Active Child Safety Bills Raising Free Speech Concerns Now Pending in the Senate

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I. Sex Offenders (the KIDS Act)

H.R. 719 and S. 431 started out with identical language that attempted to address the concern that sex offenders are using social networking and other Internet sites where children might be active. In considering the legislative options, however, the House rejected the original approach and instead adopted to focus on the specific sex offenders of concern, and to take concrete action to prevent those individuals from approaching minors online. The Senate continues to consider the original language, which would be far less effective and focused than the House approach, and has a number of very serious problems. **CDT strongly urges the Senate to adopt the House approach.**

H.R. 719, Keeping the Internet Devoid of Sexual Predators Act (passed by the House of Representatives on 11/14/07). This bill would (a) authorize additional funds to increase supervision of sex offenders who might pose risks for minors online, (b) allows the imposition of specific Internet access limitations (in probation/release terms) on sex offenders who pose risks online, and (c) makes other statutory changes to facilitate the monitoring of sex offenders. **CDT supports these provisions in H.R. 719.**

S. 431, Keeping the Internet Devoid of Sexual Predators Act (to be marked up in the Senate Judiciary Committee on 12/13/07). This bill would require sex offenders to register their e-mail, instant messaging, and other online addresses, and would permit social networking sites to screen their users against a database of addresses. This, however, would be far less focused or effective than the approach taken in H.R. 719. As detailed below, S. 431 would very likely reduce the ability of blogging and social networking sites to offer their services for free. In addition, S. 431 has a number of serious problems in its terms:

1. The definition of "commercial social networking website" in S. 431 sweeps in many blogs on the Internet and a large and growing number of commercial and other sites. Many blogs (a) contain profiles of participants, (b) enable communications over the Internet, and (c) are created in a commercial context. Thus, for example, the leading liberal and conservative political blogs - DailyKos and RedState (both of which accept advertisements) - certainly fall into the definition of "commercial social networking website," as would the tens of millions of websites provided on free blog sites such as blogger.com and livejournal.com (both of which are commercial sites). A likely consequence of this overbroad definition is that some free or low cost sites will not be able to bear the significant cost of screening their users against the database of addresses that the bill envisions. Thus, it is likely that this bill will serve to reduce the avenues for free and low cost expression on the Internet - the very thing that has made the Internet such a powerful force in our society. Although concerns about sex offenders are unquestionably important, the harm to and reduction of online free expression would be a significant and unfortunate cost of such an overbroad definition.

2. The superficially "voluntary" nature of the database would in practice not be voluntary, and would thus impose significant costs on a very broad range of websites, including many sites where child predators are not likely to make contact with minors. Although the draft bill avoids making the screening of sex offender addresses a mandatory obligation, there is no question that pressure (from Capitol Hill and the media) will force many sites - including free and low cost sites - to screen their users. Again, this will likely lead to a reduction of available sites on the Internet, as well as a trend to move websites overseas where they will be less

responsive to American concerns. And, critically, many sites that will effectively be forced to screen users will not be the types of sites that in fact carry significant risk to minors (thereby imposing significant economic costs without corresponding social benefits). If S.431 is going to considered, however, we urge an additional subsection (6) to the provision allowing the use of the database, along the following lines: "Nothing is this section shall be construed to require any Internet site to access or use the database of registered identifiers, and no federal or state liability or other adverse consequence shall be imposed based on a decision not to access or use the database." This language would reduce the coercive nature of the proposed system, while permitting competition in the marketplace among sites that are already seeking to be the most family/child friendly networking sites on the Internet.

3. In light of the fluidity of online identities, and the trivial ease of creating new identifiers and online addresses, we think that the "voluntary" screening that the bill anticipates would be ineffective: Many Internet addresses and identifiers are wholly unverified and cannot be linked to verifiable physical addresses or actual identities, such addresses and identifiers are not unique across the Internet, and they can be instantly created or discarded. Thus, any screening process would be error-ridden, and would not be effective in excluding sex offenders from "social networking" sites. Moreover, the ineffectiveness would be especially true for the most dangerous of offenders - those intent on violating parole limitations on contact with minors. At the end of the day, this bill will not actually do much to protect kids from anyone intent on harming them, and it will have a negative impact on the free availability of outlets for lawful speech online.

4. The public availability of a database of hundreds of thousands of actual e-mail addresses (and other identifiers) would raise a host of serious security and related problems. We urge that language be included specifically requiring that the collected addresses be kept private.

CDT urges the Senate to reject S. 431, and to adopt the more effective and focused approach taken in H.R. 719.

II. NCMEC Reauthorization

Both H.R. 2517 (passed by the House) and S. 1829 (to be considered by the Senate) would: (a) dramatically increase the funding of the National Center for Missing & Exploited Children (NCMEC), and (b) expand NCMEC's mission far beyond its appropriate areas of expertise. Although CDT does not object to increased funding for NCMEC, **we oppose the expansion of NCMEC's responsibilities into areas far beyond their expertise.**

H.R. 2517, Protecting Our Children Comes First Act (passed by the House of Representatives on 12/5/07). As noted, this bill would expand the scope of NCMEC's "Cybertip" line to include a range of topics which are beyond NCMEC's areas of expertise or appropriate responsibility:

1. In Section 3 of H.R. 2517, the bill would add Section (P)(vi) to require NCMEC to receive "Cybertips" on "unsolicited obscene material sent to a child." Unlike child porn (which is an essentially objective thing to determine), obscenity is highly subjective according to the local community. What might be "obscene" in Virginia (where NCMEC is located) might not be obscene in Las Vegas. NCMEC has no expertise on obscenity, and could not appropriately try to

determine "is this obscenity" in the same way it tries to determine "is this child porn." This subpart would involve NCMEC in prosecutorial decision-making on topics about which it has no expertise – and about which NCMEC cannot possibly obtain expertise on the "community standards" in every community in the country. CDT urges the Senate to drop this subpart.

2. Sections (P)(vii) and (P)(viii) would require NCMEC to receive "Cybertips" on "misleading domain names" and "misleading words or digital images on the Internet." To the extent these terms are relevant to any criminal law, the terms represent pure legal determinations that NCMEC should not be making. NCMEC is in theory a *private* organization and should not be tasked with making prosecutorial decisions. As with (P)(vi) discussed above, the Senate should drop these subparts and leave NCMEC focused on its core mission of child pornography and missing children.

In addition, Section (F) adds reporting obligations on NCMEC – which we support – but overlooks more than one-half of NCMEC's work, the child pornography Cybertip line, for which there is almost no public information. We suggest that (F) be expanded (or a new section added) to require reporting about the Cybertip line (about child pornography), to include at least (a) how many reports of alleged child porn are received from the public each year, (b) how many of those reports are passed on to law enforcement as likely child porn, (c) how many reports of alleged child porn are received from ISP and other service providers each year, (d) how many of those reports are passed on to law enforcement, and (e) the average speed of the "passing on" of reports to law enforcement. We also urge the Senate to require the Department of Justice to report on the speed of its review of child pornography referrals from NCMEC, in light of the anecdotal evidence indicating that prosecutorial review is often delayed by many months.

S. 1829, Protect Our Children First Act (to be marked up in the Senate Judiciary Committee on 12/13/07). This bill is similar to (but has significant difference with) what was passed by the House in H.R. 2517. All of the concerns and comments about H.R. 2517 apply to S. 1829, *except* the Senate version does not have the language mandating that NCMEC receive tips on "misleading domain names" and "misleading words or digital images on the Internet."

CDT urges that the mission of NCMEC *not* be expanded beyond its areas of expertise, as both H.R. 2517 and S. 1829 would do.

III. Expansion of ISP Reporting Requirements (the SAFE Act)

The House passed H.R. 3791, a very problematic expansion of the NCMEC reporting requirement for ISPs and online service provides. Senator Kyl may introduce a related amendment that is also significantly problematic.

H.R. 3791, Securing Adolescents From Exploitation Online Act (passed by the House of Representatives on 12/5/07). This bill was passed by the House under a "suspension" procedure that is intended for non-controversial bills, even though this bill raises very significant constitutional and other problems. The bill would (a) expand the scope and burden of reporting possible law violations to NCMEC, and make failure to report a criminal matter, (b) increase the fines for non-reporting, (c) expand what information must be reported (with no privacy protection on that information), (d) require ISPs and others to keep and maintain any child

pornography reported to NCMEC, and (e) create a federal government program to "blacklist" content identified by NCMEC as possible child pornography (with no judicial or even government review of the blacklist). These provisions raise serious problems:

1. By dramatically increasing the fines for failing to report to NCMEC, and by making a failure a criminal matter, the bill would burden and penalize the Internet industry for a problem that is the responsibility of the Department of Justice (DOJ). To the extent there is a problem with ISPs not reporting to NCMEC, the problem is that DOJ has failed to issue the regulations governing the reporting, as Congress required *in 1999.* Simply put, DOJ has never detailed who reports and how reports should be made. All of the big ISPs and service providers are reporting anyway (using voluntary guidelines developed by a trade association in the absence of the DOJ regulations). There is no evidence that the current $50,000 fine is not enough incentive for providers to report to NCMEC, and such increased fine would likely not be necessary if DOJ were to ever issue the needed regulations. It is inappropriate for Congress to impose a significantly greater burden on private industry as a response to a problem created by DOJ.

2. The bill would require Internet and online service providers to "register" with NCMEC – a wholly unprecedented requirement for a medium that has seen extraordinary growth and innovation precisely because providing services on the Internet does *not* require the type of registration mandate contained in this bill. The registration mandate would likely apply to thousands of small online application providers, and would very likely chill the innovative contributions from such small providers (or drive them overseas). The Internet has flourished because innovators have been able to offer new services without having to register with the government – this bill would reverse that vital long-term policy.

3. The bill would require Internet and online service providers to disclose to NCMEC an extraordinary amount of personal information – including the contents of e-mail – all without any judicial supervision or even prosecutorial involvement. Much of the information required to be disclosed could *not* be disclosed to the government without a court order or formal subpoena. Moreover, because NCMEC is in theory a *private* organization, the information disclosed to NCMEC is not covered by the Privacy Act or the Fourth Amendment, and what NCMEC does with the information cannot be determined through the Freedom of Information Act. Absolutely nothing in this bill would prevent NCMEC from maintaining a database tracking the online activities of American citizens who have not been convicted of or even charged with any crime. And, since this bill increases the penalties on ISPs for failing to report, more and more completely innocent Americans will be reported (in an abundance of caution by the ISPs), and thus swept up in the data collection and tracking that NCMEC could do under this bill.

4. In creating the new Section 2258C, this bill would authorize the creation of a federal "blacklist" of images and websites that are alleged to contain child pornography, and then distribute the black list to service providers. Sites would be placed on this blacklist even though no prosecutor, judge, or jury has ever reviewed the images and found them to be actual child pornography. Although such a program might arguably be constitutional when performed by wholly private entities, this bill would make this "blacklist" a federal program. Such a federal blacklist of content alleged to be illegal would flatly violate the First Amendment under the Supreme Court's decision in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

CDT strongly urges the Senate to reject H.R. 3791.

Proposed Amendment by Senator Kyl (may be introduced at the Senate Judiciary Committee markup on 12/13/07) (comments based on the language in HEN07M05_xml.pdf). This amendment would increase the fine for a failure to report to NCMEC (as discussed in paragraph 1 immediately above with regard to H.R. 3791). As detailed above, this increase would be an inappropriate response to the real problem, which is a failure by the Department of Justice to issue the needed regulations that govern the reporting process.

In addition, this amendment would give the Federal Communications Commission authority to impose civil fines on ISPs and online service providers – bringing the FCC into a criminal/prosecutorial matter when it has absolutely no experience in the field of criminal investigations/prosecutions in this area. Moreover, this proposal would give the FCC rulemaking authority over a broad range of Internet-based business (including entities like eBay, Amazon, Google, YouTube, Blogspot, DailyKos, RedState) that have *never* been subjected to FCC or any other regulatory regime. This would open the door to FCC regulation of Internet websites. **CDT believes that this entire amendment should be rejected.**

IV. Online Safety Education

The Senate is considering a *very good* bill that would provide needed funding in the area of online safety education. CDT strongly supports the passage of S. 2344.

S. 2344, Internet Safety Education Act (to be marked up in the Senate Judiciary Committee on 12/13/07). This bill would authorize $10 million of grants each year for five years to support Internet safety education for both children and parents. S. 2344 is similar to H.R. 4134, which was passed by the House, except that the House version directs that half of the money must be awarded to one particular organization that is based in the House sponsor's district.

S. 2344 is precisely the type of child safety bill that Congress should be passing. Two blue-ribbon panels established by Congress to investigate how best to protect children in the online environment concluded that the most effective way to protect kids online is to combine *education* with the voluntary use of filtering and other technology tools to empower parents to decide what content their children should access. Both the "COPA Commission"[1] and the National Academy of Sciences[2] issued reports that emphasize education as the most effective way to keep children safe online. **CDT urges passage of S. 2344.**

For more information on these and other free speech and child safety bills in Congress, please contact John Morris at (202) 637-9800 or jmorris@cdt.org.

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[1] The "Final Report of the COPA Commission," released on October 20, 2000, is available online at http://www.copacommission.org/report/.

[2] *See* Nat'l Research Council of the Nat'l Academy of Sciences, "Youth, Pornography, and the Internet" (2002). The full report is available online at http://books.nap.edu/html/youth_internet/ (HTML form) or http://books.nap.edu/openbook/0309082749/html/index.html (PDF form).