context of Cable TV. Then, in Reno v. ACLU, while striking down a provision of the CDA that imposed a ban on "patently offensive" communications on the Internet by criminalizing exposure of the material to minors, the Court noted the existence of less restrictive alternatives, among them reliance on end user-based filtering and blocking mechanisms. A few years later, in Playboy, the Supreme Court declared unconstitutional another provision of the CDA—Section 505, preventing signal bleeding—which required cable TV operators to fully scramble or fully block premium channels carrying sexually oriented programming, or otherwise channel the transmission of adult content to a safe-harbor period. Applying strict scrutiny, the Supreme Court


169. 518 U.S. 727 (1996) (holding unconstitutional two out of three provisions of the Cable Consumer Protection Act of 1992: a requirement that cable operators "segregate-and-block" sexually explicit patently offensive programming, and another provision that permitted cable operators to prohibit indecent programming over public access PEG channels. The third provision, which permitted cable TV operators to prohibit indecent programming on leased-access channels, was declared valid under the First Amendment).


171. Reno, 521 U.S. at 874.

172. Playboy, 529 U.S. at 808.

173. Telecommunications Act of 1996, Pub. L. No. 104-104 § 505, 110 Stat. 136, 47 U.S.C. § 561 (2000). Signal bleeding refers to the audio or video portions of the scrambled programs that resulted from imprecision of the scrambling technology. Cable operators use scrambling technology to avoid access of unsubscribed customers to certain programming, but imprecision of the scrambling technology used on analog systems can result in a leakage of parts of the visual images or sounds of the scrambled programs. See Playboy, 529 U.S. at 808. This imprecision, where unsubscribed customers might hear or see portions of the unscrambled
determined that less restrictive alternatives existed to the time-channeling requirement of the provision, and therefore, Section 505 was a violation of the First Amendment. Justice Kennedy wrote, "a regime in which viewers could order signal blocking on a household-by-household basis presented an effective, less restrictive alternative to § 505."\textsuperscript{174}

\textit{Regulatory Approach Based on Blocking Mechanisms is Still Too Recent for Assessment.}

Regulations based on blocking mechanisms controlled by the end user are still in their infancy, and they are limited to a voluntary, single medium approach. Problems associated with the early stages of the regulations include low levels of reception by the general public. Although the number of end users relying on blocking mechanisms remains low, these numbers are increasing, and it is not realistic to anticipate that all houses will need to use these mechanisms. As has been noted elsewhere, there are no children living in more than 63\% of all American homes.\textsuperscript{175} Therefore, it can be assumed that in almost two-thirds of American homes there will be no need to adopt blocking mechanisms aimed at protection of minors. Also, not every parent will consider that there is a need to protect his/her children from controversial speech; therefore, the success or failure of blocking mechanisms cannot be assessed only by the percentages of homes using these mechanisms. Other problems associated with the regulations include a large parental lack of knowledge about the new technologies, and the lack of parental technological skills needed to activate the blocking mechanisms.

Another major problem is related to the effectiveness of the mechanisms. There are still too many Web sites without ratings, and there are many voices criticizing the subjective nature of the ratings.\textsuperscript{176} Critics are challenging regulations based on blocking programming is called "signal bleed." \textit{Id.}

\textsuperscript{174} \textit{Playboy}, 529 U.S. at 807.

\textsuperscript{175} Approximately 36\% of all American households have children under 18 years. More than 20 million minors reported by the U.S. census as children under the age of 18 in American households are over 15 years of age. \textit{See Profile of General Demographic Characteristics: 2000}, at http://www2.census_2000/datasets/demographics_profile/0_National_Summary/2khus.pdf (May 2001).

\textsuperscript{176} \textit{See generally} Woodard, \textit{supra} note 112; Kaiser Family Found., \textit{New Survey Finds Most Parents Want to Use the V-Chip, But Aren’t Well Informed About How to Do So, supra} note 112; Electronic Privacy Info. Ctr., \textit{Faulty Filters: How Content Filters Block Access to Kid-Friendly Information on the Internet, supra} note 123. \textit{See also} Lawrence J. Magid, \textit{Child Safety
mechanisms, like the CIPA, because of the so-called over and under inclusiveness of the blocking features, that is, the presence of errors in the filtering and blocking process that might result in valid content blocked as objectionable speech, and objectionable content finding its way through the blocking mechanisms.\textsuperscript{177}


Blocking mechanisms will probably play an important role in the new electronic media environment. But for that to happen, the mechanisms will have to evolve so that they can work in diverse media platforms, capable of transmitting and receiving content in more than one medium. So far, blocking mechanisms operate only in the medium for which they were created. But with the trends of convergence, and with the adoption of common digital platforms, it is possible to anticipate that blocking mechanisms will be designed to act for all electronic media content regardless of the originating medium.

Regulations relying on blocking mechanisms also have followed a medium-specific approach. But as technology moves forward, and electronic media continues patterns of convergence, it is possible to foresee regulations based on blocking mechanisms capable of recognizing specific categories of content regardless of the medium used. In the end, the current medium-specific approach, or the application of some content-regulations to selected electronic media, might result in an unnecessary distinction, as technology brings all electronic media together in new multimedia platforms.

A regulatory approach based on blocking mechanisms provides several potential applications for the new electronic media environment because digital technologies allow blocking mechanisms to monitor and block even single images and words in a television show or a website.\textsuperscript{178} Therefore, blocking mechanisms in the future could well be developed to block unwanted content on a scene-by-

\textsuperscript{177} \textit{See, e.g.,} Faulty Filters, supra note 176; Marvin J. Johnson, \textit{The Effectiveness of the Children Internet Protection Act,} at http://www.aclu.org/congress/1040401a.html (Apr. 4, 2001) (statement of the ACLU before the House of Representatives Committee on Energy & Commerce, Subcommittee on Telecommunications and the Internet).

\textsuperscript{178} Since digital technology is capable of identifying tiny pixels containing a small fraction of a frame, it is possible to foresee changes in the blocking mechanisms to recognize segments rather than the entire program. \textit{See generally} BRUCE M. OWEN, \textit{THE INTERNET CHALLENGE TO TELEVISION} 116 et seq. (1999).
scene basis, or blocking a segment of a program without blocking the entire program. They could also recognize objectionable audio portions of a program while they allow for the remaining of the program to be aired, or they could recognize harmful text and pictures in a web site and act to block that content without affecting the entire web site. For these options to work, blocking mechanisms would need to work with more elaborate systems of ratings that provide detailed information on diverse controversial speech.

A more elaborate system of ratings would mean that electronic media speakers would probably have to engage in more extensive encoding of programming. Such systems of rating and encoding might benefit from a more precise correlation of content and harm, where the harmful effects of the objectionable material are correlated to specific members of the audience depending on their age, and not necessarily on identifying everyone less than 18 years as "children" in need of protection. As an illustration, if societal concerns are centered on the scientifically proven harmful effects of sexually explicit materials containing graphically explicit sexual encounters of minors 12 years or younger, then blocking mechanisms should be programmed by parents of these minors to block all materials fitting that description, regardless of the medium of transmission, but without affecting the remaining content accompanying those graphic materials. Potential applications of these mechanisms also extend to other non-harmful but still controversial speech if parents determine to block such materials.

V. CONCLUSION

The availability of certain objectionable content in the electronic media, coupled with calls from advocacy groups demanding government intervention to protect minors from exposure to that material and with constitutional limitations restraining Congress’ scope of action, led to the adoption of regulations relying on technology-based blocking mechanisms. These regulations represent the first output of what appears to be a new legislative approach to address in a narrow manner the compelling interest of protecting minors from harmful materials in the electronic media. Perhaps unintended, an additional outcome of these regulations has been the

adoption of a new layer of content regulations for the electronic media in the United States, one that is based on blocking mechanisms.

An expanding congressional reliance on blocking mechanisms in a new media environment is a possibility. But solutions to a number of variables might be required before we witness more intense reliance on blocking mechanisms. First, there will need to be a significant increase in the use of blocking mechanisms in United States households. This could be expected as parents become more technologically savvy and as the new blocking technologies prove their feasibility. Also, more information campaigns might be needed to educate parents on the advantages of the use of blocking mechanisms. Second, a clearer distinction between what objectionable materials are constitutionally protected and what are not might be necessary. Also, there is a need for more specific conclusions regarding the harmful effects of media contents and the age of minors. Until these variables are solved, Congress will probably avoid an increasing reliance on blocking mechanisms as substitutes for traditional content regulations in the electronic media. However, Congress might continue to apply this regulatory approach to new challenges presented by the new electronic media environment.