PRICEWATERHOUSECOOPERS

Memo

To: The COPA Commission

From: Scott Charney

Date: August 28, 2000

Subject: COPA Commission Comments

First, I would like to apologize for being unable to attend the Commission's recent hearings in California, and thank the Commission for its willingness to accept written comments. Your specific tasking -- which includes finding ways of reducing minors' access to material that is harmful to them on the Internet -- is indeed a daunting one, both legally and technically.

Legally, efforts to protect minors using the Internet have yet to survive constitutional challenge. Key provisions of the Communications Decency Act and Child Online Protection Act were struck down, the latter after serious attempts to address the flaws of the former. Most striking is the Third Circuit's conclusion that: "[W]e are forced to recognize that, at present, due to technological limitations, there may be no other means by which harmful material on the Web may be constitutionally restricted, although, in light of rapidly developing technological advances, what may now be impossible to regulate constitutionally may, in the not-too-distant future, become feasible." The subtext of this statement is that we have allowed technology in general, and markets in particular, to dictate public policy, and now must live with that decision.

Technically, efforts to protect children have also been limited in effectiveness. URL-naming conventions (such as a top level domain of ".kids") or other identifiers do not currently exist. Additionally, content filtering has inherent limitations at both ends of the spectrum: they risk being underinclusive (giving children access to inappropriate material) and overbroad (denying children access to material that is actually appropriate).

It is against this backdrop that I do have one suggestion: the Commission may wish to consider recommending to Congress the enactment of legislation which prohibits mislabeling

website content as being suitable for children.[1] Significantly, the legislation should not require a website to be labeled; it should only provide that if a label is applied, it must be truthful. (Compelled labeling may violate the First Amendment, as it might constitute compelled speech.)

This legislation would enable market based products to function more effectively. More specifically, parents could demand and deploy filters that affirmatively look for a child-friendly label, prohibiting their children access to those sites that are either unlabeled, or not specifically labeled as safe for children. In response, those seeking to attract children would tag their websites as "child friendly," and falsely doing so would result in penalties. As for the penalties themselves, there are of course several options. One approach might be to provide for injunctive relief, as well as a civil penalty, in the case of a mislabeled site, with stiffer sanctions -- perhaps even criminal penalties -- if it could be proven that an individual/organization intentionally mislabeled a site.

[1] This idea was suggested to me by Philip Reitinger, Deputy Chief of the Computer Crime and Intellectual Property Section at the U.S. Department of Justice. I mention this so as to not receive undue credit for the idea, but I also do not wish to imply that this approach has been approved or adopted by the Justice Department.