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ICANN'T Do It Alone: The Internet Corporation for Assigned Names and Numbers and Content-Based Problems on the Internet

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I. INTRODUCTION

The Internet began as a simple mechanism for transferring data, but has since become an integral part of today's society, providing a high-tech means for communication, commerce, and entertainment. As may be expected, the Internet has also created a number of serious legal problems. It therefore would be logical to assume that a government body closely regulates the Internet—anticipating and dealing with the complex issues and problems that often arise. Surprisingly, this is not the case. Instead, the Internet is privately managed by the Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit corporation based in California.[1]

This Comment highlights the historical development of the domain name system and ICANN and posits that United States (U.S.) law does not properly support ICANN in its mission to solve the complex problems facing the Internet. This assertion is illustrated by examining just one of these problems—the dangers posed by the content of Internet applications to which young, impressionable children have access. Because entities that place adult-oriented materials on the Internet often avoid regulation by claiming fundamental rights to free speech granted by the First Amendment of the Constitution,[2] many parents struggle to protect their children from the negative influences of such material. Conversely, ICANN has been understandably reluctant to make policy decisions that in any way infringe upon the valuable rights to free speech of those posting such material. Therefore, the content of these applications is not properly regulated, and as a result, children have access to harmful images and expressions that may negatively influence their psychological and moral development.

This Comment asserts that to solve these problems, Congress must support future ICANN measures by providing appropriate legislative standards by which ICANN can operate—principles by which it can

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1. For an informational Internet site about the Internet Corporation for Assigned Names and Numbers, see http://www.ICANN.org.

2. U.S. CONST. amend. I.

base solutions. In the illustrative example of content-based problems, Congress should create a standard for "zoning" adult-oriented material on the Internet and require ICANN to categorize the material by top-level domain name.[3] Properly labeling adult-oriented material in this manner (e.g., labeling pornographic material with the top-level domain ".xxx") would not infringe upon valuable free speech rights, and yet still afford Internet users the individual freedom to accurately filter adult-oriented material (by using privately installed hardware- or software-based filters).

To better understand this proposed solution, Part II of this Comment provides an abbreviated history of the technical and governmental development of the Internet and the domain name system. Part III explains the problems related to adult-oriented materials posted on the Internet, and Part IV summarizes recent initiatives and failures to solve these problems. Part V critiques ICANN, in its current form, and concludes that despite ICANN's apparent authority, the U.S. Government ultimately reigns over the domain name system and should be held accountable for its failings. Part VI highlights a dissenting opinion in a recent Supreme Court case involving Internet content-based problems and then proffers a legal basis by which Congress could develop a zoning law to regulate Internet content and yet still protect important fundamental rights to free speech. Last, Part VII provides a summary and concludes that in general, as in the specific instance of content-based problems, new legislation is needed to promote the healthy development of the Internet.

II. AN ABBREVIATED HISTORY OF THE INTERNET

Twenty years ago, relatively few people had even heard of the Internet. Since then, the Internet has developed into a powerful means of communication, commerce, and entertainment,[4] and has become an integral part of many people's lives. Studies indicate that by the end of 2005, the Internet will have a staggering 720 million users globally.[5]

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3. *See generally* Christopher Furlow, *Erogenous Zoning on the Cyber-Frontier*, 5 VA. J.L. & TECH. 7 (2000). Alternatively, Congress could require ICANN to register all material deemed safe for young children with the top-level domain name ".kids." These domain names could provide parents with the ability to identify the quality of material their children are viewing on the Internet.

4. *See* Rebecca W. Gole, *Playing the Name Game: A Glimpse at the Future of the Internet Domain Name System*, 51 FED. COMM. L.J. 403, 404 (1999).

5. *See* Furlow, *supra* note 3, ¶ 1. *But see* Dina Demner, *Children on the Internet, at*

A. The Birth of the Internet

When computers were first invented, they were stand-alone tools, one computer could not communicate with another. In 1965, scientists developed a way for a computer in Massachusetts to communicate with a second computer in California.[6] The U.S. Department of Defense deemed this technology to have great potential and funded research projects to further its development.[7] Soon many public universities and government agencies operated private computer networks that transferred data and, in many cases, email messages.[8] By the mid-1980s, scientists developed the capability to link these many private networks together into a "network of networks."[9] With this development, the Internet as we know it today was born.

B. The Domain Name System

During the first years of the Internet, networking capabilities improved, partly because the mechanisms enabling one computer to find another improved. Initially, computers on the Internet were identified solely by unique Internet protocols (IPs) consisting of 32-bit numbers.[10] "Because no two computers had the same IP address, it was possible to locate any computer on the Internet . . . ."[11]

As the number of computers on the Internet grew, the basic structure of this identification system became inadequate.[12] Scientists solved this problem by developing the current method of "mapping each

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http://www.otal.umd.edu/uupractice/children (last visited Jan. 24, 2002) ("The number of Internet users worldwide is expected to grow to 300 million by 2005, from roughly 150 million currently . . . .").

6. Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 192 (Oct. 2000) ("In order to allow computers to communicate effectively, though, computer scientists had to devise an entirely new way, known as packet switching, of transmitting information over phone lines.").

7. *See id.*

8. Barry M. Leiner et al., *A Brief History of the Internet*, *at* http:www.isoc.org/internet/history/brief.shtml (last visited Feb. 15, 2002); *see also* Weinberg, *supra* note 6, at 193 ("Computer networks began springing up wherever researchers could find someone to pay for them. The Department of Energy set up two networks, NASA set up another, and the National Science Foundation (NSF) provided seed money for yet another. In each case, far-flung researchers were able to use the network to communicate and share their work via e-mail.").

9. Weinberg, *supra* note 6, at 193.

10. *Id.* at 194.

11. *Id.*

12. Leiner et al., *supra* note 8.

IP address to a domain name."[13] Unique domain names, such as "*www.internet.com*," serve as Internet addresses that allow individuals to consistently identify and locate material on the Internet.[14] The last part of the domain name is called the top-level domain.[15] The Internet currently functions with six unique top-level domains: .com, .net, .org, .gov, .mil, and .int.[16] These names originally represented the nature of the business registering the name.[17] "However, as of September 1995, the domain registrars no longer enforced these distinctions and [currently] any party [can] register any prefix without regard to the nature of the registrant."[18]

C. Governing the Internet

The Internet has been "governed by different organizations during its development. During the first few years, the U.S. Department of Defense (DoD) governed the workings of the Internet through contracts with organizations such as the Stanford Research Institute and the Information Sciences Institute.[19] The DoD determined "how names and essential routing numbers [were] assigned to ... other Internet resources."[20] Later, the National Science Foundation (NSF) and the U.S. Government civilian and military contractors and grant recipients took over the role of governing the civilian part of the infrastructure.[21]

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13. Weinberg, *supra* note 6, at 195; Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 20-93 (Oct. 2000) (providing a detailed account of the origins of the domain name system and the contractual basis of ICANN's authority), *available at* http://personal.law.miami.edu/~froomkin/articles/icann.pdf. For a summary of ICANN's history, *see also* ICANNWatch, *ICANN For Beginners*, *at* http://www.icannwatch.com/icann4beginners.php#causes (last visited January 22, 2002).

14. *See* Jonathan M. Ward, *The Rise and Fall of Internet Fences: The Overbroad Protection of the Anticybersquatting Consumer Protection Act*, 5 MARQ. INTELL. PROP. L. REV. 211, 214 (2001); Froomkin, *supra* note 13, at 37-40.

15. Ward, *supra* note 14, at 214.

16. *Id.*

17. *Id.*

18. *Id.* Private organizations are still limited, however, to the designations .com, .org, and .net.

19. Weinberg, *supra* note 6, at 198.

20. ICANNWatch, *ICAANN For Beginners*, *at* http://icannwatch.com/essays/icann4beginners.html (last visited January 22, 2002).

21. *See id.*; *see also* Bruce Sterling, Short History of the Internet, *at* http://w3.aces.uiuc.edu/AIM/scale/nethistory.html (last visited Apr. 23, 2002) (providing a history of the Internet from its origins as ARPANET, managed by scientists and researchers in the 1970s, to its current status as a means for commercial and private interaction); Leiner et al., *supra* note 8 (providing a detailed description of the Internet's early theoretical and

The NSF contracted with a private company, Network Solutions, Inc. (NSI), to handle many complicated issues pertaining to domain name registration.[22]

The Internet grew rapidly as a commercial tool with worldwide broadcasting ability, so consequently the popularity of domain names increased, especially those corresponding to valuable trademarks.[23] Soon it became clear that NSI could not meet the demands presented by complex legal issues and an ever-increasing number of Internet users. Accordingly, in 1996, organizations such as the International Telecommunications Union, the International Trademark Association, and the World Intellectual Property Organization formed an internationally based Internet Ad Hoc Committee (IAHC) to examine the pressures facing the domain name system.[24] The IAHC proposed to the U.S. government that seven new top-level domains should be added to help relieve the pressures of increased use;[25] but the U.S. government failed to implement this proposal. At the same time, the European Union began to express concern over the U.S. government's control of this "critical element of global communication and commercial resources on which they foresaw their economies and societies becoming ever-more dependant."[26]

D. Internet Corporation for Assigned Names and Numbers

Ultimately, in 1998 the U.S. government responded to concerns about the state of the domain name system by issuing a "White Paper," which recognized that the Internet was "rapidly becoming an international medium for commerce, education and communication," and cited a "need for change."[27] In citing problems related to the Internet, the White Paper noted that the cumbersome mechanisms for resolving conflicts between trademark holders and domain name

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practical development). The Internet was first described in August of 1962, in "a series of memos written by J.C.R. Licklider" of the Massachusetts Institute of Technology. Leiner et al., *supra* note 8. The memos described a "globally interconnected set of computers through which everyone could quickly access data and programs from any site." *Id.*

22. Weinberg, *supra* note 6, at 198-99.

23. ICANNWatch, *supra* note 20.

24. *See generally* Generic Top Level Domain Memorandum of Understanding, *at* http://www.gTLD-MOU.org (last visited February 15, 2002).

25. Weinberg, *supra* note 6, at 201-2.

26. ICANNWatch, *supra* note 20.

27. *See* United States Department of Commerce, *Management of Internet Names and Addresses* (June 5, 1998) [hereinafter U.S. Department of Commerce], *available at* http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm.

holders and the rising commercial interest in the Internet created a need for a more "formal and robust management structure."[28] As a solution, the White Paper recommended responsible private-sector action, as opposed to government controls, in the form of a new private corporation with the authority to manage and perform a "specific set of functions related to [the] coordination of the domain name system . . . ."[29]

According to the White Paper, the U.S. government would not retain direct control of the proposed corporation.[30] In fact, the government "backed away from any concrete suggestions regarding the structure of the new corporation."[31] Instead, the Clinton Administration employed an "industry self-regulation" concept, which allowed the private sector to form the organization "based on a broad consensus among industry stakeholders."[32]

Responding to the White Paper's comments, the Internet community formed ICANN,[33] a "private, non-profit, consensus-

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28. *Id.*

29. *Id.* The White Paper recommended that the new corporation:

> 1) set policy for and direct allocation of IP number blocks to regional Internet number registries; 2) oversee operation of the authoritative Internet root server system; 3) oversee policy for determining the circumstances under which new TLDs are added to the root system; and 4) coordinate the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet.

Id.

30. *See id.* ("In light of the public comment and the changes to the proposal made as a result, as well as the continued rapid technological development of the Internet, the Department of Commerce has determined that it should issue a general statement of policy, rather than define or impose a substantive regulatory [scheme] for the domain name system.").

31. Weinberg, *supra* note 6, at 208.

32. ICANNWatch, *supra* note 20.

> In June 1998, the US Department of Commerce (DoC) and an interagency task force headed by Presidential Senior Adviser Ira Magaziner responded to concerns about the [domain name system] with the Statement of Policy on the Privatization of Internet Domain Name System, known as the [domain name] White Paper. Embracing the rhetoric of privatization, the . . . White Paper called for the creation of a private nonprofit corporation to take over the [domain name system] and institute various reforms. Shortly thereafter, an international group, after meeting in secret, incorporated ICANN as a private nonprofit California corporation. After some negotiation, DoC lent ICANN much of its authority over management of the [domain name system].

Id.

33. *See* ICANN, *About ICANN*, *at* http://www.icann.org/general/abouticann.htm (last visited Feb. 27, 2001) ("Formed in October 1998, the Internet Corporation for Assigned Names and Numbers (ICANN) is a non-profit, private-sector corporation . . . .").

based... [c]orporation charged with technical coordination of the Internet."[34] ICANN consists of a:

> broad coalition of the Internet's business, technical, academic, and user communities [and] has been recognized by the U.S. and other governments as the global consensus entity to coordinate the technical management of the Internet's domain name system, the allocation of IP address space, the assignment of protocol parameters, and the management of the root server system.[35]

Upon formation, ICANN took over the domain name system, with the important task of upgrading it to meet Internet user's needs.[36]

ICANN apparently continues to have control over the technical workings of the Internet for the foreseeable future.[37] However, it is arguable that despite promoting the existence of ICANN, the U.S. government still controls the domain name system, upon which the functions of the Internet are based.

The heart of the domain name system is a small "root file" of computer data stored in Herndon, Virginia.[38]

> This 'root' file or 'root zone' file is the authoritative list of top-level domain names. For each name it gives the Internet address of the computer that has the authoritative list of who has registered domain names in that top-level domain .... The data is authoritative because the right people use it—it is the file from which the thirteen computers known as the legacy root name servers get their data. And they, in turn, are authoritative because almost every computer on the Internet gets its data from one of those root servers, or from a cached downstream copy of their data.[39]

Currently, NSI has explicit control of the root files through a contract with the U.S. Department of Commerce (DoC).[40] With this contract, the government controls the root files that determine which top-level domain names are available to the general Internet community.

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34. ICANNWatch, *supra* note 20.

35. ICANN Fact Sheet, *at* http://www.icann.org/general/fact-sheet.htm (last visited Apr. 23, 2002).

36. *See* U.S. Department of Commerce, *supra* note 27; ICANNWatch, *supra* note 20.

37. *See* ICANNWatch, *supra* note 20.

38. Froomkin, *supra* note 13, at 43.

39. *Id.* at 43-44; David Conrad, *Root Nameserver Year 2000 Status* (July 15, 1999), *available at* http://www.ican.org/committees/dns-root/y2k-statement.htm.

40. Froomkin, *supra* note 13, at 44.

III. AN ILLUSTRATION OF THE PROBLEMS FACING THE INTERNET: CONTENT ON THE INTERNET

ICANN has a large amount of responsibility as the "technical manager" of the Internet. In addition to technical responsibilities, ICANN often responds to legal and political issues as well. One of the most hotly debated issues involves questions regarding how to govern Internet sites containing adult-oriented material, while still protecting the Constitutional rights of purveyors of such material.

Content-based issues are frequently debated because the Internet reaches a large number of young children. In fact, statistics show that "children are the fastest growing segment of the population using the Internet, and will soon represent the majority of Internet users."[41] One study found that in the year 2000, there were over 55 million private households and 99% of public schools in the U.S. with access to the Internet.[42] Internet use by children at home and at school in countries throughout Europe and Asia is also growing rapidly.[43] This increased use corresponds to an increased reliance on the Internet as an educational tool and a means for entertainment.[44] However, while in many respects the Internet can be invaluable, in some aspects it may deviate from community values and standards by allowing those children using the Internet to access whatever indecent material may be found online.[45]

A. Adult-Oriented Material on the Internet

The Internet is often utilized to display and transmit adult-oriented material, including that which is sexually explicit. Studies indicate that roughly 80% of content on the Internet is pornographic and that "over 1,000 computer 'bulletin board services'" contain pornography.[46]

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41. *See also* Marc S. Berger, *Keeping Pace with the Expanding Internet: Can the Courts Keep Up?*, 9, ALB. L.J. SCI. & TECH. 51, 71 (1998) (stating that "[i]n his speech at the Internet/Online Summit: Focus on Children, in Washington, D.C., Vice-President Gore stated that 'ten million children are already on the Internet, and that in only a short time, children will represent the largest segment of the population that is on-line"); Demner, *supra* note 5 (stating that the "Internet today is a part of kids' natural environment").

42. *See* Demner, *supra* note 5.

43. *Id.* (quoting studies finding that 78% of students in Sweden and 74% in Canada are able to go online at school and 80% of children in Sweden and 71% of children in Canada have access to the Internet at home).

44. *Id.* (stating that in addition to educational use at school, "[c]hildren also go online for learning activities that are not connected directly with school").

45. *See* Furlow, *supra* note 3, ¶ 1.

46. *See* Net Angel, *at* http://www.netangel.com/statistics.htm (last visited Jan. 24, 2002).

Because children can be easily influenced by mass media, most parents wish they had more control over the content of the things their children are exposed to, specifically, and "most notably," pornography.[47] Surveys indicate that "66% of parents feel that sexually explicit material is a growing problem, and 60% think that it is too easy to access sexually inappropriate content accidentally."[48]

In addition to pornography, many Internet sites contain violent images or speech,[49] such as those explaining how to obtain guns, make bombs, or execute a murder and many of these sites target the young.[50] For example, so-called "hate groups," such as the World Church of the Creator, have posted Internet sites filled with propaganda devoted specifically to attracting children and "the Internet ha[s] prove[n] a natural match for racist Skinheads trying to capture the minds of teens."[51] Another unsettling example of violent material is the increased use of the Internet by street gangs promoting membership to young children.[52]

However, because the Internet has become an important informational and educational resource, most parents are not likely to

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But see Timothy Zick, *Congress, the Internet, and the Intractable Pornography Problem: The Child Online Protection Act of 1998,* 32 CREIGHTON L. REV. 1147 (1999) (This survey estimated that in 1998, "nearly 70% of the traffic on the web consisted of adult-oriented material that was unsuitable for children.").

47. *See* Furlow, *supra* note 3, ¶ 2. *See also* Net Angel, *supra* note 46 ("Playboy's [Internet site], which offers free teaser shots of its Playmates, averages 5 million hits per day.").

48. *See* Furlow, *supra* note 3, at n. 9. In addition, a poll of parents showed that 85% were in favor of a recently approved United States Children's Internet Protection Act, which requires, *inter alia*, that "schools use filtering software to block access to inappropriate Web sites." John L. Micek, *Survey: Parents Fear Net Porn Access,* NewsFactor Network (Jan. 10, 2001), *available at* http://www.newsfactor.com/perl/story/?id=6600.

49. For a detailed listing of thousands of "hateful" sites on the Internet, see Raymond Franklin, *The Hate Directory, Hateful Sites on the Internet, at* http://www.bcpl.net/~rfrankli/hatedir.htm (last visited Jan. 25, 2002). *See also* Anti-Defamation League, *Poisoning on the Web: Hatred Online, at* http://www.adl.org/poisoning_web/introduction.html (last visited Mar. 16, 2001).

50. Anti-Defamation League, *supra* note 49.

51. *Id.* "Hate groups" with sites on the Internet include the Klu Klux Klan, neo-nazis, and African American anti-semites. *Id.*

52. *See* Carrie Kirby, *Street Gangs Parade Their Colors and Lifestyles on the Web,* NewsFactor Network *at* http://newsfactor.com/perl/story/?id+6538 (January 8, 2001). "'Its just another risk for kids—they make (gangs) look attractive,' said Thomas Kirkpatrick, president of the [Chicago Crime] commission. 'They have free e-mail, chat rooms. It's another recruiting avenue." *Id.* "Some Web sites include message boards where gangsters give one another props (respect) or dises (disrespect). There are even 'Web rings' or networks of linked sites, devoted to gangs." *Id.*

forbid their child from using the Internet at all.[53] In fact, most parents concede that although the Internet poses many dangers, forbidding a child from using the Internet will prevent that child from gaining valuable educational experiences.[54] Therefore, without a viable method for filtering the information available to their children, most parents are helpless in the battle of protecting their children from these negative influences.

IV. FAILURES TO SOLVE THE PROBLEM

Historically there have been several efforts to resolve content-related problems on the Internet. While many of the efforts were well intentioned, there have been only minimal successes.

A. Failed Private Initiatives

There have been many private technology-driven initiatives to restrict children's access to material on the Internet. For instance, parents can purchase and install software technologies on their personal computers to filter Internet sites containing adult-oriented material.[55] However, these technologies have quickly become outdated[56] and are either over-inclusive or under-inclusive before they are even installed.[57] Hardware filtering technologies are also available, but are subject to the same failings as software technologies.[58] Although they are useful in limited situations, hardware technologies lack versatility because of

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53. Furlow, *supra* note 3, ¶ 2.

54. *Id.* at n.10 (citing a survey by the Annenberg Public Policy Center which indicated that "while 78% of parents feared that their children might view sexually explicit material, 59% of parents confessed that, in their respective opinions, children without Internet access are at a disadvantage compared to their peers who have access. Moreover, 75% of parents felt that the Internet was a place where children could gain exposure to new things, and 72% felt Internet access helps children with their schoolwork").

55. *Id.* ¶7-9. Software programs can serve as broad filters that block out entire protocols, heuristic filters which search for and block out web sites containing "meta-data" associated with questionable content, or centralized programs that standardize a rating system for web sites and allow for self-labeling and third-party-labeling to filter inappropriate material. *Id.* Many software technologies are available online and provide users with the ability, for a fee, to download filtering software that will help screen individual Internet web sites based upon their content. *See, e.g.*, Net Nanny, *at* http://www.netnanny.com/home/net-nanny-4/product-description.asp (last visited Jan. 24, 2002) (claiming to screen out Internet sites that contain sexually explicit, hateful, violent, or drug related content); Get Net Wise, *at* http://www.getnetwise.org/tools (last visited Jan. 24, 2001).

56. Furlow, *supra* note 3, ¶7-9.

57. *Id.* ¶7.

58. *Id.* ¶7-9.

their relative permanence and because they usually require a technician for installation or removal.[59] In the end, "[e]ven if parents utilize screening technology, they cannot thereafter rest assured that the technology will protect their children."[60]

As an alternative solution, many Internet providers are providing voluntary search engines, such as "Ask Jeeves for Kids"[61] and "KidsClick."[62] Major search engines such as "Go.com" also provide free Internet filters, which act as parental controls. Despite their efforts, these technologies still encounter definitional problems and, as a result, do not provide parents and schools with a sufficient amount of control over the type of material viewed by their children.

B. Failed Congressional Initiatives

1. The Communications Decency Act

The federal government has also been unsuccessful in its legislative attempts to manage content on the Internet. For example, Congress enacted the Communications Decency Act (CDA) as part of the Telecommunications Act of 1996.[63] Section 223 of the CDA prohibited the knowing transmission of any "communication which is obscene or indecent, knowing that the recipient of the communication[s] is under [eighteen] years of age . . . ."[64]

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59. *Id.*

60. Robert W. Peters, *There is a Need to Regulate Indecency on the Internet,* 6 CORNELL J. L. & PUB. POL'Y 363, 367 (Winter 1997) (stating that "[p]rograms which identify specific sites as unsuitable have difficulty keeping up with the exploding number of new and changing sites").

61. *See generally* http://www.ajkids.com (last visited Jan. 24, 2002).

62. *See generally* http://sunsite.berkeley.edu/KidsClick! (last visited Jan. 24, 2002).

63. 47 USCA § 223 (Supp. II 1996) (repealed 1997).

64. *See id.* The relevant provision of the statute provided that

> whoever-(1) in interstate or foreign communications knowingly-(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18 [United States Code], or imprisoned not more than two years, or both.

Id. at § 223(d).

The general intent of the CDA, to protect children from dangerous material, was meritorious. However, in 1997 the Supreme Court in *American Civil Liberties Union v. Reno* ruled that provisions of the CDA were unconstitutionally broad and vague.[65] In striking down the CDA, the Court criticized many aspects of the statute and specifically noted that it failed to define broad terms, such as "indecent" and "patently offensive."[66] The Court noted that the Act limited communications that adults were constitutionally entitled to under the First Amendment and that the Act's potentially broad exclusion of material unconstitutionally threatened Internet users.[67]

2. The Children's Online Protection Act

In October 1998, Congress again attempted to regulate Internet speech. First, Congress held two hearings to address problems related to the ease with which children could access pornography on the Internet.[68] Subsequently, Congress enacted the Children's Online Protection Act (COPA) as part of the Omnibus Appropriations Act for the Fiscal Year 1999.[69] COPA was specifically drafted to address the Court's concerns in *Reno,*[70] and only extends to certain types of speech made on the World Wide Web, but not to other aspects of the Internet, such as email or newsgroups.[71] COPA differs from the CDA in that it only attempts to prohibit speech that is "harmful to minors."[72] This limitation is much narrower than the CDA, which attempted to prohibit all "indecent" and "patently offensive" material.[73]

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65. *See* Reno v. ACLU, 521 U.S. 844 (1997). *See also*, Jennifer Zwick, *Casting a Net Over the Net: Attempts to Protect Children in Cyberspace*, 10 SETON HALL CONST. L.J. 1133, 1141 (Summer 2000) (quoting one academic as saying: "if we had sat down and purposely set out to write a statute that completely violated the First Amendment and [would] undoubtedly be struck down by the Supreme Court, we could not ourselves have come up with better language to accomplish that purpose").

66. *Reno*, 521 U.S. at 845, 862.

67. *Id.* at 875.

68. *See* Zick, *supra* note 46, at 1173.

69. 47 U.S.C.A. § 231 (West 1999) (providing that "[w]hoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both").

70. *See* Zick, *supra* note 46, at 1151.

71. 47 U.S.C.A. § 231; *see also* Zick, *supra* note 46, at 1174 (explaining that the World Wide Web only consists of a portion of the Internet).

72. *See* Zick, *supra* note 46, at 1174.

73. *See id.*, at 1177. In addition, unlike CDA, COPA does not prohibit parents from purchasing material deemed "harmful to minors" for their own children who are under 17

The general intention of COPA is to prevent Internet sites from asking children for personal information.[74] Under COPA, owners of soliciting Internet sites must obtain parental consent before collecting any personal information from children under thirteen-years-old by means of phone, fax, or mail.[75] Basically, it requires Internet solicitors to presume that every user is a pre-teen until they can establish otherwise.[76]

As a result of First Amendment challenges from several parties, including the American Civil Liberties Union (ACLU),[77] a federal appeals court unanimously voted to grant a preliminary injunction enjoining the application of COPA[78] on the basis that it unconstitutionally required web browsers to abide by the strictest of community standards.[79] This decision was appealed and was recently argued before the Supreme Court and a decision is expected in May of 2002.[80]

Even if enforcement of COPA is not ultimately enjoined for constitutional reasons, it will not be effective in accomplishing its goal of protecting children from "harmful" material on the Internet. Most current pornographers will not be affected by COPA because they already employ a credit card verification scheme to secure payment

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years old. *Id.* at 1178.

74. 47 U.S.C.A. § 231. Material that is deemed "harmful to minors" is defined as:

> [A]ny communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that-(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. at §231(e)(6).

75. Cyberspace Lawyer, *In the News*, 5 Cyber.Law 29 (April 2000).

76. *Id.*

77. *See* ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000) (affirming "judgment enjoining enforcement of COPA . . . because publisher could not restrict access based on geographic locale, was impermissible burden on constitutionally protected speech"); *see also* Zwick, *supra* note 65, at 1143 ("While granting a preliminary injunction, the court stated that "no one, the government included, has an interest in the enforcement of an unconstitutional law.").

78. *ACLU*, 217 F.3d at 166; *see also* ACLU News, *ACLU v. Reno II Victory! Appeals Court Rejects Congress' Second Attempt at Cyber-Censorship* (June 22, 2000), *available at* http://www.aclu.org/news/2000/n062200b.html.

79. *ACLU*, 217 F.3d at 166.

80. *See* Ashcroft v. ACLU, 533 U.S. 973 (2001).

from subscribers.[81] In addition, "many minors have access to credit cards, and there is no evidence that an artful minor could not pose as an adult in order to gain access to 'harmful' material."[82]

Although COPA may succeed in causing smaller pornographers and solicitors of obscene material to go out of business, the Act is not properly directed for its intended purpose—the protection of children from harmful material. Congress failed to notice that not all potentially harmful material on the Internet is posted for a commercial purpose. COPA does not limit children's access to the many other freely accessible sites that include potentially harmful, obscene images and text. Instead, it only addresses commercial entities that profit from displaying pornography on the Internet. Although COPA may succeed in limiting the number of small peddlers of harmful material who are unable to afford the installation costs of credit card payment and collection systems, it will not prevent children from accessing such material.

C. Failed ICANN Initiatives

In light of Congressional and private initiatives and failures, many in the Internet community look to ICANN for a solution. Nevertheless, ICANN has also failed to solve content-based problems facing the Internet. Most notably, ICANN recently failed to seize the opportunity to implement top-level domain names that denote Internet sites containing adult-oriented material.

In 2000, ICANN selected seven new public top-level domains to join, among others, the already well known .com, .org, and .net.[83] These new

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81. *See* Furlow, *supra* note 3, ¶ 16; Zick, *supra* note 46, at 1191.

82. Zick, *supra* note 46, at 1191. As part of the COPA legislation, Congress created the Commission on Online Child Protection to conduct studies to help reduce access by minors to material that is harmful. Matthew Baughman, *Recent Legislation: Regulating the Internet,* 36 HARV. J. ON LEGIS. 230, 232 (Winter 1999). The COPA Commission failed to heed calls for mandatory filtering laws and instead submitted to Congress a report recommending "voluntary approaches that can be taken to protect children from harmful material on the Internet." 17 E-Commerce, *Net Filtering Bill Imminent, Despite Commission Report,* 6, 8 (November 2000). Although the COPA commission performed a detailed study of the costs and benefits associated with protective methods and technologies, the commission "pointedly limited its recommendations to voluntary measures." *Id.* These voluntary measures are not sufficient to eliminate the threats posed to children by some material on the Internet because there is no incentive for promoters of violent and sexually explicit material to act, and no ramification for failure to act.

83. *See* E-Commerce, *supra* note 82, at 8. "[T]he winning proposals were: .biz, .info, .name, .pro, .museum, .aero, and .coop. Among the losers: .law, .kids and .web." *Id.* Internet sites such as 'http://www.copacommission.org' and 'http://www.g-TLD-mou.org' define many

top-level domain names will purportedly signify the content contained on the Internet site. For example, if a site has the top-level domain ".aero," the user will know that the site contains information related to the aerospace industry. This initiative raised the hopes of many in the Internet community that ICANN would promulgate a top-level domain name signifying adult-oriented material. The advantage to having such a domain is that the individual user could readily identify sites containing adult-oriented material. The capability to identify these sites at a high level would provide parents the ability to easily filter those sites. For example, parents could purchase simple software or hardware filters designed to block all Internet sites containing specific top-level domain names containing adult-oriented sites. This type of filter would be easy to develop because it would simply block out an entire domain name and would not become outdated or be susceptible to over- or under-inclusiveness.

Despite proposals to select one or more top-level domains that indicate adult-oriented Internet sites, ICANN limited its focus to commercial interests when making its selections.[84] Lobbyists for mandatory top-level domains such as ".xxx" were disappointed. "'The main concern . . . [was] that there is a clear bias and unwillingness by ICANN to address the most significant concern on the Internet today, which . . . is the safeguarding of children against harmful content.'"[85]

ICANN also failed to implement the proposed top-level domain name ".kids" which could have designated Internet sites containing material suitable for children under a certain age.[86] According to one news report, ICANN staff members voted against a ".kids" domain name because of "the international reach of the Internet [and] the complexity of . . . definitional issues . . . ."[87] Definitional issues include

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relevant parties and considerations involved in the top-level domain name selection process. *See also* CNET News.com Staff, *ICANN to Finalize New Top-Level Domains, at* http://news.cnet.com/news/0-1005-200-5122051.html (March 13, 2001).

84. *See* Thomas A. Lipinski, *The Developing Legal Infrastructure and the Globalization of Information: Constructing a Framework for Critical Choices in the New Millennium Internet—Character, Content and Confusion*, 6 RICH. J.L. & TECH 19 (Winter 1999/2000).

85. Clint Boulton, *ICANN Cool on .kids and .xxx*, InternetNews–Web, *at* http://www.internetnews.com/de-news/article/0,10_508531,00.html (last visited January 24, 2002) (quoting Jason Hendeles, president and chairman of ICM Registry).

86. *See* E-Commerce, *supra* note 82, at 8.

87. Patricia Jacobus, *ICANN Staff Opposes ".kids,"".xxx" Domains*, CNET News.com, *at* http://news.com/2100-1023-248455.html (Nov. 10, 2000).

questions such as who would "decide what material is safe and how registrars could be certain that visitors were actually children."[88]

ICANN also pronounced that there were no plans to introduce additional top-level domains beyond the seven commercially-oriented domains selected,[89] causing further questions as to whether ICANN is capable of solving the content-based problems facing the Internet. Although domain names delineating adult-oriented content were considered, no specific reason was given for why the names were rejected.[90] Presumably, arguments supporting First Amendment rights were a factor in the selection process.

In 2001, in response to concerns voiced by the Internet community, the Senate and the House of Representatives met to discuss the legitimacy of ICANN and its procedures.[91] Witnesses, including the chairman of ICANN, testified before congressional bodies, such as the House Energy and Commerce Subcommittee on Telecommunications and the Internet,[92] who harshly criticized ICANN's process of selecting new suffixes.[93] Despite raising issues relating to the content of material on the Internet, the congressional meeting did not produce any viable solutions.

V. IS ICANN TO BLAME? THE NEED FOR A LEGAL STANDARD

ICANN has recently been criticized for its unwillingness to create solutions to content-based problems on the Internet. In fact, "ICANN has come under fire from a wide variety of individuals and organizations

88. *Id.*

89. Stuart Lynn, Interview, *ICANN's Lynn: No New Domains Anytime Soon*, CNN.com, *at* http://www.cnn.com/2001/TECH/internet/11/20/interview.lynn.idg/index.html (last visited Jan. 24, 2002).

90. CNET News.com Staff, *ICANN to Finalize New Top-Level Domains*, *at* http://news.cnet.com/news/0-1005-200-5122051.html (Mar. 13, 2001). *But cf.* Aaron Pressman, *ICANN Says Nu-Uh to Dot-kids*, The Industry Standard (Nov. 10, 2000) ("Because of the inadequacies in the proposed technical and business measures to actually promote kid-friendly content, the evaluation team does not recommend selecting a dot-kids domain in the current phase of the TLD program, . . . [i]n addition, because of the controversy surrounding, and poor definition of the hoped-for benefits of dot-xxx, we also recommend against its selection at this time."), *available at* www.thestandard.com/article/0,1902,20129,00.html.

91. Kathleen E. Fuller, *ICANN: The Debate Over Governing the Internet*, 2001 DUKE L. & TECH. REV. 0002 (Feb. 14, 2001), *available at* http://www.law.duke.edu/journals/dltr/ARTICLES/2001dltr0002.html.

92. Keith Dawson, *Congress Tweaks ICANN* The Industry Standard (Feb. 9, 2001), *available at* www.thestandard.com/article/0,1902,22085,00.html.

93. *Id.* (Charles Pickering, a representative from Mississippi was quoted as saying "[i]f you don't take steps to rearm quickly . . . the promise and future of ICANN is at risk.").

around the world for its handling of the political and economic aspects of administering the domain system."[94] But how much control does ICANN actually have over the Internet? Does ICANN have the legal authority to create solutions to tough problems?

> In the case of ICANN, there is no statute. Congress at no time determined that the [domain name system] should be privatized, or indeed, legislated anything about national [domain name system] policy. Instead, DoC itself chose to delegate the [domain name system] functions to ICANN, relying on its general authority to enter into contracts .... [I]t is unusual for a nonprofit corporation to be created for the express purpose of taking over a government regulatory function.[95]

A. Does the U.S. Government Actually Control the Domain Name System?

1. ICANN and its Contracts with DoC

If the government controls the authoritative list of top-level domains, did it really relinquish control to ICANN? Although the government may not "own" the Internet, it arguably "owns" the root files from which the domain name system operates. Therefore, decisions regarding the domain name system could, and maybe should, be made at the governmental level.

In addition to owning the root system, the government arguably controls the activities of ICANN. As detailed in Part I of this Comment, the Internet and its domain name system were originally controlled by a combination of volunteers, such as NSI and U.S. government civilian and military contractors.[96] The exponential growth of the Internet prompted the government to "relinquish" their control of the Internet by calling for the formation of ICANN. However, ICANN still operates under contract with the U.S. government, and the U.S. government oversees a great deal of ICANN's policy-based decisions relating to the domain name system.[97]

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94. Todd R. Weiss, *ICANN will Address Alternate Top-Level Domains,* The Industry Standard (May 31, 2001) (quoting David Hernand, CEO of Internet-based company New.Net), *available at* www.thestandard.com/article/0,1902,26811,00.html.

95. Froomkin, *supra* note 13, at 24.

96. *Id.* at 21-22.

97. Letter from Andrew J. Pincus to The Honorable Tom Blilcy, Chairman, Committee on Commerce, United States House of Representatives (July 8, 1999) [hereinafter Letter from Andrew J. Pincus], *available at* http://www.ntia.doc.gov/ntiahome/domainname/blileyrsp.htm.

> [Since] ICANN is utterly dependent on DoC for ICANN's continuing authority, funding, and, indeed, its reason for being, it would be reasonable to conclude that the corporation is currently so captive that all of ICANN's decisions can be fairly charged to the government. If so, the [domain name system] has not, in fact, been privatized at all, even temporarily.[98]

The most obvious operational aspect denoting the government's continuing control is that ICANN does not have the authority to create new top-level domain names without approval from the DoC.[99] "NSI, which continues to physically operate the root, remains obliged to secure written approval from the DoC before adding any top-level domains to the root."[100] A second aspect is that if ICANN fails to achieve the technical and often policy-based goals set forth by various governmental contracts, the DoC can choose another entity to replace it.[101] Third, ICANN and the DoC's relationship has been likened to a master-servant relationship as opposed to a relationship at "arms length."[102] The DoC continues to review the procedures and operations of ICANN and "retains considerable authority to review and countermand ICANN's decisions."[103] Therefore, since ICANN's activities are closely monitored by the U.S. Government, arguably the government should also be held accountable for the Internet's content-based problems.

2. Can ICANN Fill a Policy-Making Role?

In addition to questions about continuing governmental control over the Internet, critics dispute whether ICANN has the legal authority to fulfill its proscribed policy-making role. Even though the White Paper purports to only give ICANN technical control over the Internet, ICANN is also required to make important policy-based decisions.[104] Critics argue that ICAAN is ill-equipped to make such decisions

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98. Froomkin, *supra* note 13, at 27.

99. *Id.* at 107.

100. *Id.* at 107-108.

101. *Id.* at 108.

102. *Id.* at 109 ("Indeed, from the first, DoC planned to be heavily involved with ICANN on a continuing basis.").

103. *Id.* at 111.

104. *See generally* Weinberg, *supra* note 6; Froomkin, *supra* note 13; Milton Meuller, *ICAAN and Internet Governance: Sorting Through the Debris of Self Regulation* (Dec. 1999), *available at* http://www.icannwatch.org/archive/muell.pdf; Fuller, *supra* note 91.

because it does not have proper legal authority.[105] Therefore, in many cases, the government is arguably needed to step in and make the tough decisions for ICANN.

Because of the nature of its position, ICANN's policy-making role is often unavoidable. In fact, even ICANN's bylaws demonstrate that it's mission is both technical and policy related.[106] The bylaws were based upon the duties spelled out in the White Paper, wherein the DoC identified four specific, blatantly policy-based, responsibilities:

> 1. To set *policy* for and direct the allocation of Internet protocol (IP number blocks);
>
> 2. To develop overall *policy* guidance and control of top-level domains . . .
>
> 3. To develop *policies* for the addition, allocation, and management of [generic top-level domains] and the establishment of domain name registries and domain name registrars and the terms, including licensing terms, applicable to new and existing [generic top-level domains] and registries under which registries, registrars, and [generic top-level domains] are permitted to operate;
>
> 4. To coordinate maintenance and dissemination of protocol parameters for Internet addressing.[107]

In response to critics skepticism as to whether its decisions truly represent the will of the Internet community, ICANN has claimed to make policy decisions using "consensus-based" standards.[108] However, research demonstrates that ICANN has failed to follow consensus-based procedures in many instances.[109]

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105. *See* Weinberg, *supra* note 6, at 213 ("The legitimacy issue was important because the Department of Commerce's recognition as such gave ICANN little in the way of actual legal authority. The U.S. Government, after all, has never managed the DNS through command-and-control regulation, and it had no command-and-control authority to delegate. ICANN was in a position to control other DNS actors only by entering into contracts in which those actors agreed to be bound.").

106. ICANN, *ICANN Bylaws (As Revised) at* http://www.icann.org/bylaws09apr99.html#X.(May 1999).

107. Letter from Andrew J. Pincus, *supra* note 97 (emphasis added); U.S. Department of Commerce, *supra* note 27.

108. *See* ICANN, Background *at* http://www.icann.org/general/background.htm#1 (July 1999) (stating that "ICANN is a non-profit corporation structured to make decisions on the basis of Internet community consensus").

109. *See* Meuller, *supra* note 104, at 518 (declaring that "[w]e can say without qualification that ICANN has failed to provide a vehicle for developing 'stakeholder consensus.' ICANN's creation has not resolved the DNS wars; it has simply fostered a political competition that allowed one faction to win at the expense of others . . . . Virtually

It has also been argued that policy decisions, such as who can become a domain name registrar, how competing domain name registrations should be resolved, and how to allocate the resources of the domain name system, are not suited to a consensus-based governance.[110] Many of these disputes involve claims to legal rights and therefore must be resolved based upon legal standards. The consensus-based ICANN is ill-equipped to resolve these disputes that involve tough questions for which "ultimately, someone must make the hard choices."[111]

Important decisions, such as opting not to add ".xxx" to the current domain name system, affect the legal rights of the entire Internet community, which is rapidly growing in number. Therefore, these decisions need to be fully explained and supported by statutory authority. These decisions, have proven to be too difficult for ICANN, in its current form, to make because it does not have a legal standard by which to operate. Even though many in the Internet community called for content-specific domain names, such as ".xxx" and ".kids", ICANN feared the consequences of making those decisions without a legal standard, and as a result failed to achieve its goal of fostering the growth of the Internet. However, in light of these failures, ICANN should not be held accountable. Rather, Congress needs to prompt and support future ICANN activity by creating legislative standards by which ICANN can base its policy measures.

VI. A SOLUTION TO THE ILLUSTRATIVE PROBLEM: ZONING THE INTERNET BY TOP-LEVEL DOMAIN NAME

If one accepts the argument that ICANN cannot solve content-based problems on the Internet without further legal foundation, the question then becomes: How can Congress succeed in passing legislation when it has already failed? As detailed earlier in Part III, congressional attempts to enact and enforce the CDA failed for constitutional reasons. However, a closer look at Justice O'Connor's dissenting opinion in *ACLU v. Reno*,[112] the case in which the Supreme Court struck down the CDA, provides a possible legislative solution.

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every major academic who follows ICANN is positioned on the critical side of the spectrum; opposition to ICANN has united Naderites and libertarians").

110. Fuller, *supra* note 91, ¶ 20.

111. *Id.*

112. 521 U.S. 844, 886-97 (1997). For an analysis of zoning laws and their application to the Internet, see generally Furlow, *supra* note 3.

A. Zoning Law and the Ginsberg Analogy

Justice O'Connor begins her dissent by analogizing the CDA to a governmental attempt to regulate speech by "zoning" the Internet.[113] Throughout history, the Supreme Court has upheld the constitutionality of zoning laws when they were "reasonable" and bore a relationship to community health, safety, morality, or general welfare.[114] The Supreme Court held in early zoning cases that the government could afford different treatment to certain establishments, not because of the content of the speech at those establishments, but rather because the government has a valid interest in (1) preventing the secondary effects such speech would have on the surrounding property, such as increasing crime or reducing property value, and (2) in generally protecting and preserving the quality of the surrounding neighborhoods.[115] Justice

113. In 1926, the Supreme Court discussed zoning laws and the constitutionality of such laws in the landmark case, *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926). In this case, the community of Euclid was divided into three kinds of use districts, including residential, commercial, and industrial or unrestricted. *Id.* "[T]he Village's twelve square miles were divided into six distinct use districts, ranging from single-family residential (the highest use) to sewage and garbage disposal facilities, penal and correctional facilities, homes for the mentally feeble, and so on—uses no 'right thinking' person would want to reside within a stone's throw of." Melvyn R. Durchslag, *Village of Euclid v. Amber Realty Co., Seventy-Five Years Later: This is Not Your Father's Zoning Ordinance*, 51 CASE W. RES. L. REV. 645, 646 (2001). "The Euclid zoning ordinance was saved because it was premised upon, and in its application operated very close to, the baseline of common-law nuisance." *Id.* at 645-46.

114. *See generally Village of Euclid*, 272 U.S. 365. *City of Renton v. Playtime Theaters Inc.*, is often referred to as a landmark case dealing with zoning laws. 475 U.S. 41 (1986). In this case, owners of several adult theaters challenged the constitutionality of a zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. *Id.* In its opinion, the Supreme Court stated that "regulations enacted for the purpose of restraining speech based on the basis of its content presumptively violates the First Amendment." *Id.* at 46-47 (citing Carey v. Brown, 447 U.S. 455, 462-63, & n. 7 (1980); Public Dept. of Chicago v. Mosely, 408 U.S. 92, 95, 98-99 (1972)). However the Court upheld this particular ordinance, reasoning that it was valid as a content neutral time, place, and manner regulation and held that the ordinance was "'. . . *justified* without reference to the content of regulated speech.'" *Id.* at 48 (quoting the Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (emphasis added)). *See also* Furlow, *supra* note 3, ¶18. "The [C]ourt noted that such a 'content-neutral' regulation was acceptable so long as it was designed to serve a substantial governmental interest and did not unreasonably limit alternative avenues of communication." *Id.*

115. *Village of Euclid*, 272 U.S. at 47. The zoning ordinance was not aimed at the "content" of the movies, but rather at preventing the "secondary effects of [the] theaters on the surrounding community." *Playtime Theaters Inc.*, 475 U.S. at 47. These "secondary effects" included effects that tended to denigrate the character of the local neighborhoods. *Id.* at 41. In its opinion the Court relied heavily on its decision in Young v. American Mini Theaters, Inc., 427 U.S. 50, 62-63 (1976). In this case, the Court held that a city of Detroit's

O'Connor also recognized that throughout history, state zoning laws have denied minors access to establishments that are frequented by adults or that may be "harmful."[116]

In stating that there is potential for an Internet "zoning law," Justice O'Connor referenced the Supreme Court case *Ginsberg v. New York*[117] and concludes that if a potential zoning law for the Internet did "not unduly restrict adults' access to constitutionally protected speech, . . . it may be valid."[118] In *Ginsberg*, the Supreme Court found that an ordinance outlawing the sale of pornographic materials to minors was constitutional.[119] The Court based its decision on a finding that a "substantial interest" in keeping children "safeguarded from abuses, which might prevent their growth into free and independent well-developed . . . citizens" exists within the police powers of the state.[120] The Court stated that the law could require pornographic material to be *separated* from other material and sold only to qualified customers, for example, customers meeting a certain age requirement.[121] The Court reasoned that its decision did not allow an elimination of free speech,

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zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other 'regulated uses' or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments. *Id. at 52*; *see also*, Furlow, *supra* note 3, ¶18.

116. Reno v. ACLU, 521 U.S. 844, 887-97 (1997); The Court cited many state statutes in support of this assertion. *See id. See, e.g.*, ALASKA STAT. § 11.66.300 (Michie 1996) (no minors in "adult entertainment" places); ARIZ. REV. STAT. ANN. § 13-3556 (1989) (no minors in places where people expose themselves); COLO. REV. STAT. § 18-7-502(2) (1986) (no minors in places displaying movies or shows that are "harmful to children"); HAW. REV. STAT. § 712-1215(1)(b) (1994) (no minors in movie houses or shows that are "pornographic for minors"); LA. REV. STAT. ANN. § 14:91.11(B) (West 1986) (no minors in places displaying movies that depict sex acts and appeal to minor's prurient interests); MINN. STAT. § 617.294 (1987 and Supp. 1997) (no minors in places displaying movies or shows that are "harmful to minors"); NEB. REV. STAT. § 28-809 (1995) (same).

117. 390 U.S. 629.

118. 521 U.S. at 889.

119. *Ginsburg*, 390 U.S. at 636.

120. *Id.* at 640 (quoting Prince v. Massachusetts, 321 U.S. 158, 165 (1943)); *See also* Furlow, *supra* note 3, ¶32.

121. *Ginsburg*, 390 U.S. 629. *Cf.* R.A. v. City of St. Paul, Minn., 505 U.S. 377, 425 (1992) ("A selective proscription of unprotected expression designed to protect 'certain persons or groups' (for example, a law proscribing threats directed at the elderly) would be constitutional if it were based on a legitimate determination that the harm created by the regulated expression differs from that created by the unregulated expression (that is, if the elderly are more severely injured by threats than are the non-elderly). Such selective protection is no different from a law prohibiting minors (and only minors) from obtaining obscene publications."); Osborne v. Ohio, 495 U.S. 103 (1990).

but rather merely protected innocent children who could be injured by it.[122]

> [C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. Indeed, [the law] expressly recognizes the parental role in assessing sex-related material harmful to minors according 'to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.'[123]

While Justice O'Connor argues that content-based problems on the Internet appear to be analogous to the issues the Court discussed in *Ginsberg*,[124] she also states that ultimately the Internet is different from "real world" property zoning because on the Internet, users can transmit and receive messages without revealing anything about their ages or identities, and not all those who post content require such information before allowing access to adult-oriented material.[125] Justice O'Connor concluded that requiring individual Internet providers to employ a method of Internet zoning would be difficult.[126] Because existing technology cannot "zone" material at a high level and properly segregate material that is "patently offensive" or "indecent," the Internet remains "unzonable."[127] However the "prospects for the eventual zoning of the Internet appear promising."[128]

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122. *Ginsburg*, 390 U.S. 629.

123. *Id.* at 639 (quoting *Prince*, 321 U.S. at 166).

124. Reno v. ACLU, 521 U.S. 844, 889 (1997).

125. *Id.*

126. *Id.* at 891.

127. *Id.* ("Although gateway technology has been available on the World Wide Web for some time now, it is not available to *all* Web speakers, and is just now becoming technologically feasible for chat rooms and USENET newsgroups. Gateway technology is not ubiquitous in cyberspace, and because without it 'there is no means of age verification,' cyberspace still remains largely unzoned—and unzoneable.").

128. *Id.*

B. The "High Level" Solution: Cyberzoning by Top-Level Domain Name

Justice O'Connor's thoughtful dissent failed to consider an available, viable method for zoning the Internet at a high level.[129] As discussed earlier, if ICANN were to label adult-oriented material with specific top-level domain names, Internet users would be provided with an easy and efficient method to identify and filter such sites. Once ICANN created these content specific Internet "zones," specific software or hardware filters could be designed to allow parents the personal freedom to limit their Internet browser's ability to access such sites. Specific browsers that filter Internet sites by top-level domain name could be sold over-the-counter or as an option on factory-built computers.

Although ICANN has already failed to implement this type of Internet "zone," Justice O'Connor's dissent states that legislation requiring ICANN to act is possible. By requiring ICANN to implement content-specific top-level domain names, as contemplated in *Ginsberg*, free speech is not abridged. Rather, adults who have a legitimate right to view obscene or violent material can still access the sites. However, by labeling adult-oriented Internet material with a specific top-level domain name, the government would allow parents a viable method to safeguard their impressionable children from viewing material that they seek to filter. According to the Court's reasoning in *Ginsberg*, the government has a constitutional right to exercise its police powers in this manner.[130]

Although a content-specific top-level domain name was proposed to ICANN, a legal justification for such an Internet "zone" was not. ICANN likely failed to implement such a domain name because of inherent "definitional" problems. ICANN likely feared that individual users would claim that their First Amendment right to free speech was being violated. However, ICANN's inherent flaw is that it is not a legislative body and it is ill-equipped to execute the needed legal analysis. The government, not ICANN, is the appropriate body to regulate the content of material on the Internet.

It is important to note that previous congressional efforts such as the CDA have been deemed unconstitutional despite arguments based on the *Ginsberg* rationale. However, unlike these previous legislative

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129. For a discussion of the application of zoning laws to the Internet, see Furlow, *supra* note 3.

130. 521 U.S. 844, 881.

efforts, the challenged legislation in *Ginsberg* did not completely forbid parents from purchasing materials for their children.[131] In order to support ICANN in its policy-making role, Congress must be called upon to draft constitutionally sound legislation that allows for parental consent.[132] Ultimately, a solution to constitutional challenges to regulation of speech on the Internet is a zoning law, because it simply promotes individual parents' ability to decide which Internet sites their children can or cannot view.

VII. CONCLUSION

During the past few years, the U.S. government has purported to place control over the technical workings of the Internet with ICANN. However, in addition to technical authority, ICANN has also been called upon to make tough policy-based decisions, without the legal or statutory authority required for such decisions. Criticisms of ICANN have arisen because it has since failed to deal with a myriad of problems facing the Internet and the Internet community. This is illustrated by ICANN's many failures to solve just one of these problems—the dangers posed by the content of Internet applications to which many young impressionable children have access. ICANN has not regulated the content of many adult-oriented applications, and, as a result, children have access to harmful images and expressions that could negatively influence their psychological and moral development.

To help promote solutions to the Internet's problems, Congress must support future ICANN measures by providing legislative standards by which ICANN can operate—standards by which it can base its solutions. With regards to the illustrative example of content on the Internet, instead of attempting to limit the individual's access to material, Congress should simply require ICANN to better label the material. This would provide an opportunity to privately screen for material that they deem inappropriate for their children.

Based upon the Supreme Court's decision in *Reno*,[133] zoning laws may potentially apply to the Internet and could provide a legal basis for which ICANN can create content-specific top-level domain names. By corralling adult-oriented sites into specific top-level domain names, the power to choose and view those sites is placed more firmly into the

131. *Id.*

132. *Id.*; *See also* Marc S. Berger, *Keeping Pace with the Expanding Internet*, 9 ALB. L. J. SCI. & TECH. 51, 64 (1998).

133. 521 U.S. at 886.

hands of the Internet users. Parents will have more control over the material viewed by their children and the Internet will be further legitimized as an educational and entertainment resource.

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