

Porn on the Internet, here and abroad

By Patrick A. Trueman

Compuserve, one of the nation's top Internet access providers, temporarily blocked more than 200 sexually explicit sites recently because a German prosecutor thought the provision of such material by the company to German citizens violated that country's law. Compuserve may have reason to fear German law but seems safe in providing pornography to American citizens, even children. That is because Congress is contemplating passage of a telecommunications bill which will protect Compuserve and all Internet access providers from criminal liability for the provision of similar material to anyone, including children.

Yes, the bill in question contains specific protective language for those access providers who make millions distributing pornography, even hard-core pornography, to children and others. Sen. James Exon, Democrat Nebraska, and Rep. Rick White, Washington Republican, are responsible for this political favor. They are the principle authors of the Communications Decency Act, which they have characterized as a measure to control computer pornography.

Computer pornography should be eradicated, not controlled. Senator Exon originally proposed a bill that was a simple, straightforward prohibition. His top staffer on the bill frankly admitted to me that he caved in to demands of access providers under heavy lobbying pressure by them and thousands of Internet users. The interests of Rep. White are patently obvious. In his Washington state district is the headquarters of major Internet

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access provider, Microsoft.

Last year when the telecommunications bill was in committee, the American Family Association fought hard against special protections for access providers. So too did such notables with a high profile in the fight against pornography as former Attorney General Edwin Meese III and Rep. Henry Hyde, chairman of the U.S. House Judiciary Committee.

Why is Congress so willing to protect those who distribute and profit from computer pornography? Because one major pro-family group and a few smaller ones urged it to. Access providers and the so-called "free speech" lobby fought for the protections, but they couldn't have gotten such major concessions from the family-friendly 104th Congress without the cover certain pro-family groups gave them.

Pro-family champion Mr. Hyde offered a much tougher, no-exceptions computer pornography provision in committee as an alternative to Exon-White. He was defeated, however, by Mr. White—who liberally touted the support of the few pro-family groups who supported the position of the access providers.

Soon Congress will vote on the final version of the telecommunications bill, which contains this soft-on-pornography language. The effect on the Internet is predictable—computer pornography will continue to flow freely.

Under the Hyde provision anyone would have been liable, including access providers, for knowingly and intentionally distributing or making available pornography to children or obscene pornography to anyone. The argument in favor of the Hyde provision—that by providing no exceptions in the law, access providers will voluntarily restrict access to pornography—was made crystal clear by Compuserve's response to the German prosecutor.

That is the exact response that could be expected from all U.S. Internet access providers by passage of the Hyde language. It is an

inexplicable irony that due only to the efforts of some pro-family groups, Compuserve and other access providers may have to block pornography to German children, but are free to provide it to the children of America.

Why did pro-family groups go to bat for access providers? I still wonder. The arguments of their representatives shifted throughout the months-long debate during consideration of the various computer pornography provisions in Congress. The lawyer for one argued that it is unconstitutional to hold access providers liable because they have no ability to block pornographic Internet sites. Her "constitutional argument" is undermined by Compuserve's response to the German prosecutor. She also contended that the Internet is a "wonderful resource" and we shouldn't go "too far" in regulating it.

Wow. Since when did Internet protection become a pro-family priority? Another prominent argument was that any computer pornography measure should be modeled after the federal dial-a-porn law with access providers treated like the phone companies are in that law. There is no more ineffective criminal law than the federal dial-a-porn law. It is hardly an appropriate model. Dial-a-porn is a thriving business in America precisely because this law has almost zero deterrent effect.

There have been no prosecutions under it since it was revised in the late 1980s to give phone companies almost blanket exemption from prosecution for what otherwise would be a crime of conspiracy when they knowingly provide service to and profit from dial-a-porn companies. The reason for this exemption was that phone companies are heavily regulated common carriers. Access providers are not common carriers and after this bill won't be regulated at all.

Congress, in the telecommunications bill to which Exon-White is appended, will impose on them all

the benefits of a common carrier but none of the burdens. If Congress wants an appropriate computer pornography model, it should mirror the federal child pornography law which, like the Hyde proposal, does not exempt providers. That is undoubtedly a major reason why one access provider, America OnLine, so willingly cooperated with the Justice Department in a recent computer child pornography sting operation.

As Compuserve has demonstrated, the best carrot and stick approach is a tough law. Only when Compuserve understood it was liable under German law for the distribution of pornography did it block pornographic sites. The company has indicated that it regretted the blockage of pornographic sites to its customers in this country and quickly ended the blockage.

Finally, some pro-family advocates argued that any law is better than what we have now. That argument assumes that current federal obscenity laws do not allow prosecution of those who traffic in such material by computer. There is no court that has ever taken this position and, indeed, the Justice Department has successfully used current law to prosecute a computer pornography crime. Thus, it only makes sense to enact a new computer pornography law if it improves the ability of the Justice Department to prosecute for computer pornography crimes.

The Justice Department has told Congress in three letters that any law that exempts access providers from liability undermines its ability to prosecute those who traffic in computer pornography. Exon-White, then, is a retreat in the war against pornography.

Sure, Exon-White will allow the Justice Department to prosecute the individuals who put obscene pornography on the Internet or pro-

vide pornography via the Internet to children. But how many of the thousands of individuals in this country who are potential prosecution targets will really be deterred by Exon-White? The Justice Department can only do a relatively few prosecutions a year for such violations. Not long ago it announced it was dropping or postponing a great number of investigations targeting those who distribute child pornography by computer for lack of investigative resources.

Certainly child pornography will be given the highest priority by the department, leaving few resources to enforce Exon-White against violators in this country. And what



about the tens of thousands of individuals in other countries who fill the Internet with pornography? Since our government has no jurisdiction to prosecute them, there is no reason to believe they will change their behavior.

There is also no reason to believe that any pornographic Internet sites will disappear. Exon-White guarantees they will remain since access providers who make those sites available will be free under Exon-White to provide them.

The simple solution to eliminating or substantially reducing those sites was Henry Hyde's bill. If access providers are liable for making pornography available, they will

clean up the Internet. The Hyde proposal would have allowed access providers to make indecent but not obscene pornography available to adults so long as they took measures to assure that the material was not available to children. This provision is made necessary by a line of court cases indicating that adults have a constitutional right to indecent material. It could have been accomplished by providing access codes or pin numbers to adult customers like banks do for ATM card customers.

Under Hyde, access providers would not be held liable for all illegal pornography on the Internet which their services may be used to obtain. Nor would it require that they check all communications to ensure that no violations of the law are occurring. They would simply be required to avoid knowing violations of the law.

This is an obligation imposed on all citizens, and Congress is foolish to exempt Compuserve and others like it from such a responsibility, especially since those most likely to be harmed will be children who, with a few clicks of a computer mouse, can enter that grand international pornographic swap meet that the Internet will be for them, courtesy of the access provider companies.

Federal criminal law has traditionally assigned equal liability both for those who commit a crime and those who aid and abet a crime. Thus any notion that access providers aren't directly responsible for the provision of pornography on the Internet should be legally irrelevant because without their willing facilitation there would be no Internet pornography.

Exon-White won't make the issue disappear from Congress. The access providers and those who enjoy the easy availability of pornography on the Internet have won round one. Soon, however, that segment of decent American society that began the clamor for a solution to the disease of computer pornography will realize that Exon-White is little more than the placebo it was designed to be and they will demand that Congress provide a serious response.