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Constitutionality of Requiring Sexually Explicit Material on the Internet to Be Under a Separate Domain Name

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Henry Cohen
Legislative Attorney
American Law Division

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Summary

It has been proposed that there be a domain on the Internet exclusively for websites that contain sexually explicit material; it might be labeled ".xxx" to complement the current ".com," ".org," and others. Some propose making use of a ".xxx" domain voluntary, and a June 26, 2008, decision by the Internet Corporation for Assigned Names and Numbers (ICAAN) to allow a virtually unlimited number of top-level domain names may make the voluntary use of ".xxx" possible in 2009. Others propose that Congress make use of ".xxx" mandatory for websites that contain sexually explicit material. This proposal raises the question whether a mandatory separate domain would violate the First Amendment, and this report focuses on that question.

It is unclear whether making a ".xxx" domain mandatory would violate the First Amendment. Whether it would be constitutional might depend upon whether a court viewed it as a content-based restriction on speech or as analogous to the zoning of adult theaters, or even as a mere disclosure requirement that did not raise a significant First Amendment issue. If a court viewed it as a content-based restriction on speech, then it would be constitutional only if the court found that it served a compelling governmental interest by the least restrictive means. Other factors that could affect its constitutionality might be whether it imposed criminal penalties and whether it were limited to websites that are predominantly pornographic.

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Constitutionality of Requiring Sexually Explicit Material on the Internet to Be Under a Separate Domain Name

A Voluntary ".xxx" Domain

It has been proposed that there be a domain on the Internet exclusively for Websites that contain sexually explicit material; it might be labeled ".xxx" to complement the current ".com," ".org," and others. Some propose making use of a ".xxx" domain voluntary, but others propose that Congress make it mandatory. The latter proposal raises the question whether a mandatory separate domain would violate the First Amendment, and this report focuses on that question.

Congress has already provided for a ".kids" domain: the Dot Kids Implementation and Efficiency Act of 2002 directs the National Telecommunication and Information Administration (NTIA), which is an agency in the Department of Commerce, to establish a "new domain" "that provides access only to material that is suitable for minors and not harmful to minors."[1] The URL for the domain is [http://www.kids.us], and that site lists 20 websites that use the domain.[2]

An article reports that chairman and president of ICM Registry Inc., "Stuart Lawley, a Florida entrepreneur, [is] trying to establish a pornography-only '.xxx' domain. In such a realm, Lawley could restrict porn marketing to adults only, protect users' privacy, limit span and collect fees from Web masters. The .xxx proposal was finally slated for approval in August [2005] by the Internet Corporation for Assigned Names and Numbers (Icann), but because of a flurry of protest,"[3] was deferred, and, on May 10, 2006, ICAAN voted against the establishment of a ".xxx" domain. Another article explains that the reason that the proposal was put off is that "the Commerce Department sought more time to hear objections [and] ICANN cannot move forward without Commerce Department approval."[4]

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[1] P.L. 107-317 (2002), 47 U.S.C. § 941.

[2] [http://www.kids.us/sitelist.html?catALL].

[3] Jascha Hoffman, "Porn Suffix, The" (sic), *New York Times Magazine* (December 11, 2005).

[4] Eric J. Sinrod, "Time For A .xxx Internet Domain?" [http://writ.news.findlaw.com/commentary/20051229_sinrod.html].

On January 6, 2007, the Associated Press reported that ICAAN had revived the proposal and opened it for public comment, but, on March 30, 2007, ICAAN rejected the proposal.[5]

On June 26, 2008, ICAAN approved a plan that would allow a virtually unlimited number of top-level domains names. The plan could disallow a name for only a few reasons, such as that it is confusingly similar to an existing name or is "contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law."[6] It remains to be seen whether, under this plan, ICAAN would approve an application to use a ".xxx" domain. Before the plan takes effect, ICAAN must approve a final version of it; this is expected to occur in early 2009.[7]

Some opponents of pornography support the proposal for a voluntary ".xxx" domain and some oppose it; likewise, some in the pornography business support the proposal and some oppose it. Both the above-mentioned articles comment on the support and opposition to the proposal:

> The proposal has had its share of critics. Some of them claim that a .xxx domain would provide legitimacy to the pornography industry. Supporters claim that a .xxx domain would make it easier for people to filter out content they do not want.
>
> The Family Research Council warns that it [the proposal] will simply breed more smut. But Senator Joe Lieberman supports a virtual red-light district because he says it would make the job of filtering out porn easier.
>
> Meanwhile, some pornographers, apparently drawn by the promise of catchier and more trustworthy U.R.L.'s, have gotten behind Lawley. Other skin-peddlers, echoing the A.C.L.U., see the establishment of a voluntary porn zone as the first step toward the deportation of their industry to a distant corner of the Web, where their sites could easily be blocked by skittish Internet service providers, credit card companies and even governments.[8]

Finally, some opponents of pornography oppose the proposal for a voluntary ".xxx" domain because "sites would be free to keep their current '.com' address in

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[5] Associated Press, "Plan Would Create '.xxx' Web Porn Domain," *New York Times* (January 6, 2007); Thomas Crampton, "Agency Rejects .xxx Suffixes for Sex-Related Sites on Internet," *New York Times* (March 31, 2007).

[6] ICANN Generic Names Supporting Organisation, Final Report, Introduction of New Generic Top-Level Domains, 8 August 2007. [http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc35657637].

[7] "Biggest Expansion in gTLDs Approved for Implementation" (June 26, 2008). [http://www.icann.org/en/announcements/announcement-4-26jun08-en.htm].

[8] Hoffman, *supra*, note 3.

effect making porn more easily accessible by creating yet another channel to house it."[9]

Constitutionality of a Mandatory ".xxx" Domain

Two bills have been introduced to create a mandatory ".xxx" domain for material that is "harmful to minors," as the bills would define the term. They are S. 2426, 109th Congress, which was introduced by Senator Baucus, and S. 2137, 107th Congress, which was introduced by Senator Landrieu. Both bills direct the Secretary of Commerce, acting through the National Telecommunications and Information Administration, to establish the new domain.

The rest of this report will consider the constitutionality of a mandatory ".xxx" domain, without focusing on these bills or any other particular proposal. It does not matter for constitutional purposes specifically how the bill would define the material that it would require to be in the ".xxx" domain; we will assume merely that such material would include sexually explicit material that is protected by the First Amendment. And all sexually explicit material is generally protected by the First Amendment, unless it constitutes obscenity, or child pornography that is produced with an actual minor.[10]

Content-based discrimination. To require that websites with sexually explicit material be under a separate domain name would be to treat such material differently from other speech, and therefore could be viewed as discriminating against speech on the basis of its content. The Supreme Court has said that "[i]t is rare that a regulation restricting speech because of its content will ever be permissible."[11] As a general rule, the Supreme Court will uphold a content-based speech regulation only if it satisfies "strict scrutiny," which means only if it is necessary "to promote a compelling interest" and is "the least restrictive means to further the articulated interest."[12] By contrast, if a regulation of speech is "*justified* without reference to the content of the speech," then the Supreme Court considers it "content-neutral" and will uphold it if it "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication."[13] In other words, if a regulation of speech has a purpose other than to protect people from harm that the speech itself might cause, then it stands a better chance of being found constitutional.

One might argue that, although requiring sexually explicit material to be under a separate domain name would discriminate against speech on the basis of its content,

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[9] Brian Bergstein, "Asia gets domain, .xxx delayed," *Miami Herald* (December 6, 2005).

[10] See CRS Report 98-670, *Obscenity, Child Pornography, and Indecency: Recent Developments and Pending Issues*, by Henry Cohen.

[11] United States v. Playboy Entertainment Group, Inc., 529 U.S. 801, 818 (2000).

[12] Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126 (1989).

[13] Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48, 50 (1986) (emphasis in original).

that would not be the purpose of the requirement, and the requirement could be *justified* without reference to the content of the speech it would regulate. Its purpose would arguably be to facilitate parents' or librarians' use of filters when children access the Internet. It would accomplish this by dividing websites into two categories — those with sexually explicit material and those without it. This could be viewed as analogous to requiring "adult" movie theaters to locate in areas that are zoned for them. In *City of Renton v. Playtime Theaters, Inc.*, the Supreme Court upheld such zoning on the theory that it "is not aimed at the *content* of the films shown at 'adult motion picture theaters,' but rather at the *secondary effects* of such theaters on the surrounding community."[14] "The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views."[15]

Analogously, one might argue, to restrict sexually explicit material to a separate domain name arguably would "zone" certain websites not because of the content of their speech but to lessen the "secondary effect" of minors' viewing those websites without parental approval. In effect, the proposal, like a zoning ordinance, would seek to isolate certain material into particular "neighborhoods" in cyberspace, and assist parents in preventing their children from visiting those "neighborhoods."

A possibly fatal flaw with this analogy, however, is that, in *Renton*, the secondary effects that the zoning ordinance sought to prevent — crime, lowered property values, and a deterioration in the quality of urban life — were not effects of viewing the regulated speech itself. The ".xxx" proposal, by contrast, would apparently attempt to protect minors from the effects of viewing the regulated speech itself, and these effects therefore are arguably not "secondary" in the sense that the Supreme Court meant in *Renton*. The ".xxx" proposal, from this view, would impose a burden on speech because Congress deems it harmful, and that is not a sufficient basis on which the government may regulate speech in a manner that affects adults, unless the regulation satisfies strict scrutiny.[16] In *Ashcroft v. Free Speech Coalition*, for example, the Supreme Court struck down a federal statute that banned "virtual" child pornography and other child pornography produced without the use of an actual minor, despite various harms that the government claimed that viewing such pornography could cause, such as "whet[ting] the appetites of pedophiles and

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[14] *Id.* at 47 (emphasis in original).

[15] *Id.* at 48.

[16] If sexually explicit speech is regulated in a manner that affects only minors, then it is more likely to be constitutional. In *Ginsberg v. New York*, 390 U.S. 629, 634 (1968), for example, the Supreme Court upheld a state statute that prohibited the sale to minors of what the Court called "'girlie' picture magazines." When, however, the government has restricted adults' access to speech, even with the purpose of protecting minors, the Court has held that "the Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'" See, e.g., Reno v. American Civil Liberties Union, 521 U.S. 844, 875 (1997), in which the Court struck down the part of the Communications Decency Act of 1996 that prohibited "indecent" material on the Internet.

encourag[ing] them to engage in illegal conduct."[17] The Supreme Court has stated: "We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech. The statute now before us burdens speech because of its content; it must receive strict scrutiny."[18]

Thus, a court might view the ".xxx" proposal either as a content-based regulation, which is constitutional only if it satisfies strict scrutiny by advancing a compelling governmental interest by the least restrictive means; or as a content-neutral regulation, which is constitutional if it advances a substantial governmental interest and allows for reasonable alternative avenues of communication. We will apply these two tests to the ".xxx" proposal, in the sections below titled "Strict scrutiny" and "Content-neutral scrutiny." First, however, we will explain why the ".xxx" proposal would even raise a free speech issue, in light of the fact that it would not censor speech.

Compelled speech. The ".xxx" proposal could be viewed as, in effect, compelling speech on the part of websites with sexually explicit material. It would compel them to identify themselves, through use of a separate domain name, as containing such material. In general, it is as unconstitutional for the government to compel speech as it is for it to censor speech, except in the commercial context.[19] In *Riley v. National Federation of the Blind of North Carolina, Inc.*, a North Carolina statute required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations. The Supreme Court held this unconstitutional, writing

> There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what *not* to say.[20]

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[17] 535 U.S. 234, 253 (2002).

[18] *Playboy*, *supra* note 11, 529 U.S. at 815 (citations omitted). *See also*, Reno v. American Civil Liberties Union, 521 U.S. 844, 867-868 (1997) (rejecting the government's claim that prohibiting "indecent" material on the Internet "constitutes a sort of 'cyberzoning'" aimed at "'secondary' effects"), and separate opinion by Justice O'Connor in *Reno*, 529 U.S. at 888 ("a 'zoning' law is valid only if adults are still able to obtain the regulated speech").

[19] Compelling commercial speech (i.e., disclosures in commercial advertisements and on product labels) is generally constitutional because the Supreme Court has held that "an advertiser's rights are reasonably protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. . . . The right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right." Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651, 652 n.14 (1985).

[20] 487 U.S. 781, 796-797 (1988) (italics in original).

In *Meese v. Keene*, however, the Court upheld compelled disclosure in a noncommercial context.[21] This case involved a provision of the Foreign Agents Registration Act of 1938, which requires that, when an agent of a foreign principal seeks to disseminate foreign "political propaganda," he must label such material with certain information, including his identity, the principal's identity, and the fact that he has registered with the Department of Justice. The material need not state that it is "political propaganda," but one agent objected to the statute's designating material by that term, which he considered pejorative. The agent wished to exhibit, without the required labels, three Canadian films on nuclear war and acid rain that the Justice Department had determined were "political propaganda."

In *Meese v. Keene*, the Supreme Court upheld the statute's use of the term, essentially because it considered the term not necessarily pejorative. On the subject of compelled disclosure, the Court wrote:

> Congress did not prohibit, edit, or restrain the distribution of advocacy materials. . . . To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda.[22]

One might infer from this that compelled disclosure, in a noncommercial context, gives rise to no serious First Amendment issue, and nothing in the Court's opinion would seem to refute this inference. Thus, it seems impossible to reconcile this opinion with the Court's holding a year later in *Riley* (which did not mention *Meese v. Keene*) that, in a noncommercial context, there is no difference of constitutional significance between compelled speech and compelled silence.

In *Meese v. Keene*, furthermore, the Court did not mention earlier cases in which it had struck down laws compelling speech in a noncommercial context. For example, in *Wooley v. Maynard*, the Court struck down a New Hampshire statute requiring motorists to leave visible on their license plates the motto "Live Free or Die"[23]; in *West Virginia State Board of Education v. Barnette*, the Court held that a state may not require children to pledge allegiance to the United States[24]; and, in *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a Florida statute that required newspapers to grant political candidates equal space to reply to the newspapers' criticism and attacks on their record.[25]

In any event, if one views the ".xxx" proposal as discriminating on the basis of content, then one could cite most of the compelled speech cases for the proposition that the ".xxx" proposal would be unconstitutional unless it can pass strict scrutiny. But one could cite *Meese v. Keene* (adapting the above quotation from it) to argue that the ".xxx" proposal would be constitutional because it would "not prohibit, edit,

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[21] 481 U.S. 465 (1987).

[22] *Id.* at 480.

[23] 430 U.S. 705 (1977).

[24] 319 U.S. 624 (1943).

[25] 418 U.S. 241 (1974).

or restrain the distribution of [sexually explicit material]. . . . To the contrary, Congress [would] simply require[ ] the disseminators of such material to make additional disclosures that would better enable the public to evaluate the [content] of the [website]."

Strict scrutiny. If the ".xxx" proposal were viewed as content-based, and not as constitutional simply by virtue of its similarity to the statute upheld in *Meese v. Keene*, then, as noted, it would be subject to "strict scrutiny," which means that it would be constitutional only if it is necessary "to promote a compelling interest," and is "the least restrictive means to further the articulated interest."[26]

Though the Supreme Court may be becoming less absolute in viewing the protection of all minors, regardless of age, from all sexual material, to be a compelling interest,[27] it has never struck down, on the ground that it did not further a compelling governmental interest, a statute aimed at denying minors access to sexual material. Rather, the Court tends to assume the existence of a compelling governmental interest in denying minors access to pornography and move on to the "least restrictive means" part of the strict scrutiny test, upholding or striking down the statute on that issue. In striking down the part of the Communications Decency Act of 1996 that banned from the Internet all "indecent" material that was accessible to minors, the Court wrote:

> In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.[28]

The ".xxx" proposal would not suppress speech, but would only compel it to be under a separate domain name. But are there less restrictive means by which to accomplish the ".xxx" proposal's goal? We will consider two alternative means.

One alternative might be to make use of the separate domain name voluntary. The question with respect to this alternative would be whether there would be an incentive for sexually explicit websites to use a separate domain name voluntarily — an incentive sufficient to induce enough of them to use a separate domain name so as to make the proposal as effective as it would be if it compelled them to use a separate domain name. An incentive, arguably, is that, just as the proposal would make it easier to block websites that use a separate domain name, it might make it easier to locate websites that use a separate domain name.

In addition, one might argue, a statute could effectively make use of a separate domain name mandatory only for websites based in the United States, as the U.S.

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[26] *Sable*, *supra*, note 12.

[27] *See*, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION (2004), at 1233, n.1146 (n.1174 in the Web version at [http://www.crs.gov/products/conan/Amendment01/topic_3_12_12.html]).

[28] *Reno*, *supra* note 16, 521 U.S. at 874.

government does not generally have authority over foreign websites. Therefore, a statute that mandated use of a separate domain name would not cover all websites with sexually explicit material, and this would appear to strengthen the case that voluntary use of a separate domain name would be as effective as mandatory use.[29]

A second alternative to the proposal might be one that already exists: the Dot Kids Implementation and Efficiency Act of 2002, mentioned at the beginning of this report. This statute may enable parents who wish to do so to block out all websites *not* under the "dot kids" domain name. If parents used a filter to prevent their children from gaining access to any website that does not use the "dot kids" domain, then they would be denying their children access to much material on the Internet that is not sexually explicit. If one deems a purpose of both the "Dot Kids" statute and the ".xxx" proposal to be not only to deny children access to sexually explicit material, but *not* to deny them access to non-sexually explicit material, then the "Dot Kids" Act might be viewed as less effective than the ".xxx" proposal, and therefore as not an adequate alternative to the latter. But, in another respect, the "Dot Kids" statute could be more effective because it could enable parents to block foreign as well as domestic websites; in that respect it might be viewed as an adequate alternative to the ".xxx" proposal.

Content-neutral scrutiny. If a court were to find the ".xxx" proposal to be analogous to the zoning of "adult" theaters that the Supreme Court has upheld, then it would ask whether the proposal is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. Because it appears that a court would likely find the proposal to serve a "compelling" interest, a court would ipso facto likely find the proposal to meet the less rigorous test of serving a "substantial" interest. And, because the proposal would not prevent anyone from posting protected speech, but would merely require them to post some speech under a separate domain name, it apparently could not even be said to reduce their avenues of communication except insofar as Internet users chose to block websites that used the separate domain name. Though the proposal would presumably facilitate such blocking, it would not require it, and therefore would seem likely to be found constitutional if this less-than-strict-scrutiny test were applied.

Criminal penalties. A factor that might make a difference to the ".xxx" proposal's constitutionality is whether it imposed criminal penalties; if it did, that might tip the balance toward making it unconstitutional. In *Reno v. American Civil Liberties Union*, the Supreme Court, in striking down the Communications Decency Act of 1996, was apparently influenced by the fact that the statute would have imposed criminal penalties, including imprisonment.[30] It distinguished *Federal Communications Commission v. Pacifica Foundation*, in which it had upheld the ban on "indecent" material on broadcast media, in part on the ground that the radio station that had broadcast George Carlin's "Filthy Words" monologue had been

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[29] This was one of the reasons that the Supreme Court upheld a preliminary injunction against enforcement of the Child Online Protection Act. *See*, Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 667 (2004) ("The District Court noted in its factfindings that one witness estimated that 40% of harmful-to-minors content comes from overseas").

[30] *Reno*, *supra*, note 16, 521 U.S. at 867.

penalized with only a Federal Communications Commission declaratory order.[31] "[T]he Commission's declaratory order," the Court in *Reno* wrote, "was not punitive; we expressly refused to decide whether the indecent broadcast 'would justify a criminal prosecution.'"[32]

Breadth of the requirement. Another factor that might make a difference to the ".xxx" proposal's constitutionality is whether it applied only to websites that contained predominantly pornographic material, or it applied to any posting of material that might be deemed pornographic, even on websites that did not contain predominantly pornographic material. The latter approach would seem more problematic from a constitutional standpoint because it would deter any website not under the ".xxx" domain name from posting material that might be deemed pornographic, even if the website posted it for other than pornographic purposes, and even if the website contained material that was predominantly, for example, of a literary, artistic, or medical nature that would not attract children.

But even a proposal that applied only to websites that contained predominately pornographic material might be unconstitutional if it defined too vaguely the websites that it would require to use the ".xxx" domain. The constitutional problem with an overly vague definition is that it might deter a website that did not use the ".xxx" domain from posting sexually explicit material for its literary, artistic, or medical content. It might be deterred for fear that the material could be construed as pornographic and the website sanctioned. A vague law violates due process because it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . .. [P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."[33]

Conclusion. If a court were to apply "strict scrutiny" to the ".xxx" proposal, then it appears difficult to predict whether it would be constitutional. Although it seems likely that the Supreme Court would find that it serves a compelling governmental interest, it is not certain whether it would find that it would be the least restrictive means to serve that interest. If a court were to apply "content-neutral scrutiny," or if the Court were to follow its reasoning in *Meese v. Keene*, then it seems likely that it would find the ".xxx" proposal to be constitutional.

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[31] 438 U.S. 726 (1978).

[32] *Reno*, *supra* note 16, 521 U.S. at 867.

[33] Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 497-499 (1982).