Written Testimony
Submitted to the Commission on Child Online Protection

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Thank you for the opportunity to address the Commission . I speak to you both as a parent of two minor children, and as someone interested in the continued expansion of the remarkable communicative potential of the Internet. Efforts by the Commission to assist us in understanding, and in making intelligent use of, the "technologies and methods that might be used to help reduce access by minors to online materials that are 'harmful to minors,'" to quote from the Commission's terms of reference, are of the deepest importance.

The situation, as I understand it, is as follows:

1. There is readily-accessible material on the Internet that we would all agree is "harmful to minors" (HTM).

2. There is readily-accessible material on the Internet that some reasonable people would claim is HTM -- or, perhaps, harmful to some minors but not others – while others would assert that it is not.

3. Congress seeks a *constitutional* way to eliminate, or at least to minimize, minors' access to HTM material (at least HTM material in the first category). Its first efforts – the Communications Decency Act and the Child Online Pornography Act – have been struck down by federal courts as unconstitutional infringements on the right to free speech.

4. Any solution must not interfere substantially, or more than is necessary to achieve the goal of limiting minors' access to HTM material, with communication by and among adults. Much HTM material is "constitutionally protected speech," and any State action that restricts adult access to such material is presumptively unconstitutional.

Any Congressionally-mandated action regarding this problem should have the following features:

1. It should recognize and respect differences of opinion as to what constitutes HTM material. These differences may be geographically-based: different local school boards, for example, will have, and should have, different views of the material that should be excluded from view by an eighth-grader. The differences may be non-geographical; followers of different religious traditions will continue to have different views as to what constitutes HTM material irrespective of geographic location, for example, as will individual parents on the basis of their own particular moral or ethical codes.

2. It should recognize that the primary responsibility for insuring that minors are not exposed to harmful material rests with parents, educators, and others in a care-giving role. In real-space, it is not the law that serves as the primary constraint on minors' access to harmful material, it is the combined effects of the culture created by parents, teachers, peers; the government's role is primarily to facilitate the reasonable exercise of that control. That should be the goal in cyberspace as well.

<u>The Domain System and HTM material</u>

1. The current configuration of the domain name system, in particular the existence of 7 top-level domains (TLDs) (.org, .com, .net, .mil, .gov, .int, .edu), is not technically mandated. There is no technical reason that there could not be hundreds, or thousands, of TLDs. ICANN is currently considering proposals to enlarge the number of TLDs.

2. Expansion in the number of TLDs is a desirable policy objective for many reasons having little or nothing to do with this Commission's inquiries. Expansion will, for instance, reduce the level of

conflict over the "rightful ownership" of particular second-level domains (*xyz.com*, *university.edu*, etc.), and it will allow a greater degree of self-differentiation of Internet services than is possible given the current artificially-maintained TLD scarcity.

3. Expansion in the number of TLDs would permit experimentation with a familiar technique for restricting minors' access to HTM material, a kind of Internet "zoning." In real-space we often use a strategy of requiring material that is appropriate only for adults to be spatially (as in 'red light' zones) or temporally (as on the federally-regulated radio broadcast spectrum) segregated.

4. If, somehow, we could arrange things such that all HTM material – however we would define that category -- were segregated into specified TLDs, it would then be a relatively trivial task to configure individual browsers so as to deny access to those TLDs, and hence to that material.[1] At the same time, the material would still be "there," available to those who wish to access it.

5. Would this solution – again, assuming for the moment that it is attainable – be constitutional if it resulted from direct congressional decree, e.g., a law requiring individuals distributing material that is "harmful to minors" to place that material within specified top-level domains? I am no constitutional scholar, and I would defer gratefully to others on that question; my reading of the cases, most importantly *Renton v. Playtime Theaters*, 475 US 41 (1986), suggests that such a law would pass constitutional muster. Precisely because zoning does not restrict adults (or children who have a supervising adult's permission) from "entering" the HTM zones, the burden on protected speech – the primary constitutional vice of COPA and the CDA – is minimized if not eliminated.

   (a) Even if such a law could achieve its objective of segregating all HTM material into specified domains, it would not, obviously, keep all minors from accessing HTM material. That it is a less-than-perfect solution to the problem should not, however, affect our view of its constitutionality.

If this were our goal, is it achievable? What steps might Congress take to help achieve it?

1. First, TLD-space must be enlarged. In the current configuration, Internet "real estate" (in the form of TLDs) is too valuable to "waste" an entire domain on HTM material. As noted above, expansion is currently on ICANN's agenda, and ICANN could, usefully, be encouraged to act rapidly on expansion plans.

2. Because that TLD expansion has not yet taken place, and because the manner in which it does take place (and, indeed, whether or not it does take place) is not entirely within Congress' control, it is difficult to specify precisely the steps that Congress could or should take to facilitate this zoning. Thus, for example, even if ICANN adopts an expansionist policy with regard to new TLDs, it is not clear whether new TLDs will be restricted, or unrestricted, in number; whether ICANN itself will designate the name(s) of the new TLDs or allow individuals to propose their own names; whether ICANN will accept proposals for new TLDs on a first-come, first-serve basis, or will utilize a lottery, or auction, or some other method for allocating responsibility for management of the new TLDs; whether ICANN will permit governmental institutions to operate new TLDs; etc. The answer to these, and many other, questions will at least partially determine the means that Congress can use to facilitate the segregation of HTM material into particular TLDs.

3. Assuming that additional TLDs become available, how can Congress encourage the segregation of HTM material into specified domains? And which domain(s)?

   (a) First, and most simply, Congress could authorize the maintenance of a public list of "designated HTM TLDs," a set of *pointers* to domains containing HTM material. The list of designated HTM TLDs could then serve as an authoritative source of information for parents (or anyone else)

[1] At least as to material on the World Wide Web. Newsgroups, for example, do not rely on domain identification in the way that web servers do, and a domain-name-based solution to the problem of HTM material on newsgroups would have to take a very different form (if it could be achieved at all).

seeking to avoid HTM material. Browsers could relatively easily be re-configured, or built, to contain an automated "lock-down" option whereby access to a designated HTM TLD would be denied; if the browser market failed to produce such an option (as I suspect it would), browser manufacturers could be "encouraged" to provide the option in their products.

(b) My guess – and it is, and can probably only be, just a guess – is that a significant amount of HTM material would "migrate" to the designated HTM TLDs without any express legal requirement that it be placed there.

(c) Congress could, alternatively, expressly mandate placement of HTM material in the designated HTM TLDs. For example, a statute could simply require that all HTM material be placed into one or more TLDs specified in the statute, or appearing *ex post* on the list of designated HTM TLDs. Alternatively, as it did in COPA itself, Congress could define the offense of distributing HTM material and provide that placement of such material in one of the listed domains is an affirmative defense to criminal or civil liability under a re-enacted COPA.[2]

(d) My own preference would be to postpone implementation of an express legal requirement of this kind until we have more experience with the effectiveness (or lack of effectiveness) of a scheme involving voluntary, uncoerced segregation of HTM material into the designated domains. While this might appear to be a somewhat weak-kneed approach to the problem at hand, it could well do considerable good (while doing little harm). It is a means by which the government can provide the one thing that is in short supply on the Internet: tools for coordinating the action of large numbers of like-minded individuals. The mere existence of the set of pointers may serve as an effective catalyst for the accumulation of a substantial amount of HTM material in the designated domains. The extent to which this solves the problem of control over minors' access to this material can be assessed *ex post*, and more vigorous means employed if necessary.

4. The difficult question becomes: how is this list of designated HTM TLDs to be maintained? How do TLDs get on, or off, the list?

(a) Congress could delegate to a federal agency the task of searching and locating HTM material for the purpose of placing TLDs in which such material is found onto the list of designated HTM TLDs.[3] Even aside from the unseemliness of having government officials seeking out material of this kind, this approach has any number of associated problems. The operators of individual TLD registries have only a limited degree of control over the material that appears there; any individual TLD is likely therefore to have a diversity of information content, *i.e.*, some sites that do, and some that do not, contain HTM material. What threshold – 1% of material? 5% of material? 10%? – will be used to determine whether or not a TLD is given the HTM designation? How will that be measured? Many TLD registry operators are likely to resist classification as an HTM designated location (especially if the threshold is low enough), and to fight, through administrative or judicial procedures, any such classification. Whatever the chosen threshold, a significant amount of material is likely to be mis-classified under such a scheme.

(b) If the goal is to *punish* registries for allowing HTM material to appear in their domains this might be an appropriate way to proceed; but the goal is not to punish them for hosting constitutionally-protected material but rather to encourage the segregation of material into identified domains.

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[2] In COPA itself, the offense -- "knowingly and with knowledge of the character of the material . . . mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors" – was made subject to an "affirmative defense": "good faith" steps taken to "restrict[] access by minors to material that is harmful to minors," including (a) requiring use of a credit card, (b) accepting a digital certificate verifying the user's age, or (c) "any other reasonable measures that are feasible under available technology." COPA, Sec. 231(c). Placement of material in a designated HTM TLD could be added as an additional affirmative defense to prosecution or to civil liability under a revised COPA.

[3] Appropriate notice and appeal procedures, it goes without saying, would have to be provided.

That can better be accomplished by instituting a procedure under which domain registries self-identify themselves through a simple application procedure, and placed on the list at their own request. It is perhaps unfortunate, but nonetheless true, that there will be commercially-operated domains that will welcome such an "official" designation as a way of signaling to potential consumers that hard-core material can be found at that location, and at least a substantial number of those with HTM material for sale will be willing to forego making their material available to minors for what they would see as the benefit of being easily locatable by their primary adult consumers.

(c) I do not see, in other words, any compelling reason, at least in the first instance, for the government to do more than to endorse the self-identification of individual domains as containing HTM material. I think it reasonably certain that a substantial amount of HTM material would make its way into those domains precisely because they can be found easily by consumers; that will enable those who wish to avoid this material to do so with relative ease.

(d) This is a small step, to be sure. But small steps are the most appropriate when walking on rapidly-changing and uncertain terrain. This will not create a world in which no minors encounter material on the Internet that may be harmful to them; but nothing Congress does can create such a world. It is minimally intrusive on the rights of adults to communicate in whatever ways they wish, and avoids entangling the government in making content-based determinations that are, at the very least, in some tension with the command of the First Amendment. It can help to bring a degree of order to the Internet in a way that many parents and educators will find useful; how much order, and how useful, cannot be predicted in advance. If it is entirely ineffective at achieving its goal, it can be abandoned, or supplemented with additional measures, in the future.