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THE PRICE OF PICS: THE PRIVATIZATION OF INTERNET CENSORSHIP

Fernando A. Bohorquez Jr.

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> Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.
>
> —Justice Hugo Black, *Associated Press v. United States*[1]

INTRODUCTION

In *Reno v. ACLU*,[2] the Supreme Court invalidated Congress' attempt to regulate the Internet through the Communications Decency Act ("CDA").[3] In that landmark ruling, the Court found the Internet to be a medium of communication that is entitled to the fullest First Amendment protection.[4] In essence, the "Internet deserve[s] the same level of Constitutional protection as books, magazines, newspapers," and the town crier bellowing from his "corner soapbox."[5] Therefore, government regulations or restrictions imposed upon Internet speech must pass constitutional muster under the strict scrutiny analysis applied by the Supreme Court to state limitations on the written or spoken word under the First Amendment. But, what if non-government actors or, more specifically, a coalition of private corporations, agreed to attempt to regulate or restrict speech on the Internet?

This Note poses that very question. In 1995, the Platform for Internet

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1. 326 U.S. 1, 20 (1945).
2. 521 U.S. 844 (1997).
3. *See id.* at 885; 47 U.S.C. § 223 (a), (d) (1997).
4. *See Reno*, 521 U.S. at 870.
5. *See* American Library Association/Intellectual Freedom Committee, *Statement on Library Use of Filtering Software* (last modified Feb. 2, 2000) <http://www.ala.org/alaorg/oif/filt_stm.html>.

Content Selection ("PICS") was introduced.[6] PICS was a conglomeration of corporations from varied sectors of the Internet and computer industry. The conglomeration consolidated their efforts under the wings of the Massachusetts Institute of Technology's ("MIT") World Wide Web Consortium ("W3C") to produce an easy-to-use Internet content labeling and selection platform which would enable Internet users to selectively control on-line content.[7] Now, just a few years since its inception, the industry offers nearly universal access to some form of PICS.[8]

The following pages examine the freedom of speech problems that PICS may present for the future and several issues that may accompany any attempts for legal redress. Before reaching any of the legal issues, this Note will address the rudimentary technological aspects of PICS. A clear headed conclusion can only be reached through an understanding of the technology, its means, and its effects. We cannot follow the analysis of Justice Taft and liken the workings of the Internet to that of spirits and magic.[9] Along those lines, Part I of this Note deals with what PICS is and how it works. Part II discusses the effects that PICS may have on the dissemination of information on the Internet and the possible free speech issues which PICS may raise.

The bulk of the legal inquiry begins in Part III with a discussion of state action, the point of departure in any constitutional analysis.[10] However, since PICS is arguably a private regulation/restriction on speech, this first step is fraught with ambiguity. Part III addresses the quandary,

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6. *See* World Wide Web Consortium, *15 Organizations from Around the World Pledge Support for PICS Platform* (last modified Nov. 1, 1995) <http://www.w3.org/PICS/951030_News.html>.

7. *See id.*

8. *See* Center for Democracy and Technology, *Internet Family Empowerment White Paper: How Filtering Tools Enable Responsible Parents to Protect Their Children Online* (July 16, 1997) <http://www.cdt.org/speech/empower.html>.

9. *See* MICHAEL BOTEIN, REGULATION OF THE ELECTRONIC MASS MEDIA: LAW AND POLICY FOR RADIO, TELEVISION, CABLE AND THE NEW VIDEO TECHNOLOGIES 37-38 (1998).

10. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 385 (1997).

focusing on the applicability of the several exceptions of the state action doctrine to PICS. Assuming, arguendo, that state action is not found, any traditional First Amendment inquiry is concluded. In the event that state action is not found, the question turns to what avenues of redress may remain. Part IV of this Note briefly examines the possibility that the union of the industry to unilaterally regulate/restrict Internet speech may fall under the visage of the Sherman Act and its scion of Antitrust laws.

The Note concludes that in light of substantial evidence of the government's tacit involvement in the private sector's adoption of the PICS paradigm, state action in the instant matter may be premised on the entanglement exception to the state action doctrine. With respect to the Antitrust alternative, the Note cannot indulge in an in depth analysis of the issue. However, as a general proposition, since the creators of PICS acknowledge that its purpose is to control content selection on the Internet, and such control invariably affects the exchange of ideas in this forum, then PICS may qualify as an unlawful association of corporations that have combined to, in effect, restrain the trade and commerce of ideas among the states.[11]

I. WHAT IS PICS?

> Rather than censoring what is distributed, as the Communications Decency Act and other legislative initiatives have tried to do, PICS enables users to control what they receive.
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> —Paul Resnick, *Filtering Information on the Internet*[12]

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11. Associated Press v. United States, 326 U.S. 1, 22 (1945) (concluding that the press is not above the mandates of antitrust legislation). Since the Sherman Act and its progeny can apply to a coalition of private actors controlling the press, as held in *Associated Press v. United States*, then it follows that the Antitrust laws may equally apply to the present cabal attempting to control the exchange of information on the Internet.

12. Paul Resnick, *Filtering Information on the Internet*, SCI. AM., 106, 108 (Mar. 1997) (emphasis omitted).

A. *The State of PICS*

Created in 1995, PICS was assembled under the auspices of MIT's World Wide Web Consortium.[13] It is a cross-industry working group, ranging from Apple and America Online to Microsoft and Netscape, whose goal is "to develop an easy-to-use Internet content labeling and selection platform that empowers [Internet users] to selectively control on-line content."[14] PICS' goals have reached initial fruition. At present, all major Internet/on-line services offer filtering at little or no cost.[15] Over 14 million Internet connected households have access to filtering capability, and Internet Service Providers ("ISPs"), which serve 85% of all Internet users, offer at least one form of filtering software.[16] One PICS-based labeling service, Net Shepherd, has rated over 300,000 Internet sites around the world.[17] In addition, a number of "stand-alone filtering products" (software which runs together with an Internet access program such as CyberPatrol and Surfwatch) allow an Internet user to filter content based on PICS labels.[18] Furthermore, Netscape has included Internet filtering technology in their latest browser releases.[19] These developments, combined with Microsoft's incorporation of filtering technology into its browser, will increase access to PICS to cover over 90% of the browser market.[20] In less than two years, the industry and PICS have come to the cusp of offering 100% of Internet users easy access to

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13. *See* World Wide Web Consortium, *supra* note 6.

14. *Id.* The W3C is international as well as cross-industry, including organizations and companies from Canada, France, Japan, and Taiwan, as well as the United States.

15. *See* Center for Democracy and Technology, *supra* note 8.

16. *See id.*

17. *See* American Civil Liberties Union, *Fahrenheit 451.2: Is Cyberspace Burning?: How Rating and Blocking Proposals May Torch Free Speech on the Internet* (visited Feb. 20, 2000) <http:// www. aclu .org/ issues/ cyber/ burning .html> [hereinafter *Farenheit*].

18. *See id.*; *see also* Center for Democracy and Technology, *supra* note 8.

19. *See* Netscape, *Netscape Netwatch* (visited Feb. 19, 2000) <http: // home .netscape.com/communicator/.v4.5/datasheet/index.html>.

20. *See Farenheit, supra* note 17.

PICS labeling services.[21]

Governments around the world have been anything but silent on the PICS issue.[22] Without exception they have encouraged and applauded PICS' arrival. President Clinton, for example, has unilaterally accepted PICS as the next step in Internet regulation and has encouraged industry development from its inception.[23] In the European Communication on Internet Policy, the nations of the European Union adopted a staunch pro-PICS stance.[24] In Australia, the federal government, via the Australian Broadcasting Association, is currently establishing a self-regulatory system incorporating PICS.[25] In the Far East, countries such as China and Singapore have turned an interested eye towards PICS as a means of implementing their Internet policy.[26]

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21. *See* Center for Democracy and Technology, *supra* note 8.

22. *See* Global Internet Liberty Campaign, *Roundup of Global Internet Issues,* 1 GILC Alert 1, ¶¶ B1.1 - B4.3 (Oct. 24, 1997) <http://www.gilc.org/alert/alert11.html>. With the possible exception of Egypt, and Yemen which is too poor to police the Internet, the nations of the world, from the Arabian Peninsula to the South Pacific, are entertaining some form of Internet regulation, which includes Internet content filters, PICS, or both.

23. *See* The White House, Office of the Press Secretary, *Statement by the President* (June 26, 1997) <http:// www. eff .org/ pub/ Legal/ Cases/ EFF_ ACLU_v_DoJ/19970626_wh_cda.announce> (stating that "[w]ith the right technology and ratings systems - we can help ensure that our children don't end up in the red light districts of cyberspace").

24. *See generally* I*M Europe, *Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions* (visited February 20, 2000) <http://www2.echo.lu/legal/en/internet/communic.html> (stating that some European countries have begun to set up a rating service which monitors internet content).

25. *See* Global Internet Liberty Campaign, *supra* note 22, at ¶ B2.1; *see also* Irene Graham, *The Net Labeling Delusion: Protection or Oppression* (Jan. 12, 1997) <http://rene.efa.org.au/liberty/label1.html>.

26. China and Singapore have an established history of government censorship and this legacy has not been forsaken with respect to the Internet. *See* Joseph D. Lasica, *Ratings Today, Censorship Tomorrow,* Salon Magazine (July 31, 1997) <http:// www. salon.com/july97/21st/article2.html>. Singapore, for example, has led the way in promoting tighter regulation of the Internet, including access to and distribution of pornography. In March 1996, the government of Singapore announced tough new rules banning "smut and material that upsets the political, social or religious status quo," making it the first

With the nearly unanimous support of industry and the unequivocal blessing of government, one may indeed question if there lie any problems with this new filtering platform. Its backers call it "Internet access control without censorship,"[27] while its opponents' comments range from ineffective to downright satanic.[28] In order to indulge in an objective analysis of PICS' possible legal ramifications, the exercise must begin from the most non-partisan of viewpoints—the technology. PICS' purpose has been firmly established: to enable Internet users, in particular parents and teachers, to control what children may access on the Internet.[29] However, the first real issue is not what it does, but how it does it.

B. *A Basic Overview of PICS Technology*

PICS is based on providing a common formatting scheme for labeling Internet sites.[30] It is designed so that any PICS-compliant selection software can process any PICS-compliant label.[31] PICS works by associating labels with web sites and other on-line documents via their Universal Resource Locators ("URLs").[32] Each label contains a set of ratings used to rate the particular web site or document, according to a scheme

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Asian country to do so. Darren McDermott, *Singapore Spins a Web Over the Internet: New Regulations Will Give Authorities Wide Powers to Police Content*, ASIAN WALL ST. J., July 12, 1996, at 3.

27. Paul Resnick & James Miller, *PICS: Internet Access Controls Without Censorship* (visited Nov. 9, 1997) <http://www.w3.org/PICS/iacwcv2.htm>.

28. *See* Lawrence Lessig, *Tyranny in the Infrastructure. The CDA Was Bad- but PICS May Be Worse*, 5.07 Wired (July 1997) <http://www.wired.com/wired/5.07/cyber_rights.html>.

29. *See* World Wide Consortium, *Platform for Internet Content Selection* (last modified Jan. 6, 2000) <http://www.w3.org/PICS/>.

30. *See* Resnick & Miller, *supra* note 27.

31. *See id.*

32. A URL is a unique address which every Web page, indeed every document, on the Internet must contain (*e.g.* http://www.fcc.gov). *See* Internet Engineering Task Force, *Uniform Resource Locators [RFC-1738]* (visited Feb. 23, 2000) <http:// andrew2.andrew.cmu.edu/rfc/rfc1738.html> (describing the technical specifications relating to the use of URLs).

laid down in a corresponding rating system.[33] The labels can be generated by the author of the web site or via a third party rater.[34] These labels can reside in the header of the URL, within a label database, or within a third party label bureau located on the Internet.[35] PICS is the encoding method for carrying the ratings, which enables multiple labels to exist to describe a particular web site by the same or different rating system as the web site.[36]

It is the selection software, not the label, which determines whether access to the user will be permitted or not.[37] The selection software obtains a PICS label from the URL header (or a local data base, or a third party bureau) then rates the web site or on-line document according to the previously selected ratings system.[38] The PICS label describes the content to the software, which then compares the ratings within the label against the locally stored restriction criteria.[39] Access to the web site is then either granted or denied.[40]

The flexibility applauded by PICS supporters stems from its ability to enable Internet users, when self-rating their site, to choose among different labeling sources, rating systems, and selection software.[41] Further, each rating system can choose its own rating dimensions, adding even greater flexibility.[42] For example, the two major self-labeling ratings systems, RSACi and Safesurf, both deal with the four horsemen of the

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33. *See* Wayne B. Salamonsen & Roland Yeo, *PICS-Aware Proxy System vs. Proxy Server Filters*, (visited Feb. 20, 2000) <http://www.isoc.org/inet97/proceedings/A7/A7_3.HTM>.

34. *See id.*

35. *See id.*

36. *See id.*

37. *See* Resnick & Miller, *supra* note 27.

38. *See* discussion *supra* Part I.B.

39. *See id.*

40. *See id.*

41. *See* Resnick & Miller, *supra* note 27. Furthermore, each rating service can use its own vocabulary, which grants the consumer even more flexibility in deciding how to filter access to sites. *See id.*

42. *See id.*

apocalypse—sex, nudity, violence, and unsavory language—on a similar, yet differing format.[43] An example of a self-rated RSACi web site may look like the following: "language (l=3), sex (s=3), nudity (n=2), and violence (v=0)."[44] The Internet user, who attempts to access this site, will either gain access or be denied, depending on whether his or her predetermined ratings settings pass all of the above criteria.[45]

In addition to the self-rating system, PICS also allows any individual or organization to label the content of others on the web.[46] Net Shepard is an example of this third party labeling system, having created independent labels for over 300,000 web sites.[47] The same mechanics are at work here as in the self-rated sites, except that in a third party labeling system, a third party applies the rating system to the content of the web site, rather than the author.[48] Another aspect of PICS flexibility, similar to the third party labeling system, is the third party option of a ratings service.[49] The difference between a ratings *service* and a ratings *system* is that a ratings *service* provides content labels for information on the Internet and it uses a rating *system* to describe the content.[50] For example, the Unitarian rating service, and the Christian Coalition rating service could both use the Motion Picture Academy Association ratings system to decide

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43. *See* C. Dianne Martin & Joseph M. Reagle, *An Alternative to Government Regulation and Censorship: Content Advisory Systems on the Internet* (visited Feb. 20, 2000) <http://www.rsac.org/homepage.asp>. The RSACi labeling system is a Web-based questionnaire that queries the user about the content of a Web page or directory tree based upon four content categories-violence, sex, nudity, and harsh language measured on five levels, e.g., Nudity: Level 0 = no nudity, escalating to Level 4 = Provocative Frontal Nudity. Whereas Safesurf is more evaluative providing descriptive labels that have highly judgmental definitions and descriptions. e.g., Nudity: Level 1 = Subtle Innuendo escalating to Level 9 = Explicit and Crude; *see also* Center for Democracy and Technology, *supra* note 8.

44. Martin & Reagle, *supra* note 43.

45. *See id.*

46. *See* Center for Democracy & Technology, *supra* note 8.

47. *See id.*

48. *See id.*

49. *See* Resnick & Miller, *supra* note 27.

50. *See* Martin & Reagle, *supra* note 43.

what each thought was the appropriate age for viewing information.[51]

Each rating service can choose its own labeling vocabulary and priorities, reflecting its own values, and these ratings can be implemented by off-the-shelf blocking software.[52] Ratings services are also associated with stand-alone filtering software such as CyberPatrol or CYBERSitter.[53] Although not all stand-alone filtering software is PICS compatible, some, such as CyberPatrol, allow filtering based on PICS labels and the majority are in the process of implementing them.[54]

II. THE POTENTIAL PROBLEMS WITH PICS

> Labeling is an attempt to prejudice attitudes and as such, it is a censor's tool.
>
> —American Library Association[55]

PICS basically accomplishes its task via two general avenues: voluntary self-rating or third party labeling.[56] Many critics assert that both of these approaches are fraught with dangers to the First Amendment protection of Internet speech.[57] Either approach, they argue, imposes restrictions on the categories chosen by the ratings designer, whether imposed

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51. *See id.*

52. *See* Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COM/ENT L. J. 453, 458 (1997).

53. *See* Center for Democracy & Technology, *supra* note 8.

54. *See id.*

55. *See* American Library Association, *Statement on Labeling: An Interpretation of the Library Bill of Rights* (last modified Nov. 11, 1999) <http://www.ala.org/alaorg/oif/labeling.html>.

56. *See generally* Weinberg, *supra* note 52, at 458. While PICS can be accomplished through voluntary self-rating and third party labeling, both approaches may impinge on the First Amendment.

57. *See generally Fahrenheit, supra* note 17. Self-rating will cause controversial speech to be censored and third-party ratings products can result in a potential for arbitrary censorship.

by the author of the site, or a third party rating system, or a rating service applying a rating system.[58] In general, PICS naysayers maintain that a PICS based rating paradigm would ultimately result in the stifling of communications in the most democratic forum of information ever known. This result would be incongruous with the Supreme Court's decision in *Reno v. ACLU*,[59] where the Court held that the Internet receives the same full First Amendment protection as the written press.[60]

A. *Self-Rating*

A proposal that citizens should self-rate their on-line speech is "no less offensive to the First Amendment than a proposal that publishers of books and magazines rate each and every article they produce."[61] The initial problem with self-rating is a Catch-22: a balancing of the author's integrity against his or her desire to be heard. In *Why I Will Not Rate My Site*,[62] author Jonathan Wallace illustrates this dilemma quite lucidly. Mr. Wallace posted an article on the web called *An Auschwitz Alphabet*, which had detailed excerpts concerning the inhumane experiments conducted by Nazi doctors upon Jewish prisoners in Auschwitz.[63] Since most web browsers are configured to block unrated sites, Wallace would be forced to rate his site in order that a segment of his targeted audience, children interested in the holocaust, would not be excluded from the site.[64] However, due to the article's depictions of nudity, compliance to

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58. *See* Weinberg, *supra* note 52 at 468.

59. 521 U.S. 844 (1997).

60. *See id.* at 870 (stating that the Court sees "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium").

61. *Fahrenheit*, *supra*, note 17; *see also* Smith v. California, 361 U.S. 147, 154-55 (1959) (where the court found unconstitutional a state ordinance requiring a retail bookseller to examine each and every book in his store to prevent the dissemination of obscene material).

62. Jonathan Wallace, *Why I Will Not Rate My Site* (visited Feb. 20, 2000) <http://www.spectacle.org/cda/rate.html>.

63. *See id.*

64. *See id.*

such a ratings system would lump the *Auschwitz Alphabet* with the likes of the "Hot Nude Women" page.[65] Under either choice, Wallace has been effectively blocked from reaching his audience.

Mr. Wallace's problem epitomizes the predicament many web site authors find themselves in with a self-rated labeling system. Authors may refuse to self-rate and miss their audience, or self-rate and still lose their audience. In order for an author to reach a wider audience or their targeted audience, the author will be compelled to make a choice. The author must either self-censor their site in order to fall within the appropriate ratings levels to be seen and heard, or continue to refuse self-censorship and risk languishment in the coldest depths of cyberspace.[66] In effect, a self-imposed ratings system precludes authors from expressing their original thoughts to reach a wider or specific audience.[67]

Professor Jonathan Weinberg provides an excellent analysis of ratings systems and their inherent fallacies in *Rating the Net*.[68] The problem, as Professor Weinberg states it, is that when an author evaluates her site in order to gain a rating from any PICS compliant ratings system, she must follow the rules of that system.[69] The problem is compounded by the intrinsically inaccurate nature of a ratings system which renders it incapable of classifying documents perfectly.[70]

There are two paradigms upon which a ratings system may work: standards based or rule based.[71] The standards based ratings systems, such as Safesurf, have several basic problems.[72] Foremost, a standard

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65. *See id.*

66. *See* J.D. Lasica, *X-Rated Ratings?* (Oct. 1997) <http:// ajr .newslink .org / ajrjdl21.html> ("Even those who disdain ratings have acknowledged they may be forced by the marketplace to self-rate if their sites become inaccessible to tens of thousands of potential readers.").

67. *See Fahrenheit*, *supra* note 17.

68. *See* Weinberg, *supra* note 52, at 459-77.

69. *See id.* at 462.

70. *See id.* at 463.

71. *See id.*

72. *See id.* at 464.

based system is grounded on value judgments by the evaluator, who would not be the user, but rather the ratings system company.[73] Obviously, the evaluator and the user may have differing values, but the user is constrained to abide by the evaluator's judgments. Furthermore, evidence abounds that this standards and value judgment approach is laden with a lack of consistency and predictability.[74] A rule based approach, such as RSACi, seems to be a preferable alternative, seeing that it purports to make no judgment classifications.[75] This approach, however, directs users to evaluate a complex and multifaceted reality according to an oversimplified schematic.[76] The rule based approach invariably results in some level of arbitrariness ignoring idiosyncratic speech and often generates absurd results.

In sum Professor Weinberg concludes:

> [A] group of evaluators can achieve fairness and consistency only if the ratings system uses simple, hard-edged categories relying on a few, easily ascertainable characteristics of each site. Such categories, though, . . . will not empower those users to heed their own values in deciding what speech should and should not be blocked. To the extent that ratings system designers allow evaluators to consider more factors in a more situationally specific manner to capture the essence of each site, they will ensure inconsistency and hidden value choices as the system is applied.[77]

Professor Weinberg's conclusion illustrates that some speech simply cannot be accurately rated. Take for instance the news. Numerous critics purport that the news is simply unratable, and any attempt to do so conflicts with every traditional value of journalism and the freedom of

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73. *See id.*
74. *See id.* at 465.
75. *See id.* at 469.
76. *See id.* at 470.
77. *Id.*

speech.[78] Others aver that Internet functions, such as e-mail and the Internet Relay Chat ("IRC"), fit into this class of inherently unratable speech.[79]

Finally, self-rating raises the quandary of prohibitive ratings costs for non-profit content providers and site managers.[80] For example, one non-profit web site named "Art on the Net," hosts on-line "studios" where hundreds of artists display their work.[81] Under a self-rating paradigm, Art on the Net would have to apply a rating to each of the more than 26,000 pages on its site, a task that requires time and staff they simply cannot provide.[82] In striking down the CDA, the Supreme Court held that imposing age-verification costs on Internet speakers would be "prohibitively expensive for noncommercial—as well as commercial— speakers."[83] The same logic may be applied in the case of self-rating; the burdensome costs and complexities may preclude certain noncommercial speakers from entering the Internet marketplace.[84]

The economic burdens of self-rating reveal a more clandestine danger underlying the costs of a self-rating system. Such a system can only be effective if content providers have an incentive to self-rate.[85] It is in-

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78. *See* Joseph D. Lasica, *Ratings Today, Censorship Tomorrow* (July 1997) <http://www.salonmagazine.com/july97/21st/ratings970731.html>; *see also* Lasica, *supra* note 66; Dan Mitchell, *Editors Reject News Site Ratings* (Aug. 28, 1997) <http://www.wired.com/news/news/business/story/6480.html>.

79. *See* Lasica, *supra*, note 78.

80. *See Fahrenheit, supra* note 17.

81. *See id.*

82. *See id.*

83. *Reno*, 521 U.S. at 881-82.

84. *See Fahrenheit, supra* note 17. For an overview of technical and economic difficulties which content providers may encounter when self-rating web sites, *see* Irene Graham, *The Net Labelling Delusion: Protection or Oppression* (Jan. 12, 1997) <http://rene.efa.org.au/liberty/label2.html>.

85. A self-rating system is based on content providers rating their own material. Absent a government mandate, content providers will not rate their sites if there is no incentive to do so—be it economical or financial. Therefore, if a majority, or even a substantial minority, of content providers do not rate their site, for whatever reason, a self-rating system loses its efficacy. A system based on self-rating cannot work effectively if a

evitable that many content providers, similar to Wallace, will not want to rate their site, and others, like Art on the Net, will not be able to afford to self-rate. Some content providers may be morally opposed to the very notion of self-rating, while others may be dissatisfied with the current choices of ratings available, and others may simply not care if their unrated content is excluded from those who use a filtering system.[86] Those content providers with the most incentive to adhere to a self-rating system are those who wish to reach the largest possible audience for profit and who have the wherewithal to do so.[87] It is, as J.D. Lasica puts it: "the law of maximum eyeballs."[88] The result is a homogenized medium dominated by commercial speakers whose subject matter is not esoteric enough to be passed over by mainstream ratings, and whose economies of scale are not burdened by the costs and complexities of a rating system.[89] In *Fahrenheit 451.2: Is Cyberspace Burning?*,[90] the ACLU issued the caveat that "Internet self-rating could easily turn the most participatory communications medium the world has yet seen into a bland, homogenized, medium dominated by powerful American corporate speakers."[91]

B. *Third Party Rating*

Many supporters of PICS assert that third party rating systems may

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substantial amount of sites are not rated. The Internet user's exposure to information under a PICS paradigm of largely unrated sites will be a fraction of what an Internet user's access would be without PICS. *See generally* Graham, *supra* note 84. For a further discussion of the possible superfluousness of a PICS paradigm based on self-rating, *see supra* text accompanying notes 241-248.

86. *See* Weinberg, *supra* note 52, at 472.

87. *See* Lasica, *supra* note 66.

88. *Id.*

89. *See Fahrenheit, supra* note 17; Lasica, *supra* note 66; Weinberg, *supra* note 532, at 482; Lasica, *supra* note 78 ("Mass-audience corporate Web sites will be spared, but ratings will blind us to many of the quirky, idiosyncratic, vibrant voices that make the Internet so astonishing.").

90. *Fahrenheit, supra* note 17.

91. *Id.*

be the answer to the apparent problems with a self-rating system.[92] Primarily, ratings by an independent third party could minimize the burdens and costs of self-rating on certain speakers. Moreover, as originally envisioned, PICS would enable a variety of third party ratings systems to develop, thereby enabling users to pick and choose from different systems and arrive at one which best reflects their own values.[93]

However, this construction may still hold First Amendment infirmities. First of all, many of the problems with self-rating are present in third party rating, such as arbitrary and inconsistent application.[94] Second, the fundamental proposition that some Internet material is simply unratable still persists.[95] Third, in the case of third party rating, the First Amendment violations may be even more egregious for three reasons: (1) the third party ratings systems may be even more value-laden and subjective than self-rated systems; (2) the author of the rated site may not necessarily receive notice of her rating, meaning she may never know whether she received a negative rating, which could arise in substantial blockage; and (3) along with not notifying the web site author of her rating and blockage, conversely, the third party rating system or service need not even notify the PICS user what is being blocked and what she is prevented from seeing.[96]

Due to the Internet's inherently dynamic state, the envisioned multiplicity of ratings systems that were supposed to emerge have yet to arise.[97] New web sites emerge online at the rate of approximately 1,500

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92. *See id.*

93. *See generally* Resnick & Miller, *supra* note 27 ("PICS provides a labeling infrastructure for the Internet. It is values-neutral: it can accommodate any set of labeling dimensions, and any criteria for assigning labels.").

94. *See Fahrenheit, supra* note 17.

95. *See* discussion *supra* notes 71-79.

96. *See Fahrenheit, supra* note 17; Michael Krantz, *Censor's Sensibility: Are Web Filters Valuable Watchdogs or Just New On-Line Thought Police?*, TIME, Aug. 11, 1997, at 56; *see also* Weinberg, *supra* note 532.

97. *See Fahrenheit, supra* note 17.

per day.[98] Ratings services simply cannot keep up with the demand of applying rating systems to each of those sites, and hope to keep some modicum of consistency, especially when using a standards based rating system.[99] Therefore, the problem of the unrated site arises again with similar results.[100] A third party rating system must inevitably choose whom it will rate and whom it will not. Unfortunately, the market directs third-party raters to rate the most commercially profitable and popular web site, thereby rendering less mainstream sites to a much less favorable position, only to be found by the most persistent of explorers.[101] The resulting homogenous scene is reminiscent of the one painted by a self-rating system.[102] In this case, however, there is also the underlying fear that a third party rating scheme, with the dominance of one or two systems, may become a monopolistic *de facto* censor.[103]

III. STATE ACTION

> It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.

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98. *See* Matthew Gray, *Internet Statistics: Web Growth, Internet Growth* (visited February 22, 2000) <http://www.mit.edu:8001/people/mkgray/net/web-growth-summary.html>. The number given in the text was reached by following two steps: 1. Subtracting the estimated number of web sites in January 1996 (100,000) from the estimated number of web sites in January 1997 (650,000); and then 2. Dividing the result from step 1 (550,000) by the number of days in a year (365); resulting with 1,506. While this number is ostensibly an estimate, it is supported by the undisputed exponential increase of the world wide web and the internet. *See id.*

99. *See* Weinberg, *supra* note 52, at 465.

100. *See Fahrenheit, supra* note 17.

101. *See id.; see also* Lasica, *supra* note 78.

102. *See supra* notes 85-91 and accompanying text.

103. *See* Graham, *supra* note 84.

—Justice Anton Scalia, *Lebron v. National Railroad Passenger Corp.*[104]

Notwithstanding the Constitutional infirmities which PICS may have, and in spite of the potential detriment PICS may impose upon the flow of Internet speech, the merits of this Constitutional inquiry may never be adjudicated for lack of requisite state action.[105] The Constitutional protection of the First Amendment applies only to government action; "[s]tate action doctrines remain the dividing line between the public sector, which is controlled by the Constitution, and the private sector, which is not."[106] This doctrine was laid down in the *Civil Rights Cases* where the Supreme Court held that the Fourteenth Amendment prevented only governmental interference with Constitutional rights.[107] Therefore, without a finding that the PICS regulation of Internet speech constitutes state action, the First Amendment inquiry is over.

The state action inquiry focuses on whether there is a sufficiently close nexus between the state and the challenged action of the entity.[108] The nexus must be so close that the action of the latter may be treated as one of the state itself.[109] Generally speaking, there are three broad avenues to establishing this nexus and fulfilling the state action requirement in the case of an action by a private party: (1) the private party can be held a government actor for state action purposes; (2) the party could fall

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104. 513 U.S. 374, 397 (1995).

105. For the remainder of the note, PICS refers to the collaboration of corporations who organized under the W3C to implement the PICS rating system.

106. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503, 504 (1985); *see also*, Note, *State Action and the Burger Court*, 60 VA. L. REV. 840, 841 (1974).

107. *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (stating that "[i]ndividual invasion of individual rights is not the subject matter of the amendment"). The Court has never explicitly overruled the holding of these cases, but has permitted Congress to protect civil liberties by using other powers.

108. *See* Chemerinsky, *supra* note 106, at 508.

109. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

under the public function exception; or (3) it could meet the entanglement exception.[110]

A. *PICS as a State Actor*

PICS may qualify under the state action exception as functioning as a government actor.[111] This exception applies in situations where the private enterprise has multiple contacts with the government and a "symbiotic relationship" between the state and private entity has been formed.[112] State action may be found, for example, where the government provides extensive subsidies and aid to the private party.[113] There must be more, however, than receipt of government funds for constitutional principles to apply.[114] The argument that PICS may fall within this exception, relies on evidence that PICS was influenced by heavy government pressure and the fact that the government is involved in overseeing its progress.[115] An examination of recent Supreme Court history may prove the contention that PICS is a state actor difficult to maintain.

In *Lebron v. National Railroad Passenger Corp.*,[116] the Court found

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110. *See generally* Chemerinsky, *supra* note 10, at 391-414 (discussing when a private entity can be considered part of the government and when a private entity's actions can be considered that of the state with respect to the recognized exceptions to the state action doctrine).

111. *See* Tony Mauro, *Nation trending towards do-it-yourself censorship* (visited February 20, 2000) <http://www.fac.org/fanews/fan9709/cover.htm>.

112. *See* Blum v. Yaretsky, 457 U.S. 991, 1008-10 (1982) (holding that due process principles did not apply to a nursing home's decision whether to discharge or transfer patients even though the home and patients received substantial government funding because the reduction in benefits was merely the incidental result of the decision of a private entity).

113. *See* Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974) (City could not grant exclusive use of public facilities to racially segregated groups even on a temporary basis because that would constitute a subsidy to the racially discriminatory practices).

114. *See Blum*, 457 U.S. at 1011.

115. *See id.* at 1011-12.

116. 513 U.S. 374 (1995).

that Amtrak, the National Railroad Passenger Corporation, was the government for state action purposes.[117] The Court considered that Amtrak was a corporation created by the government, for the furtherance of a government objective, and the government retained the rights to appoint a majority of Amtrak's directors.[118] In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,[119] the Court held that the United States Olympic Committee ("USOC") was not a part of the government for the purposes of state action.[120] The Court found that notwithstanding the facts that the USOC was founded by government charter, regulated by federal law, and federally funded, it was not a government actor for constitutional purposes.[121]

It appears that finding a private group a government actor for the purposes of state action is really a matter of degree.[122] Primarily, PICS was not created by the government and therefore fails at least one of the compelling factors the Court found in *Lebron*.[123] Moreover, the government does not appoint any directors to the boards of any of the members of PICS or the World Wide Web Consortium, nor does it retain any stock or subsidize any of its losses, contrary to *Lebron*.[124] The argument of government control over PICS stems from its purported coercion of the industry to adopt PICS and its continued support of it.[125] This support,

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117. *See id.* at 397-98.

118. *See id.* at 380.

119. 483 U.S. 522 (1987).

120. *See id.* at 546.

121. *See id.* at 544.

122. *See* Chemerinsky, *supra* note 10, at 390-91.

123. *Cf.* Resnick & Miller, *supra* note 27 (noting that PICS is an effort of the World Wide Web Consortium at MIT's Laboratory for Computer Science, drawing on the resources of a broad cross-section of the industry).

124. *Cf. id.*

125. Numerous critics support the notion that the cooperation of PICS and the government is one of coercion. The government threatened to introduce "Son-of-CDA" legislation if the industry were not to handle the problem of pornography on its own. *See* Declan McCullagh, *At the Censorware Summit* (July 17, 1997) <http://www.pathfinder.com/time/digital/daily/0,2822,12297,00.html>; Mark Newton, *Platform for Internet*

however, does not approach the level of involvement exhibited in *Lebron*. The only solid analogy to *Lebron* is that both PICS and Amtrak were created for the furtherance of a government purpose.[126] It is difficult to conclude that PICS possesses a level of government involvement commensurate to the degree found in *San Francisco Arts and Athletics*. The USOC, after all, was funded and regulated by the government, two factors which are missing from PICS.[127] Even if such a level of involvement can be found, PICS would likely not be found a government actor, as the Court did not hold the USOC to be a government actor for the purposes of state action.[128]

B. *Public Function Exception and PICS*

The second possible avenue in finding state action is the public function exception.[129] The pivotal authority in this area is *Jackson v. Metropolitan Edison Co.*[130] In *Jackson*, the Court noted that private behavior may qualify as state action if the state has delegated to the private entity a function "traditionally exclusively reserved to the state."[131] This doctrine is grounded in the notion that the government should not be able to avoid the Constitution by delegating its task to the private sector.[132] It

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Content Selection (visited Feb. 22, 2000) <http://slash.dotat.org/~newton/pics/>; *see also* Lessig, *supra* note 28; *see generally* Lasica, *supra* note 66.

126. It would be difficult, and problematic, to hinge a finding of state action solely on the premise that the private entity was created for the furtherance of a government purpose. For state action to lie there simply must be more, as the text above indicates. *See supra* notes 111-121 and accompanying text. However, this does not mean that PICS and its relation to the government may not fall under one of the exceptions to the doctrine. *See infra* Part III.B-C.

127. *See San Francisco Arts*, 483 U.S. at 543.

128. *See id.* at 546-47.

129. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (1974) (no state action in the operation of a private utility company even though it was given virtual monopoly status and licensed by the state).

130. *Id.* at 345.

131. *Id.* at 352.

132. *See* Lebron v. National Railroad Passenger Corp., 513 U.S. 374, 397 (1995).

first arose in *Smith v. Albright*,[133] where the Court ruled that holding an election for government office is a public function that must meet the constitutional requirements of equal protection.[134]

Another early case applying the public function exception was *Marsh v. Alabama*.[135] The Court held that running a city was a public function, and therefore, when done by a private entity, must be in compliance with the Constitution.[136] The Court followed this line in *Evans v. Newton*,[137] where it held that running a park was a public function, and therefore, a private entity must manage it under the constraints of the Constitution.[138] However, the Court narrowed the broad interpretations of the public function exception found in *Marsh* and *Evans* in other contexts, specifically in the collision between property rights and freedom of speech.[139] In fact, the government function analysis has developed along restrictive lines, finding that the mere operation of business which could be performed by a government will not be construed as a public function.[140]

In order to establish that PICS falls within the public function exception, the regulation of Internet speech must be shown to be a traditional and exclusive state function. In the broadest sense, it can be argued that the government has a traditional and exclusive function of regulating mass media, be it radio, broadcasting, or the press. Since the Internet is a

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133. 321 U.S. 649 (1944).

134. *See Smith*, 321 U.S. at 664.

135. 326 U.S. 501 (1946).

136. *See id.* at 509.

137. 382 U.S. 296 (1966).

138. *See id.* at 302.

139. *See, e.g.*, Hudgens v. National Labor Relations Board, 424 U.S. 507, 519-21 (1976) (where the Court concluded that the First Amendment does not apply to privately owned shopping centers regardless of the content of the speech. This conclusion is reconcilable with the Jackson test, because it is arguable that shopping centers are not a task traditionally and exclusively held by the government).

140. *See Jackson*, 419 U.S. at 352; *see also* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164 (1978) (no state action in the sale of a debtor's goods by a warehouseman even though a state law authorized such sales).

medium of communication,[141] any regulation of it may be considered a public function.[142] Therefore, if PICS can be said to be a delegation of Internet regulation to a private entity, then it falls under the public function exception.

The authority of the government to regulate mass media such as broadcasting, cable, and radio is well established.[143] In fact, the Telecommunications Act of 1934, and its revision in 1996, demonstrates the government's persistent and pervasive involvement in regulating communication and the media.[144] Moreover, state governments have a tradition, dating back to the early days of the common law, of regulating speech and the press where a compelling public interest dictates such action.[145] Laws concerning defamation, libel, and perjury fall into this category; as do ordinances concerning public and nonpublic forums, parades and assemblies. The argument follows that since there is such a long and extensive history of government involvement in regulating all forms of media, and the Internet is a medium of communication, then any regulation of Internet communications must fall under the public function exemption because it is a traditional and exclusive state function.

However, an equally convincing argument can be made that the regulation of speech is not a traditional and exclusive state function. Indeed, one may question whether the government has a legitimate func-

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141. *See* Reno v. ACLU, 521 U.S. 844, 850 (1997).

142. *See generally id.* In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court acknowledged Congress' power to regulate certain speech on the Internet. For example, the obscenity section of the CDA was not struck down. The Court said Congress may regulate speech on the medium of the Internet, but its means must pass strict scrutiny.

143. *See generally* Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969) (broadcast television); Turner Broadcasting System v. FCC, 512 U.S. 622 (1995) (cable television); FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (radio broadcasting) (establishing the government's ability to regulate mass media).

144. *See generally* 47 U.S.C. §§ 153-706 (1996) (regulating a broad spectrum of telecommunications-related activities).

145. *See generally* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1022-1025 (1997) (providing a brief history of speech and press regulation).

tion in regulating speech at all. The First Amendment itself was written as a safeguard against the government from having any role in telling its citizens what they may or may not say.[146] It is the people themselves who have the inherent traditional power to censor their speech; the government's role is limited to those rare instances where it behooves the public interest to restrict communications, and even then, the state's action must generally pass strict scrutiny.[147] Moreover, even if the regulation of speech has been traditionally exercised by the sovereign via certain forms of censorship, it has never been exclusively reserved to the state, and therefore cannot satisfy the second half of the exception.[148] One need look no further than a parent scolding a child, or a newspaper editor declining to print a story, to find examples of non-government sponsored censorship.

The problem with reaching a conclusion on the merits of these opposing arguments is that the state action doctrine and its exceptions are a "conceptual disaster area."[149] As many commentators have pointed out, the doctrine's application over the past fifty years has been anything but consistent.[150] One prime example of the Court's possible arbitrariness with respect to the public function exception is the Court's inconsistency in the shopping center context.[151] However, a couple of factors tend to favor a conclusion that PICS does not qualify under the public function exception.

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146. *See* Smith v. California, 361 U.S. 147, 156-59 (1959) (Black, J., concurring).

147. *See generally* GUNTHER & SULLIVAN, *supra* note 145, at 1022-1245.

148. *See* Wade v. Byles, 83 F.3d 902, 906 (7th Cir. 1996) (holding that notwithstanding that the provision of security and the power of arrest are powers traditionally exercised by the police forces of the state, these powers have never been exclusively reserved to the state and therefore a private security guard's actions do not constitute state action under the traditional and exclusive exception to the state action doctrine).

149. Henry J. Friendly, *The Public Private Penumbra -- Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982) (quoting Black, *The Supreme Court, 1966 Term - Foreward: "State Action," Equal Protection, & California Proposition* 14, 81 HARV. L. REV. 69, 95 (1967)).

150. *Cf.* Chemerinsky, *supra* note 106, at 505.

151. *See* note 139 and accompanying text; *see also* Chemerinsky, *supra* note 10, at 399-400.

Primarily, the tone and language of *Jackson* sets a high bar for any public function argument. In *Jackson*, the Court declined to extend state action to an electric utility company despite the facts that the electric company provided a public service, under a virtually state granted monopoly, and was subject to heavy state regulation. The electric company did not qualify under the public function exception because running a utility is not a function "traditionally exclusively reserved to the State."[152] This bar does not bode well for a public function finding with respect to PICS in light of the facts that PICS is by no means a state granted monopoly, nor subject to intense state regulation, and its function—the regulation of Internet speech—has never been an exclusive prerogative of the State. Another factor to consider is that PICS deals with First Amendment violations, rather than racial discrimination issues. At least one circuit has repeatedly held that state action inquiries involving First Amendment violations tend to favor against the finding of state action, as opposed to challenges involving charges of racial discrimination where state action is easier to find.[153] This factor, combined with the Supreme Court's restrictive interpretation of "traditional and exclusive," could very well lead to the conclusion that state action is not present in the instant matter.

C. *Entanglement and PICS*

The final state action category under which PICS may fall is the entanglement exception.[154] Under this exception, the Constitution applies if the government affirmatively authorizes, encourages, or facilitates pri-

152. *See Jackson*, 419 U.S. at 352.

153. On account of the generally recognized anathematic status of any government-sponsored racial discrimination, the second circuit has held that a lesser degree of state involvement is needed to meet the state action requirement in cases alleging such discrimination, *see Jackson v. Statler Foundation*, 496 F.2d 623, 635 (2d Cir. 1974), than in those claiming infringement of First Amendment rights, *see Wahba v. New York University*, 492 F.2d 96 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974); *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973); *Powe v. Miles*, 407 F.2d 73, 82-83 (2d Cir. 1968).

154. *See* Chemerinsky, *supra* note 10, at 395.

vate conduct that violates the Constitution.[155] State action will be found where the government has commanded or encouraged the alleged wrongdoer to engage in the activity which has harmed the aggrieved party.[156] The decision is made ad hoc by "sifting facts and weighing circumstances."[157] The entanglement exception usually deals with, but is not limited to, the categories of judicial and law enforcement actions, government licensing regulation, government subsidies, and voter initiatives.[158] The Court is most likely to find state action under this exception where it can be shown that the government's purpose was to undermine protection of constitutional rights, or that the government facilitated such private conduct.[159]

The key to determining whether PICS qualifies is assessing the history of the Clinton Administration's involvement with PICS. Evidence of the White House's stance on PICS demonstrates unconditional support.[160] At the White House Censorware Summit, President Clinton joined with numerous firms of the Internet and computer industry to design a family friendly Internet.[161] In the White House Release, A Family Friendly Internet,[162] issued shortly after the summit, the President laid down a strategy that clearly delineates the administration's proposed

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155. *See id.*

156. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 724 (1961) (racial discrimination by private lessee of a restaurant in a state parking authority complex constituted state action because of the degree of state involvement in the creation and maintenance of the complex and the benefits mutually conferred).

157. *Id.* at 722.

158. *See* Chemerinsky, *supra* note 10, at 403.

159. *Id.* at 414.

160. *See Clinton Announces Plan for Kid-Friendly Internet Despite Court Ruling,* COMM. DAILY, July 17, 1997, at 39; J. Scott Orr, *Clinton roots for the internet providers to provide the filters for filth Voluntary rating system and vigilant parents can take place of Decency Act, President Says,* STAR-LEDGER, July 17, 1997, at 4.

161. *See* McCullagh, *supra* note 125. The firms which met at the White House included America On-line, AT&T, Microsoft and a multitude of other high-tech firms and non-profit groups. *See* Center for Democracy and Technology, *supra* note 8.

162. *See* White House Help Desk, (visited February 22, 2000) <http:// www.whitehouse.gov/WH/New/Ratings/index.html>.

Internet regulation direction along PICS and the rating of the net.[163] In fact, the same strategy, only in more detail, is laid out in the Internet Family Empowerment White Paper.[164] After the summit, President Clinton stated: "We need to encourage every Internet site, whether or not it has material harmful to minors, to rate its contents."[165]

In December of 1997, the government went one step further at the Internet/On-line Summit: Focus on Children.[166] Hundreds of leaders of the industry, law enforcement, child and public advocacy organizations, government, schools, and libraries gathered in Washington for the three day summit to discuss ways to enhance the safety and benefits of cyberspace for the American family.[167] Joined by Vice President Al Gore, as well as several other influential governmental figures, the participants sought to reach a consensus on how to keep minors away from cyberporn.[168] Their conclusion: "let the private sector handle it."[169] Poignantly, the mission statement of the Summit itself tacitly stated that the private sector should assume a leadership role in protecting minors from illicit material on the Internet.[170] Rather than relying on government regulation, Vice President Gore said that "parents should look to [the] industry for

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163. *See id.*

164. *See* Center for Democracy and Technology, *supra* note 8.

165. McCullagh, *supra* note 125. Some sources have gone so far as to say that the administration threatened the industry with "son-of-CDA" style legislation if good-faith voluntary censorship was not followed by the industry. *See also* Lessig, *supra* note 28; Newton, *supra* note 125.

166. The Internet/On-line Summit: Focus on Children, was a first-ever summit of industry leaders, educators, law enforcement officials, public interest and family advocates seeking to enhance the safety and education of children in cyberspace. *See News from the Summit* (last modified Dec. 3, 1997) <http://www.kidsonline.org/news>.

167. *See Summit Archives* (last modified Feb. 25, 1998) <http://www.kidsonline.org/archives>.

168. *See* Andrew L. Shapiro, *The Danger of Private Cybercops*, N.Y. TIMES, Dec. 4, 1997, at A31.

169. *See id.*

170. *See Internet On-line Summit: Focus on Children. Mission Statement* (last modified Nov. 19, 1997) <http://www.kidsonline.org/mission>.

tools that will let them filter Internet content."[171] The industry has responded in the affirmative. Among other initiatives, ISPs now, collectively, offer filtering programs to over 85% of Internet users, and the browser companies have reacted by offering almost 90% of the market access to PICS compliant software.[172] Finally, in the White House Censorware and Internet/On-line: Focus on Children Summits, the Clinton Administration has in effect laid down the plan for Internet regulation and placed the private sector at the helm.[173] The government appears to be a supervising partner, declaring initial guidelines, whereas the burden of implementation (and the burden of liability) has been handed to the private sector.[174] In the words of Robert Corn-Revere, "Censorship is being contracted out."[175]

In *Writers Guild of America, West, Inc. v. FCC*,[176] the Central District Court of California concluded that threats, influence, and pressure by the chairman of the FCC improperly caused the broadcasting networks and the National Association of Broadcasters (NAB) to adopt the

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171. Shapiro, *supra* note 168.

172. *See* discussion *supra* Part I.A.

173. The evidence of a concerted dialogue between the government and PICS is well documented. The process can be broken down into 3 stages. The first stage is the Introduction of the Problem. The administration held a White House Censorware summit, less than a month after the CDA decision. At the summit, the President unequivocally supported ratings systems and filters to be administered by the private sector as a means of addressing the Internet censorship quandary. *See* discussion *supra* and notes 160-165 and accompanying text. The second stage, the Passing of the Torch, evidences in the Internet /Online: Focus on Children Summit. There the administration tacitly hands over responsibility of policing the net to the private sector, while implementing certain initiatives, e.g., the Internet hotline, to facilitate the industry's proposed actions. *See* discussion *supra* notes 166-171. The next and final step, Implementation, is now entirely out of the administration's hands, in effect washing any action on behalf of PICS clean of state action. So in a literal sense, it is not state action, per se, which is being alleged, rather state planning of the action.

174. The two summits produced initiatives and guidelines for the creation of a "Family Friendly Internet." *See* White House Help Desk, *supra* note 162; Shapiro, *supra* note 168.

175. Mauro, *supra* note 111.

176. 609 F.2d 355 (9th Cir. 1979).

so-called "family viewing policy" as an amendment to the NAB television code, thereby violating the First Amendment.[177] Although the Court of Appeals for the Ninth Circuit later vacated and remanded the holding on primarily jurisdictional grounds,[178] the District Court's analysis of the First Amendment issue is of particular relevance to the instant matter.

Specifically, the District Court found that Chairman Wiley's techniques of convincing the industry to adopt the "family viewing hour" violated the First Amendment.[179] These tactics involved: (1) five meetings between himself and members of the Commission staff and industry representatives which dealt with television sex and violence; (2) three public speeches by Chairman Wiley which exhorted the industry to undertake private action and indicated that unless some action were taken, the government might intervene; (3) several telephone conversations between Chairman Wiley and various network executives; and (4) suggestions by Chairman Wiley to various NAB representatives that the NAB expedite its consideration of a proposal for a Code Amendment incorporating the family viewing policy.[180] Chairman Wiley's campaign lasted from October 1974 until April 1975. In April 1975, the NAB announced the family viewing policy.[181]

The analogy between *Writers Guild* and PICS is striking. Threats, influence, and pressure by the federal government to convince the Internet industry to adopt PICS are evident.[182] So far, the government has held two summits addressing Internet regulation, with more to follow.[183] Furthermore, various public officials, including the President and Vice

177. *Id.* at 360.

178. *See id.* at 361-66.

179. *See id.* at 362.

180. *See id.* at 359-60.

181. *See id.* at 360.

182. *See* White House Help Desk, *supra* note 162; *see also* The White House, Office of the Press Secretary *supra* note 23. The legislature has not relaxed its attempts to regulate the Internet, on both the federal and state levels. *See On-line Censorship in the States*, SPEECH IN AMERICA (ACLU, New York, N.Y.), Sept. 1997 (covering state and local legislatures attempts to regulate the Internet).

183. *See* discussion *supra* Part III.B.

President, have given speeches attesting to the policy of private sector regulation of the Internet.[184] Finally, the government's unconditional support of PICS from the beginning indicates the strong possibility that it conducted several correspondences to industry executives of its position on Internet regulation, and buttress the theory of repeated "Son of CDA" legislation threats.[185]

If the District Court found requisite state action in Chairman Wiley's informal tactics to implement the family viewing policy, then it is surely plausible that another federal court may find state action in the government's approach to implementing private regulation of the Internet via PICS. However, as noted above, the District Court's holding was remanded on primarily jurisdictional grounds. The Court of Appeals found that notwithstanding the fact that techniques used by the FCC presented serious Constitutional issues, the District Court should have deferred the issues to the FCC.[186] But this primary jurisdiction problem is not evident in a PICS cause of action.[187] Therefore, in theory, with the absence of the jurisdictional tension prevalent in *Writers Guild*, the initial holding in *Writers Guild* may be valid precedent upon which to premise an argument for finding state action in PICS.

D. *The First Amendment Issue*

As the above discussion illustrates, "whether particular conduct is

184. *See id.*

185. *See id.*

186. *See Writers Guild of America, West, Inc.* 609 F.2d at 362-365. Due to the delicate nature of the balanced system of broadcast regulation, the Court held that the district court had overstepped its boundaries by not adhering to the doctrine of primary jurisdiction and deferring the issue to the FCC. *See id.*

187. Contrary to broadcasting, the issue of comity among government branches present in *Writer's Guild* does not apply in the instant case. A court considering a challenge to the constitutionality of PICS would not be concerned with this question of comity because the FCC's present Internet jurisdiction only concerns economic, not content regulation. *See, e.g., The FCC, Internet Service Providers, and Access Charges* (last modified Jan. 7, 1998) <http://www.fcc.gov/Bureaus/Common_Carrier/Factsheets/ispfact.html>.

'private' on the one hand, or 'state action,' on the other, frequently admits of no easy answer."[188] Assuming state action is found, under any of the above exceptions, the easier question may be whether PICS regulation of Internet speech actually violates the protections of the First Amendment. As discussed in Part II of this Note, there are various freedom of expression problems that arise with PICS' regulation of Internet content. As discussed earlier, the Supreme Court held in *ACLU v. Reno* that Internet speech merits the same level of Constitutional protection as the printed word.[189] It would follow that if PICS conduct would not be acceptable with respect to the dissemination of newspapers, books or magazines, then it would similarly be violative of the First Amendment with respect to Internet speech.

In *Smith v. California*,[190] the Supreme Court held that a city ordinance, which imposed strict criminal liability on any bookseller possessing obscene material, had such a tendency to inhibit constitutionally protected expression that it could not stand. "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience."[191] The demand of a bookseller to inspect everything in his or her stock before releasing to the public would inevitably deplete the amount of information released to the public of both obscene and constitutionally protected material. The bookseller's burden would therefore become the public's burden; the "bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered."[192]

Arguably, PICS imposes a similar burden on Internet content providers. As illustrated in Part II of this Note, in order for content providers to

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188. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-350 (1974) (citations omitted).

189. *See* Reno v. ACLU, 521 U.S. 844, 870 (1997).

190. 361 U.S. 147 (1959).

191. *Id.* at 153 (citations omitted).

192. *Id.* at 154.

ensure that their product reaches an audience, they will inevitably have to self-censor the material to fall within the parameters of acceptability of the PICS compliant censors. This self-censorship will result in substantive costs similar to the bookseller's burdens present in *Smith,* as well as the incidental public costs discussed in *Smith.* Under PICS, an Internet content provider will have to examine everything he or she has published, is publishing and wishes to publish in order to ensure that it will not be blocked. Such a content review and rating process would invariably result in a lesser degree of information being released to the public because of the costs associated with self-rating and the fact that notwithstanding the content's self-rating, it may still be blocked. With respect to non-profit organizations, such as Planned Parenthood and Art-on-the-Net, the costs of inspection and self-rating are especially acute because they do not have the wherewithal to rate their Internet site's content. The inherent financial limitations of most non-profits would have an even greater effect on what information such non-commercial content providers release.

It is unclear, however, whether a claim of compelled self-censorship can stand without any criminal or civil penalties. The *Smith* court relied heavily on the fact that the ordinance imposed criminal sanctions on the basis of strict liability, a prior restraint which inevitably leads to self-censorship.[193] Civil sanctions, such as fines with respect to defamation suits, have also been recognized as substantive prior restraints leading to self-censorship which are unconstitutional.[194] Self-censorship is a harm that can be realized without actual prosecution,[195] but it seems that some substantive penalty must loom over the speaker in order for the challenged scheme to violate the First Amendment. A claim such as the instant one—that PICS induces self-censorship by compelling content providers to tailor their speech in order to reach a greater audience—may

193. *See id.* at 154-55.

194. *See* New York Times v. Sullivan, 376 U.S. 254, 266 (1964) (concluding that if the press were required to guarantee the truth of all their factual assertions on penalty of civil fines, such a paradigm would lead to self-censorship, rather than free debate).

195. *See* Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393 (1988); *see also* ACLU of Georgia v. Miller, 977 F. Supp. 1228, 1231 (N.D. Ga. 1997).

not be enough despite the effects that such prior restraint may have on society as a whole because the only penalty the speaker faces is the threat of not being heard by as many people as he or she originally wanted.

Herein lies an alternative challenge to PICS on First Amendment grounds—the right to receive information. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[196] citing numerous precedent, the Supreme Court discussed the "First Amendment 'right to receive information and ideas,' concluding that freedom of speech 'necessarily protects the right to receive.'" In finding that prescription drug consumers had standing to challenge a statutory ban on the dissemination of prescription drug prices, the Court concluded that if there is a "right to advertise, then there is a reciprocal right to receive the advertising."[197] Similar to the consumers in *Virginia Pharmacy*, Internet users have the right to receive information of various content providers on the Internet and PICS detrimentally affects this access. On the most fundamental level, PICS restricts the free flow of all types of speech, controversial and banal, which the public has a right to hear.[198] More specifically, PICS restricts access to sites without notifying the user of what he or she is missing, meaning that many Internet users will be unknowingly deprived of all kinds of information, including constitutionally protected speech.

Another argument against the First Amendment validity of PICS may be that its regulation of Internet speech is unconstitutionally overbroad.[199] A PICS paradigm would substantially restrict all types of

196. 425 U.S. 748, 756 (1976) (citations omitted) (Court held that consumers of prescription drugs had standing to assert the First Amendment rights enjoyed by advertisers of the product and that statutory bans on advertising prescription drug prices violated First and Fourteenth Amendment and could not be justified on the basis of the state's interest in maintaining the professionalism of its licensed pharmacists).

197. *Id.* at 757; *see also* United States v. National Treasury Employees Union, 513 U.S. 454, 470 (1995) (holding that "large-scale disincentive to Government employees' expression [imposed] a significant burden on the public's right to read and hear what employees would otherwise have written and said" and therefore the disincentive abridged First Amendment freedoms of both the public and the employees).

198. *See National Treasury Employees Union*, 513 U.S. at 470.

199. *See* Reno v. ACLU, 521 U.S. 844, 874 (1997).

speech, from the constitutionally protected to the constitutionally infirm. Human rights groups, such as Amnesty International, who document governmental atrocities would have to either censor their on-line reports or risk not being seen or heard on the web by many. Various Legal Aid organizations, with barely enough funds to maintain a web site, will be forced to squander precious resources to rate its site in order to comply with rating schemes. In this sense, PICS is unconstitutionally overbroad because it significantly restricts more speech than the Constitution allows to be controlled in a substantive fashion by incidentally imposing costs on content providers which are otherwise superfluous.[200] Furthermore, a PICS rating scheme raises the problem of arbitrary enforcement, another concern of the overbreadth doctrine.[201] As discussed in Part II of this Note, PICS is by definition arbitrary since all ratings systems, whether they be rule or standards based, are to some extent, inherently somewhat judgmental or capricious.[202] This is compounded by the high susceptibility of selective enforcement of ratings systems via a third party rating service.

In response, one may argue that the effect of PICS on Internet speech is not substantive enough to trigger an overbreadth challenge. The reasoning: in order to avoid the deleterious effects PICS may impose, the Internet user need only turn off the PICS compliant software. This argument is based on the erroneous assumption that all Internet users have the capacity to turn PICS off. In addition, this ignores the reality that most content providers, when threatened with the prospect of not getting through to a large portion of their target audience, will invariably censor their material accordingly, a priori. Therefore, it makes no difference that some Internet users can turn off PICS and thereby get through to the pre-

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200. *See* Schad v. Borough of Mt. Emphraim, 452 U.S. 61, 76-77 (1981) (court found unconstitutional a city ordinance prohibiting all live entertainment, notwithstanding that it was targeted against live nude dancing, which is not protected by the First Amendment, because the ordinance prohibited much more speech than just nude dancing).

201. *See* Kolender v. Lawson, 461 U.S. 352 , 357 (1983); *see also* Houston v. Hill, 482 U.S. 451, 465 n.15 (1987).

202. *See* Weinberg, *supra* note 52, at 464-67.

viously blocked site, because once they get there the material will have already been self-censored.

IV. THE ANTITRUST ALTERNATIVE

> Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.
>
> —Justice Hugo Black, *Associated Press v. United States*[203]

There still remains the strong possibility that prerequisite state action may not be found.[204] In that case, one may turn to the alternative of an antitrust action on which to base a claim against PICS. In essence, such an argument must demonstrate that the corporations who consolidated under the auspices of the World Wide Web Consortium combined in the form of PICS to, in effect, restrain the trade and commerce of ideas among the several states.[205] However, the reader must keep in mind that the following discussion is a basic application of general antitrust principles to the instant case; an in-depth analysis, using substantive case law and precedent, is beyond the scope of this note.

The basic objective of federal antitrust legislation is to prevent or suppress devices or practices which create monopolies or otherwise restrain trade or commerce by suppressing or restricting competition and obstructing the course of trade.[206] Most pertinent to the PICS discussion is section one of the Sherman Antitrust Act, which declares that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign

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203. 326 U.S. 1, 20 (1945).

204. *See* discussion *supra* Part III.

205. *See* 15 U.S.C. § 1 (1981).

206. *See* RICHARD POSNER & FRANK H. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS 152-70 (1981).

nations, is hereby declared to be illegal."[207] However broadly the Sherman Act was written, the courts have come to apply it only to unreasonable restraints of trade.[208] The courts have grouped these restraints into two camps: per se offenses and those that violate a rule of reason.[209]

The paramount inquiry under either restraint analysis is whether the corporations who consolidated their efforts under the auspices of the World Wide Web Consortium, combined in the form of PICS to restrain the trade and commerce of ideas among the states. As proposed in Part II of this Note, this position is highly tenable.[210] Primarily, PICS itself admits that its sole purpose is to control content selection of the Internet, although in theory, the control lies with the user.[211] The creators of PICS go so far as to fully acknowledge the possibility that the end result of PICS may be the stifling of a multitude of ideas on the Internet—a homogenization of the most diverse market place of ideas the world has yet to know.[212] With this intent and knowledge in mind, combined with the fact that any purported aim to control content will inevitably restrict the exchange of ideas of the Internet on some level, members of PICS would more than likely qualify as a group that has combined with the intent to restrict trade among the states. The next inquiry is whether PICS regulation of the trade of ideas on the Internet classifies as either a per se viola-

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207. 15 U.S.C. § 1 (1981).

208. *See* Standard Oil Co. v. United States, 221 U.S. 1, 99-100 (1911).

209. *See* Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958).

210. *See* discussion *supra* Part II.

211. World-Wide Web Consortium, *PICS: Rules 1.1* (Nov. 4, 1997) <http://www.w3.org/TR/PR-PICSRules.htm>.

212.

> Perhaps most troubling is the suggestion that any labeling system . . . will tend to stifle noncommercial communication .... Because of safety concerns, some people will block access to materials .... For such, the Internet will function more like broadcasting, providing access only to sites with sufficient mass market appeal to merit the cost of labeling .... While lamentable, this problem is an inherent one that it is not caused by labeling.

See Resnick, *supra* note 12, at 108.

tion of section one of the Sherman Act, or falls under the rule of reason doctrine.

Per se violations are business practices that are so "pernicious and so anticompetitive in nature that the courts have declared these practices to be unlawful under all circumstances without regard to questions of motive and effect."[213] Some examples of per se offenses include horizontal price fixing, vertical price fixing, horizontal customer allocations, and some tying arrangements.[214] A tying arrangement is a type of discriminatory condition imposed upon a person in a business relationship which may injure the imposee, to the benefit of the imposer.[215] It is basically a prerequisite to the service offered, which must be fulfilled before the requested service is provided.[216] The basic example of a tying arrangement is a producer of photocopying machines requiring purchasers to buy copy paper from the company as a condition of the sale.[217]

PICS may fall under the tying arrangement class of per se offenses. Through the position of its monopoly power, PICS is asking Internet users to rate their site according to another's set of values.[218] If the user does not rate his site it will go largely overlooked.[219] In other words, before you can reach a mass audience you must rate yourself, regardless if you want to or not, and even then, you still may not reach your targeted audience.[220] PICS infringes on the right to publish of those who do not

213. Conrad M. Shumadine et al., *Antitrust and the Media*, 461 PLI/PAT 97, 179 (1996).

214. *See* ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS 326-40 (1994).

215. *See id.*

216. Some examples of tying arrangements are: 1) requiring the purchase of space in one newspaper as a prerequisite to the purchase of space in another; or 2) requiring the purchase of a service as a prerequisite to the purchase of radio or television time; or 3) the imposition of a condition that a subscriber to a publication or to a news service must subscribe, as well, to the other unneeded or unwanted publications or service. *See generally* POSNER & EASTERBROOK, *supra* note 206, at 777-857.

217. *See* GELLHORN & KOVACIC, *supra* note 214, at 326.

218. *See* discussion *supra* Part II.A-B.

219. *See id.*

220. *See id.*

wish to rate themselves. PICS prevents Internet speakers from reaching an audience via a tying arrangement which sets the condition of mass publication on the prerequisite of self-rating.

In the alternative, PICS may fail the "rule of reason." The "rule of reason" doctrine is an amorphous concept which applies to types of "business behavior which may be anticompetitive in certain circumstances, but which are not so clearly anticompetitive in nature that the courts are willing to fashion an inflexible rule of illegality."[221] Justice Brandeis stated this "rule of reason" test in the following fashion:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business . . . ; its conditions before and after the restraint was imposed; the nature of the restraint; and its effect, actual or probable.[222]

In *Associated Press v. United States,*[223] the Supreme Court invalidated the by-laws of the Associated Press (AP) which prohibited all AP members from selling news to non-members and granted each AP member the discretion to block its non-member competitiors from joining the AP.[224] In affirming the lower court decision that the by-laws "were contracts in restraint of commerce,"[225] the Court agreed that the by-laws were designed to "stifle competition in the newspaper publishing field" and that the by-laws "hindered and impeded the growth of competing newspapers."[226] Addressing the AP's claims that such a decision infringed upon their First Amendment freedoms, the Court answered that

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221. Shumadine et al., *supra* note 213, at 179.
222. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
223. 326 U.S. 1 (1945).
224. *See id.* at 4.
225. *Id.* at 11.
226. *Id.* at 12.

the "freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."[227] The Court found no support, not even in the First Amendment, that "a combination to restrain trade in news and views has any constitutional immunity."[228]

The Internet is a medium comparable to the press.[229] Since a group of actors conspiring to restrict the trade of ideas within the context of the press may be invalid, as held in *Associated Press*, it follows that an unreasonable restraint of ideas by a powerful cabal with respect to the Internet may be invalid as well. In fact, an argument can be made that any restraint of trade of ideas on the Internet should be even more closely scrutinized under the antitrust laws than the restraints invalidated in *Associated Press* because of the inherent egalitarian nature of the Internet.

First, the adage that freedom of the press is limited to those who own one, does not apply to the Internet.[230] The startup and maintenance costs of running your own personal soapbox on the Internet is, generally speaking, much lower than other mediums of mass communication, such as newspapers, magazines, radio, and broadcasting.[231] These low startup and maintenance costs mean that in theory, all voices begin from a somewhat equal footing on the Internet. Moreover, the Internet's exponential growth and the volume and diversity of its content are due in large part to the fact that no one entity or cabal has ever come close to exercising control over its development or substance.[232] This is far different from the press where control and content is highly concentrated in the hands of a few major players.

The imposition of a rating paradigm, by a group of the most power-

227. *Id.* at 20. The Court affirmed this basic proposition in *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139-40 (1969) and in *Lorrain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951).

228. *See Associated Press*, 326 U.S. at 20.

229. *See* Reno v. ACLU, 521 U.S. 844, 849-53 (1997).

230. *See* ACLU v. Reno, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999).

231. *See id.* "In the medium of cyberspace . . . anyone can build a soapbox out of web pages and speak her mind in the virtual village green to an audience larger and more diverse than any the Framers could have imagined." *Id.*

232. *See* ESTHER DYSON, RELEASE 2.0 at 8 (1997).

ful actors in the Internet community upon all its other constituents, poses a serious threat to the continued evolution of this democratic medium. Such a unilateral imposition, by the large combination which is PICS, directly threatens the independence of the "small dealers and worthy men" of the cyberworld.[233] One of the initial policy bases behind the antitrust laws and their progeny is to "perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."[234] The Internet is the ultimate embodiment of this principle, and the antitrust laws should be used as a shield to maintain the Internet's position as such.

In the instant case, industrial members of PICS place an unreasonable restraint on the interaction of ideas between Internet users. Before PICS, Internet speakers had an unlimited audience for their ideas, and listeners had unlimited access to those they wanted to hear.[235] After PICS, the audience and the access may be severely limited.[236] The nature of the restraint of PICS violates the speaker's right to publish freely, and prohibits the listener from hearing without hindrance.[237] As many commentators have shown by demonstrating the ineffectiveness and arbitrary nature of the filtering software, the deleterious effects of PICS are very probable if not progressively actual.[238] Finally, the evil PICS was de-

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233. United States v. Vons Grocery Co., 384 U.S. 270, 274 (1966) (citing United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897)) (stating that one of the avowed purposes of the antitrust laws is to protect smaller entrepreneurs from elimination by powerful monopolistic combinations).

234. United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945).

235. This general proposition stems from that fact that prior to PICS, content providers had no incentives whatsoever (except their own editorial judgment) to limit or censor their online material. *See* discussion *supra* Part II.A-B. However, post PICS may prove to be a different situation. *See id.* Therefore, it follows that if content providers provide less material, then content seekers will ostensibly receive, post PICS, less material as well.

236. *See* discussion *supra* Part II.A-B.

237. *See id.*

238. Studies have shown that current filters are incredibly inaccurate, blocking sites that an Internet user would not contemplate being blocked under the prescribed

signed to combat, exposure of offensive and obscene material to children, although well intentioned, can be addressed in some other manner that would not serve to the detriment of adults and children as well.[239]

In *The Net Labeling Delusion*,[240] Irene Graham sets forth the idea that labeling is inherently a backwards attempt at protecting children.[241] Basically, unless every document is labeled, the software must be set to block unlabeled material in order to effectively protect children.[242] If the software does not block unlabeled material there is the obvious risk that children will be exposed to unsuitable material.[243] Therefore, if unlabeled material is blocked by the software program, placing a label on unsuitable material is unnecessary to protect children because the material is inaccessible whether or not it is labeled.[244] There is no reason to label material that parents do not want their children to have access to. If it is unrated, the children will be blocked from the material anyway.

> In other words, the sole purpose of labeling, with regard to children's access, is to make material available to children who are using filtering programs, not to block it. There is no point, for example, in requiring Playboy to label photos containing nudity; if they are unlabeled they will be blocked anyway.[245]

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paradigm. Since the PICS system hinges on the accuracy of the ratings systems and the filters which complement it, this problem illustrates the inadequacies of the proposed system and the real dangers which lie in its implementation. *See, e.g.*, Karen G. Schneider, *Learning from the Internet Filter Assessment Project, Summary Report* (Sept. 13, 1997) <http:// www. bluehighways .com/ tifap/ learn.htm>; *see also* Electronic Privacy Information Center, *Faulty Filters: How Content Filters Block Access to Kid-Friendly Information on the Internet* (Dec. 1997) <http:// www2.epic .org/ reports/ filter-report .html>.

239. *See* Graham, *supra* note 84.

240. *See id.*

241. *See id.*

242. *See id.*

243. *See id.*

244. *See id.*

245. *Id.* (emphasis omitted).

This further demonstrates that the restriction of the trade of ideas under PICS is an unreasonable restraint and may not be warranted as a prophylactic measure to prevent children access to pornography. As Graham suggests, there may be other less infringing avenues of regulation upon speech, which can be implemented to protect children from unsuitable material.[246] The fact is that PICS is not aimed towards less regulation of speech, it targets the entire gamut of web content. A more finely tuned approach, which in fact addresses the need to block unsuitable material from children and provide the children with suitable material, may be more acceptable. Furthermore, the ostensible solution is good parenting.[247] Just as a parent can exclude a child from watching certain videos on the home VCR, the parent can assume the responsibility of what the child may watch on the computer screen.

V. CONCLUSION

The problem with PICS, simply put, is that it privatizes Internet censorship. The only difference between government regulation of the Internet and a private rating system under PICS is who is deciding what we see. For all its professed good intentions, PICS is still just another form of censorship. Furthermore, there is an increased danger with censorship going corporate, because at least the government can be held accountable, whereas usually, in a constitutional paradigm, a private party may not be held to such a high standard.

Usually, state action is not even an issue, but in determining the constitutional muster of PICS, it is crucial. As the analysis demonstrates, any conclusion as to whether PICS may pass the state action requisite depends largely on its falling under the exceptions to the rule rather than the rule itself. Although these exceptions are even more inconsistent and unpredictable than the doctrine, this Note concludes that state action can

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246. *See* CPSR, *CSPR Press Release: Computer Professionals Question Internet Filtering Agreement* (last modified July 20, 1997) <http://www.cpsr.org/dox/issues/filters.html>.

247. *See id.*

be premised on an entanglement exception theory using *Writers Guild of America* as the point of departure. The alternative of an antitrust action may provide the redress which is avoided for lack of state action. Unfortunately, an in depth application of antitrust case law precedent is an endeavor which goes beyond the scope of this note.

In conclusion, the best possible alternative to PICS would be an approach suggested by Ms. Graham in *The Net Labeling Delusion*.[248] Ms. Graham stated that if unlabeled material is blocked by filters anyway, then the labeling of unsuitable material is superfluous.[249] I would propose a spin on this approach. The end purpose should be to give children access to suitable material, not to exclude them from unsuitable material. Web sites which profess to offer "kid-friendly" material should voluntarily tag their sites as kid-friendly and warrant their sites as suitable for children. These content providers have an incentive to label their material in such a fashion because it will facilitate children's access to their site.

In the converse, commercial pornographic sites should be required also to tag themselves. The procedure could comprise part of a licensing procedure requiring porn sites to register with an independent watchdog, something akin to the Better Business Bureau. The watchdog provides the porn site with its "tag" upon registration. When an Internet user wants commercial on-line pornography, he or she would then punch in the keyword on their search engine or browser which would seek out those tagged sites. The constitutional validity of regulating commercial pornography is well established, so First Amendment problems would be much less troubling.[250] Second, this would target the majority of sites

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248. *See* Graham, *supra* note 84.

249. *See id.*

250. The issue is not obscene pornographic speech, since even the staunchest critics of the CDA concede that its obscenity provisions were constitutional. *See* Reno v. ACLU, 521 U.S. 844, 870-74 (1997). Sexually explicit material has been held as a low value type speech which is open to government regulation. *See* Chemerinsky, *supra* note 10, at 836. Further, state regulation of commercial speech is examined under intermediate scrutiny, as opposed to strict. *See id.* at 893-903. Therefore, government regulation of

which parents are worried about, for example, Hustler, Penthouse, and the ubiquitous generic "smut-sites." Finally, this approach would not threaten the First Amendment rights of authors who have merely incorporated sexual themes into their works.

Of course this solution is far from perfect. We return to the problem of what should be the criteria for a "kid-friendly" site and a "commercial pornographic" site. However, at least it is a focused attempt at regulation rather than a blanket restriction on the entire Internet. The above solution attempts to address what should be the true aim: providing children with access to suitable material, while preventing their exposure to unsuitable material in a fashion that least restricts the free flowing exchange of ideas which is the Internet.

Fernando A. Bohorquez Jr.

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speech which falls under both of these categories—i.e. obscenity and commercial speech—may be constitutional and not violate First Amendment freedoms.