

**BARRIERS TO THE VOLUNTARY ADOPTION OF INTERNET  
TAGGING PROPOSALS**

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I. INTRODUCTION

One of the best qualities of the World Wide Web (“Web”) is the staggering quantity and diversity of available content. Not all content, however, is suitable for all users. In particular, many parents worry about the exposure of children to pornography on the Web.<sup>1</sup> Given the rapid growth in the amount of online sexual content, this concern is unlikely to abate.<sup>2</sup>

Congress has been and continues to be interested in protecting children from online pornography.<sup>3</sup> At first, Congress enacted heavy-

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1. See Richard Whitney Johnson, Note, *Trademark for Creating a Kid-Friendly Cyber-playground on the Internet*, 2006 UTAH L. REV. 465, 465 (2006).

2. See *id.*; see also C.W. Nevius, *Wise Parents Peek in Kids' MySpace*, S.F. CHRON., Feb. 25, 2006, at B1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/02/25/BAGT5HEPDK1.DTL&hw=myspace&sn=001&sc=1000>.

3. See Mark C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J.L. & PUB. POL'Y 977 (2002) (arguing that politi-

handed statutes, which were struck down by courts as unconstitutional censorship.<sup>4</sup> More recently, Congress has sought to encourage and, in some contexts, require the use of filtering software.<sup>5</sup> Filtering software allows the user to control what content he or others view when online.<sup>6</sup> For instance, parents may install a filter on their home computer in order to prevent their children from viewing Web content they deem inappropriate.

In their recent attempt to aid filtering, members of Congress have introduced legislation that would require websites containing sexually explicit material to include government-mandated labels, known as “tags,” on each web page containing such material.<sup>7</sup> Tagging proposals such as these are designed to assist consumers who employ filtering software by encouraging content providers to rate their content in a manner that facilitates detection of harmful material.<sup>8</sup> Some proposals require content providers to place tags in the code of their websites, while others would merely encourage content providers to tag voluntarily.<sup>9</sup>

However, tagging cannot succeed simply by congressional fiat. The willingness of content providers to implement the tags that Congress selects affects the success and, in some cases, the constitutional-

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cal forces encourage legislators to pass laws regulating sexual material online, even when those laws are obviously unconstitutional); Anuj C. Desai, *Filters and Federalism: Public Library Internet Access, Local Control, and the Federal Spending Power*, 7 U. PA. J. CONST. L. 1, 3 (2004) (“Congress loves to regulate the Internet.”); *see also*, S. Res. 205, 110th Cong. (2007) (enacted); H.R. Res. 455, 110th Cong. (2007) (enacted) (announcing June 2007 as “National Internet Safety Month”).

4. *See* Child Online Protection Act, 47 U.S.C. § 231 (2000), *invalidated by* ACLU v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007); Communications Decency Act, 47 U.S.C. § 223 (2000), *invalidated by* Reno v. ACLU, 521 U.S. 844 (1997).

5. In this regard, Congress has focused on schools and libraries. *See* Children’s Internet Protection Act (“CIPA”), 47 U.S.C.A. § 254(h) (West 2000 & Supp. 2004) (requiring libraries and public schools that obtain federal assistance to provide Internet access to install filtering software on their computers); *see also* Deleting Online Predators Act, H.R. 5319, 109th Cong. (2006) (requiring public schools and libraries receiving certain federal funding to block children from accessing “commercial social networking websites” and “chat rooms” without adult supervision). The Supreme Court has upheld CIPA. *See* United States v. Am. Library Ass’n, 539 U.S. 194 (2003).

6. *See infra* Part II.

7. The proposal was first introduced in three bills in the 109th Congress. *See* Project Safe Childhood Act, S. 3432, 109th Cong. § 3(c) (2006); Internet Safety (Stop Adults Facilitating the Exploitation of Youth) Act of 2006, S. 3499, 109th Cong. § 7 (2006); Internet Stopping Adults Facilitating the Exploitation of Today’s Youth Act (SAFETY) of 2006, H.R. 5749, 109th Cong. § 8 (2006). Although the 109th Congress ended soon after introduction of the bills, the proposal has been reintroduced in two bills currently before the 110th Congress. *See* Internet Stopping Adults Facilitating the Exploitation of Today’s Youth Act (SAFETY) of 2007, H.R. 837, 110th Cong. § 10 (2007); Protecting Children in the 21st Century Act, S. 49, 110th Cong. § 102(b) (2007). Congress has not yet taken any action on either bill.

8. The specifics of different tagging proposals vary greatly. They often differ in labeling standards and the method for encouraging implementation of the tags. Tagging proposals are discussed in Part III.

9. *See infra* Part III.

ity of the tagging proposals. Even congressional proposals that mandate tagging for certain websites cannot succeed without voluntary compliance by content providers who are not subject to U.S. law.<sup>10</sup> Several scholars have argued that market forces are likely to promote voluntary foreign compliance with U.S. tagging laws.<sup>11</sup> They believe that adoption of a tagging standard by the United States could serve as a tipping point, and ultimately promote widespread international coordination around that standard.<sup>12</sup>

This Note takes a more skeptical view. It argues that a tagging standard given legal effect only by the U.S. government is unlikely to lead to widespread voluntary adoption of tags by content providers. This Note also argues that any tagging scheme will give foreign providers of sexual content incentives to mislabel their websites. Part II describes how Internet filtering software works. Part III examines and compares tagging proposals put forth in Congress and in the academic literature. Part IV first analyzes the importance of voluntariness to the success of all tagging proposals, with particular attention to the inability of the United States to impose tagging requirements on broad classes of online sexual content. This Part then examines how courts have analyzed the First Amendment questions raised by tagging proposals. In Part V, after assessing the contention that tagging would occur voluntarily if tagging legislation were enacted in the United States, this Note argues that voluntary tagging is unlikely to occur because domestic content providers will still lack the economic incentives to tag and foreign content providers will have a heightened incentive to mislabel.

## II. BACKGROUND ON CONVENTIONAL FILTERING

Conventional Internet filters prevent computer users from accessing certain content online.<sup>13</sup> Filters can be limited to Web browsing, or they can extend to other Internet programs, such as e-mail and in-

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10. Proposals could also succeed if the United States persuaded other nations to adopt legal requirements to tag as well. This Note assumes that such efforts, if any, would not be successful, in part due to cultural differences that could frustrate any ability to agree on a common set of tags. *See generally infra* notes 146–149 (discussing the problems cultural differences pose to tagging efforts).

11. *See* Thomas B. Nachbar, *Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character*, 85 MINN. L. REV. 215, 270–75 (2000); R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L. REV. 755, 771 (1999); *see also* Johnson, *supra* note 1, at 486.

12. The views of those scholars are detailed *infra* Part IV.A.

13. *See* ACLU v. Gonzales, 478 F. Supp. 2d 775, 789 (E.D. Pa. 2007). This opinion contains a thorough discussion of current filtering technology.

stant messaging programs.<sup>14</sup> Parents can install a filter on their home computer that allows the parents to limit the content their children can receive while allowing themselves unrestricted Internet access.<sup>15</sup> Most filters are customizable and allow parents to choose the level of protection and the types of content to be blocked.<sup>16</sup> Filters are also used by employers in the workplace to shield employees, and by adults in the home to protect themselves.<sup>17</sup>

Filters, when enabled, typically determine which content to block through a combination of several methods. They typically screen content against a “black list” of websites that are known to contain objectionable material.<sup>18</sup> They also ordinarily screen content against a “white list” of websites known to be safe for children.<sup>19</sup>

Given the staggering amount of content available on the Web,<sup>20</sup> black and white lists alone are not sufficient to screen out objectionable material. To overcome the limitations of black and white lists, users typically have two options. The more secure, but more limiting, option is the “walled garden” approach. The walled garden limits the user’s access to material on the filter’s white list.<sup>21</sup> The less secure, but more flexible, option is “dynamic filtering.” A dynamic filter quickly analyzes Internet content when the user seeks to access it. If the dynamic filter determines that the material is appropriate, the user is allowed to view the webpage. If the webpage is found to be inap-

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14. *Id.* at 791; see also InternetSafety.com, Control Kids Email and Keep Safe Online with Safe Eyes, <http://www.internetsafety.com/safe-eyes/emailblocking/> (last visited Dec. 1, 2007) (advertising the e-mail blocking features of Safe Eyes, a popular commercial filter).

15. See *Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004).

16. *Gonzales*, 478 F. Supp. 2d at 791; see also CYBERPATROL, CYBERPATROL USER GUIDE 21–28 (2006), available at <http://www.cyberpatrol.com/uploadedFiles/support/Guides/CP-UserGuide7.6.pdf> (explaining how to set up variable protection levels).

17. Filters can also operate at different levels of a networked computing system — for instance on an individual computer, on an office network, or on an Internet service provider. See Marc D. Nawyn, *Code Red: Responding to the Moral Hazards Facing U.S. Information Technology Companies in China*, 2007 COLUM. BUS. L. REV. 505, 511–12 (2007). Due to the emphasis of most tagging proposals on protecting individual users and particularly children, this Note focuses on lower-level filtering on individual computers.

18. *Gonzales*, 478 F. Supp. 2d at 790.

19. *Id.*

20. One author has estimated that the total amount of continuous traffic on the Internet is forty petabytes, or 40,000,000,000,000,000 bytes. See Stephen Cass, *How Much Does the Internet Weigh?*, DISCOVER, May 29, 2007, at 42, available at [http://discovermagazine.com/2007/jun/how-much-does-the-internet-weigh/article\\_view?b\\_start:int=1](http://discovermagazine.com/2007/jun/how-much-does-the-internet-weigh/article_view?b_start:int=1). A 2005 study estimated that the Web contained 11.5 billion webpages. See A. GULLI & ALESSIO SIGNORINI, THE INDEXABLE WEB IS MORE THAN 11.5 BILLION PAGES (2005), <http://www.cs.uiowa.edu/~asignori/web-size/size-indexable-web.pdf>.

21. See *Gonzales*, 478 F. Supp. 2d at 790.

appropriate, the filter prevents the user from viewing it.<sup>22</sup> While dynamic filtering is fairly new,<sup>23</sup> most filters today have this feature.<sup>24</sup>

Filters are not perfect. They block material that users might deem acceptable and fail to screen out content that users might find objectionable.<sup>25</sup> Estimates and views of their effectiveness vary.<sup>26</sup> One district court found, based on estimates provided by the parties, that filters on average blocked 95% of sexually explicit material.<sup>27</sup>

Even ignoring its error rate, filtering software is controversial even if there are no attendant tagging requirements. On one hand, many members of the public, including parents and politicians, favor the availability and use of filters.<sup>28</sup> By enabling concerned Internet users to choose their level of exposure to sexually explicit material while otherwise preserving unrestricted access to such content, some free speech advocates view filters as a good way to accommodate the desires of parents and the goal of maintaining free discourse online.<sup>29</sup> On the other hand, some free speech advocates argue that filtering is not an acceptable solution, even if parents have a strong interest in protecting their children.<sup>30</sup> In support of their position, such advocates cite incidents in which filters have been used for purposes other than

22. *See id.* at 790–91.

23. *See* COMM’N ON ONLINE CHILD PROT., COMMISSION ON CHILD ONLINE PROTECTION (COPA): REPORT TO CONGRESS 22 (2000), available at <http://www.copacommission.org/report/COPAreport.pdf> (noting that dynamic text filtering was an emerging technology and, as of that date, not yet widely available).

24. *See Gonzales*, 478 F. Supp. 2d at 790–91.

25. *See id.* at 794.

26. *See id.* Compare COMM’N ON ONLINE CHILD PROT., *supra* note 23, at 21–22 (rating filtering as fairly effective), with Johnson, *supra* note 1, at 477–79 (criticizing the shortcomings of filters).

27. *See Gonzales*, 478 F. Supp. 2d at 795–96.

28. *See, e.g., Dot Kids: Hearing Before the Subcomm. on Telecom. & Internet of the Comm. on Energy and Commerce*, 108th Cong. (2004) (testimony of Rep. Markey) (discussing the “facilitat[ion of] easier browsing and filtering of content that many parents desire”); *see also* Patrick M. Garry, *The First Amendment in a Time of Media Proliferation: Does Freedom of Speech Entail a Private Right to Censor?*, 65 U. PITT. L. REV. 183 (2004) (arguing for a private “freedom to censor” by filtering); Patrick M. Garry, *The Flip Side of the First Amendment: A Right to Filter*, 2004 MICH. ST. L. REV. 57 (2004) (arguing for a “freedom to filter”); Otilio Gonzalez, *Regulating Objectionable Content in Multimedia Platforms: Will Convergence Require a Balance of Responsibilities Between Senders and Receivers?*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 609, 642 (2004) (calling for greater efforts to educate parents about filtering).

29. *See, e.g.,* Ctr. for Dem. & Tech., Internet Family Empowerment White Paper (July 16, 1997), <http://www.cdt.org/speech/970716empower.html>; Brief of Feminists for Free Expression as Amicus Curiae in Support of Appellees, *Reno v. ACLU* at 15–16, 521 U.S. 844 (1997) (No. 96-511), 1997 WL 74382.

30. *See, e.g.,* Lawrence Lessig, *Privacy, Jurisdiction, and the Regulation of Free Expression, What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS 629, 652–55 (1998); Richard J. Peltz, *Use “the Filter You Were Born with”: The Unconstitutionality of Mandatory Internet Filtering for the Adult Patrons of Public Libraries*, 77 WASH. L. REV. 397 (2002); Elec. Frontier Found., Internet Blocking & Censorware, <http://www.eff.org/Censorship/Censorware/> (last visited Dec. 1, 2007).

those designated by the user;<sup>31</sup> for example, the filter produced by one company blocked users of its filter from accessing websites critical of its products.<sup>32</sup> Thus, these critics fear that filters will block content (that users might wish to see) without users' knowledge.

### III. TAG-BASED FILTERING AND TAGGING PROPOSALS

Proponents of tagging argue that widespread tagging would help users filter out unwanted material on the Web. Although tagging proposals vary significantly in form, they share certain functional similarities. They typically focus on Web content rather than on private exchanges, such as e-mail or instant messaging, that occur via non-web browser programs. In all proposals, a content provider would place a tag in the code of each webpage it intends to make detectable by tag-enabled filters.<sup>33</sup> Tags would not, by themselves, block content from any users. Instead, a user, such as a parent, would have to use tag-detecting filtration software and instruct it to block out websites that contained a particular tag. Such software could be included in web browsers or could operate independently, as is the case with conventional filters. Users could use tag-based filtering independently or in combination with conventional filtering software.

The typical user would never see the tags, which are designed to communicate directly with the filtering or browsing software. Some proponents of tag-based regimes believe that the invisibility of tags from typical users avoids some concerns that tagging legislation undercuts First Amendment values. For instance, Professor Lawrence Lessig believes that the invisibility of tags from users would avert criticisms that the government is branding certain speech with a "digital scarlet letter."<sup>34</sup>

The idea of tagging websites has been around since at least 1996, when the World Wide Web Consortium introduced the Platform for Internet Content Selection ("PICS").<sup>35</sup> Anyone can develop a PICS-compatible ratings scheme; websites can then incorporate those schemes and rate themselves.<sup>36</sup> Commentators quickly recognized that, in the absence of government support, tagging would not be

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31. See, e.g., Lessig, *supra* note 30, at 655 (collecting "[h]orror stories").

32. See Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT. L.J. 453, 462 (1997).

33. See, e.g., Video: A Modest Proposal for Zoning Immodesty, <http://www.lessig.org/blog/archives/h2m.mov> (Lawrence Lessig) (last visited Dec. 1, 2007).

34. *Id.* See also LAWRENCE LESSIG, CODE: VERSION 2.0, at 253 (2006) [hereinafter Lessig, CODE].

35. See Paul Resnick & James Miller, *PICS: Internet Access Controls Without Censorship*, COMM. ACM, Oct. 1996, at 87, available at <http://www.w3.org/PICS/iacwcv2.htm>.

36. See *id.* at 88.

widely implemented.<sup>37</sup> Proponents of tagging recognize that because no rating system has yet gained a foothold, any ratings vocabulary remains costly for users to learn and not very useful.<sup>38</sup> However, these proponents also believe that a government-backed tagging regime will make widespread implementation possible because it will eliminate the costs associated with duplicative schemes.<sup>39</sup>

This Note introduces a new categorization system for tagging proposals. The system divides the proposals into four basic forms, which can vary in two significant ways. First, in some proposals, the government mandates tagging, while in others the government makes tagging voluntary but acts in other ways to encourage it. Second, in some proposals, the government specifies how content providers should label their webpages, while in others the government leaves the ratings vocabulary and the appropriate rating to the discretion of content providers. In all proposals, the government punishes inaccurate labeling.

Table 1: Comparison of Tagging Proposals		
	<b>Government-Specified Ratings</b>	<b>Unspecified Ratings</b>
<b>Mandatory Tagging</b>	“Specified-Mandatory”  Examples: <i>Bills in Congress, Lessig</i>	“Unspecified-Mandatory”  Example: <i>Wagner</i>
<b>Voluntary Tagging</b>	“Specified-Voluntary”  Example: <i>Nachbar</i>	“Unspecified-Voluntary”  Example: <i>Johnson</i>

For proposals this Note classifies as “specified-mandatory,” the government would establish a ratings standard and mandate its use. The Internet Stopping Adults Facilitating the Exploitation of Today’s Youth Act (SAFETY) of 2007<sup>40</sup> and the Protecting Children in the

37. See Wagner, *supra* note 11, at 769 (“But in late 1998, it seems unlikely that an idealized PICS system will spring up soon without at least some form of government intervention.”); Keith Weidner, *Mandatory Self-Rating or Zoning: Which Way to Empower Parents?*, 2 GEO. J.L. & PUB. POL’Y 679, 680 (2004) (noting that PICS will only become widely used if mandated by the government).

38. See Nachbar, *supra* note 11, at 270–71; *infra* Part V.A (explaining how proponents of tagging believe that as a ratings vocabulary becomes more widely employed by content providers and content consumers, the ratings will become less costly for users to employ).

39. See Nachbar, *supra* note 11, at 272–75.

40. See H.R. 837, 110th Cong. § 10 (2007).

21st Century Act,<sup>41</sup> are examples of specified-mandatory tagging proposal. The bills would require most commercial websites that contain sexually explicit material to include tags designed by the Federal Trade Commission (“FTC”).<sup>42</sup> For the purposes of these proposals, the definition of “sexually explicit” means any material that depicts sexually explicit conduct, as that term is defined in 18 U.S.C. § 2256(2)(A),<sup>43</sup> a child pornography statute.<sup>44</sup> In these proposals, FTC must design the tags to be invisible to users viewing the web page through web browsers, but visible to the web browsers or filters processing the web page’s source code.<sup>45</sup> Failure to tag a sexually explicit web page could result in punishment, including fines and up to five or fifteen years in prison, depending on the bill.<sup>46</sup> In addition to the pending legislation, Professor Lessig has proposed that the government should require websites containing material “harmful to minors”<sup>47</sup> to include a “<h2m>” HTML tag.<sup>48</sup>

In “unspecified-mandatory” tagging proposals, the government would require web pages to include tags but would not make any suggestions as to the content of those tags. The leading proposals of this form incorporate a PICS-based rating scheme. For example, Professor R. Polk Wagner has argued that the government should promote a PICS-based rating scheme and punish those who mislabel their websites.<sup>49</sup>

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41. See S. 49, 110th Cong. § 102(b) (2007).

42. See, e.g., H.R. 837, § 10; S. 49, § 102(b); Internet Stopping Adults Facilitating the Exploitation of Today’s Youth Act (SAFETY) of 2006, H.R. 5749, 109th Cong. § 8 (2006); Internet Safety (Stop Adults Facilitating the Exploitation of Youth) Act of 2006, S. 3499, 109th Cong. § 7 (2006); Project Safe Childhood Act, S. 3432, 109th Cong. § 3(c) (2006).

43. See, e.g., H.R. 837, § 10(a)(3); S. 49, § 102(b)(4)(B); H.R. 5749, § 8(a)(3); S. 3499, § 7(a)(3); S. 3432, § 3(c).

44. Chapter 110 of Title 18 of the United States Code, which contains section 2256, is titled “Sexual Exploitation and Other Abuse of Children.” See 18 U.S.C.A. §§ 2251–2260 (West 2000 & Supp. 2004).

45. See H.R. 837, § 10(c); S. 49, § 102(b)(2); H.R. 5749, § 8(c); S. 3499, § 7(c); S. 3432, § 3(c).

46. See H.R. 837, § 10(e) (providing for a statutory maximum of five years’ imprisonment, unless the defendant has been previously convicted of certain sex crimes, in which case the statutory *minimum* is five years’ imprisonment and the maximum is fifteen years); S. 49, § 102(b)(5) (providing for a fine, a statutory maximum of five years’ imprisonment, or both); H.R. 5749, § 8(e) (providing for a fine, a statutory maximum of fifteen years’ imprisonment, or both); S. 3499, § 7(e) (providing for a fine, a statutory maximum of fifteen years’ imprisonment, or both); S. 3432, § 3(c) (providing for a fine, a statutory maximum of five years’ imprisonment, or both).

47. The “harmful to minors” standard for speech is discussed *infra* Part IV.B.1. See also Nachbar, *supra* note 11.

48. See LESSIG, CODE, *supra* note 34, at 253–61.

49. See Wagner, *supra* note 11, at 771, 779; see also Coralee Penabad, Note, *Tagging or Not? — The Constitutionality of Federal Labeling Requirements for Internet Web Pages*, 5 UCLA ENT. L. REV. 355, 385 (1998) (suggesting that the government might require all websites to include PICS-based ratings).



In the “specified-voluntary” tagging proposal suggested by Professor Thomas B. Nachbar, the government would establish a system of ratings but would not mandate the ratings’ use.<sup>50</sup> While users would get to decide whether or not to use the government labels, the government would punish those who chose to employ the labels but mislabeled their web page.<sup>51</sup> Nachbar argued that content providers are likely to adopt voluntarily a uniform rating standard, once one becomes sufficiently popular.<sup>52</sup> He further argued that a rating scheme established by the government would be superior to one established by the marketplace of content providers.<sup>53</sup>

Finally, in the “unspecified-voluntary” tagging proposal, the government’s only role would be to punish mislabeling. The ratings schemes that the government would be enforcing would be privately designed. For example, one proposed system allows private parties to obtain trademark-like protection for Internet ratings systems they develop.<sup>54</sup> This proposal also suggests giving the right-holder the ability to enforce mark protection against those who use it without permission.<sup>55</sup> Under the proposal, the government would be able to impose criminal sanctions on individuals who used the marks without permission or used the marks in a way that does not meet the standards established by the right-holder.<sup>56</sup>

#### IV. IMPORTANCE OF VOLUNTARY TAGGING

##### *A. Importance for Effectiveness*

The effectiveness of any form of tagging proposal depends on the voluntary adoption of tags by content providers.<sup>57</sup> “Voluntary” proposals obviously cannot work well unless a large number of content providers choose to tag their content. However, the extent of voluntary compliance is also important to “mandatory” proposals. In particular, limits on U.S. lawmaking authority mean that voluntary compliance is important because of foreign websites, which are not subject to U.S. law.

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50. See Nachbar, *supra* note 11, at 270–75. Content providers would remain free to tag websites using a ratings system other than the one promoted by the government. See *id.*

51. See *id.* at 263.

52. See *infra* Part V.A.; Nachbar, *supra* note 11, at 270–80.

53. See *id.*

54. See Johnson, *supra* note 1, at 465–68.

55. See *id.* at 491–92.

56. See *id.* at 491–95.

57. See COMM’N ON CHILD ONLINE PROT., *supra* note 23, at 23 (“The effectiveness of voluntary first-party rating is limited because it is dependent on widespread adoption.”).

A large amount of pornographic material on the Web today originates outside of the United States, yet it is accessible to individuals residing within the United States through foreign websites. In 2004, the Supreme Court cited a 1999 case from the Eastern District of Pennsylvania, which found that 40% of sexual content on the Internet originated overseas.<sup>58</sup> The amount and proportion of sexual content on the Internet originating abroad have increased since that time.<sup>59</sup>

If a tagging bill were enacted, the scope of U.S. enforcement authority would depend on how the statute was drafted. Courts typically presume that U.S. statutes are not meant to have extraterritorial effect unless Congress manifests a contrary intent.<sup>60</sup> For instance, the district court reviewing COPA relied on this presumption to find that the Act did not apply to foreign websites — specifically, websites hosted or registered outside of the United States.<sup>61</sup> Similarly, courts probably would construe the tagging proposals recently introduced in Congress to apply only to U.S. websites since the bills manifest no intent to the contrary.

Admittedly, there are certain exceptions to the presumption that U.S. statutes are not meant to have extraterritorial effect.<sup>62</sup> For example, in *United States v. Bowman*,<sup>63</sup> the Supreme Court held that a statute could have extraterritorial application if the statute in question was “not logically dependent on [its] locality for the Government’s jurisdiction, but [was] enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated.”<sup>64</sup> Based on *Bowman*, two courts of appeals have presumed extraterritorial effect for criminal child pornography statutes despite no manifestation of congressional intent in *United States v. Harvey*<sup>65</sup> and *United States v. Thomas*.<sup>66</sup> These cases might be distinguished as grounded in courts’ unique solicitude for prosecuting child pornography.<sup>67</sup> However, the U.S. Court of Appeals for the Armed Forces has persuasively criticized *Harvey* and *Thomas* as misconstruing *Bowman*.<sup>68</sup>

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58. See *Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004) (citing *ACLU v. Reno*, 31 F. Supp. 2d 473, 484 (E.D. Pa. 1999)).

59. *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 789 (E.D. Pa. 2007) (finding that approximately 50% of all sexually explicit websites are foreign websites).

60. See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

61. *Gonzales*, 478 F. Supp. 2d at 810–11.

62. See, e.g., *United States v. Bowman*, 260 U.S. 94, 98 (1922).

63. 260 U.S. 94 (1922).

64. *Id.*

65. 2 F.3d 1318, 1327–29 (3d Cir. 1993).

66. 893 F.2d 1066, 1068–69 (9th Cir. 1990).

67. For example, the Supreme Court has held that the First Amendment provides significantly less protection for child pornography than for other forms of sexual speech. See *infra* notes 86 & 91 and accompanying text.

68. See *United States v. Martinelli*, 62 M.J. 52, 58 (C.A.A.F. 2005).

While Congress could most likely overcome this roadblock to U.S. enforcement authority over foreign websites through clear drafting, more intractable limits exist. International law limits the ability of the United States to enforce even laws that are intended to have extra-territorial effect.<sup>69</sup> In the criminal context, a nation can enforce its laws against persons who are themselves present or who have assets in that territory, or persons who the nation can successfully extradite.<sup>70</sup> Most extradition treaties require the activity to be a crime both in the extraditing jurisdiction and the receiving jurisdiction.<sup>71</sup> If the United States unilaterally passed a mandatory tagging statute, the absence of equivalent laws in other countries would generally make it impossible to extradite owners of foreign websites who do not tag. As a result, individuals who are not themselves in the United States and who do not have assets in the United States would be immune from direct criminal regulation.<sup>72</sup>

In the civil context, U.S. enforcement power abroad is also limited. U.S. courts typically refuse to exercise personal jurisdiction over foreign persons who have only published content on the Internet.<sup>73</sup> However, courts will find personal jurisdiction over Internet content providers who have taken actions that specifically direct content to a particular forum.<sup>74</sup> Professor Nachbar argues that in a specified tagging regime, foreign websites that use the U.S. labeling system would be directing their content to U.S. viewers, making it likely that courts would find personal jurisdiction over foreign websites that adopt U.S. government-designed tags.<sup>75</sup> However, even if U.S. courts found personal jurisdiction, collecting civil judgments and enforcing injunctions against a foreign-based non-citizen content provider with no assets in the United States would remain difficult.

Professor Jack Goldsmith suggests that while direct regulation is not always a possibility, it is often possible for the United States to indirectly regulate content providers whose websites cause harm through indirect methods.<sup>76</sup> To indirectly regulate content providers, he suggests that the United States could: (1) punish in-state end users who receive and use illegal content; (2) regulate Internet Service Pro-

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69. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987).

70. See Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1216 (1998). See generally Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1 (1996).

71. See Goldsmith, *supra* note 70, at 1220.

72. See *id.* at 1217–18.

73. See Nachbar, *supra* note 11, at 314; Goldsmith, *supra* note 70, at 1218.

74. See *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003); see also *Calder v. Jones*, 465 U.S. 783 (1984) (finding personal jurisdiction based on intentional, fraudulent actions aimed at a particular jurisdiction, albeit outside of the Web context).

75. See Nachbar, *supra* note 11, at 313–16.

76. See Goldsmith, *supra* note 70, at 1221–24.

viders (“ISPs”) or others who transmit information; or (3) regulate the in-state software or hardware by which transmissions are received.<sup>77</sup> In the tagging context, however, these regulatory methods would face high constitutional hurdles because they would have the effect of censoring speech. The right of adults to receive non-obscene speech on the Internet is protected,<sup>78</sup> and adults may not be barred from receiving harmful-to-minors material in the name of protecting children.<sup>79</sup> For these reasons, the First Amendment probably prevents the use of indirect methods for regulating foreign actors.

### B. Importance in First Amendment Review

Many of the mandatory tagging proposals are likely to be examined under First Amendment strict scrutiny. If strict scrutiny applies, a statute must be narrowly tailored to achieve a compelling government purpose.<sup>80</sup> In applying strict scrutiny, a court would consider the effectiveness of tagging proposals in protecting children, particularly in comparison to conventional filtering. In this comparison, the extent of voluntary foreign compliance will play a crucial role.

#### 1. Which Proposals Would Receive Heightened First Amendment Scrutiny?

It seems likely that many mandatory tagging proposals would be subject to strict scrutiny. Content-based restrictions on speech are subject to strict scrutiny.<sup>81</sup> A court will consider specified-mandatory tagging proposals to be content-based regulations because “mandating the labeling [of websites] according to a designated ratings system . . . is a classic content-based restriction on speech: the government is distinguishing among categories of speech according to content.”<sup>82</sup> Because such proposals arguably require content providers to express the government’s opinion about the content, they may unconstitutionally compel speech as well.<sup>83</sup>

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77. *Id.* at 1222–23. Goldsmith also suggests it would be possible to regulate financial intermediaries. *Id.* at 1223. This last option is not relevant to websites that do not charge for content.

78. *See Reno v. ACLU*, 521 U.S. 844, 874 (1997) (“[T]he CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive [and thus requires strict scrutiny].”).

79. *See Butler v. Michigan*, 352 U.S. 380, 383 (1957) (stating that a statute may not “reduce the adult population . . . to reading only what is fit for children”).

80. *See, e.g., United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 811–12 (2000).

81. *See Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

82. Wagner, *supra* note 11, at 778 (emphasis omitted).

83. *See Kathleen M. Sullivan, First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1679 (1998) (concluding that government mandating of particular online ratings systems would present a compelled speech problem).

However, the standard of review of a tagging proposal would be less strict if the regulated speech were a type of speech that has been categorized as low value.<sup>84</sup> For example, in *Miller v. California*, the Supreme Court held that the government is free to prohibit speech that is obscene.<sup>85</sup> Under *Miller*, speech is obscene if: (1) “‘the average person, applying contemporary community standards,’ would find that the work, taken as a whole, appeals to the prurient interest”; (2) “the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law”; and (3) “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>86</sup> In addition, the government may prohibit minors from obtaining material that is “harmful to minors.”<sup>87</sup> The “harmful to minors” test recasts the basic obscenity test in light of the effect of a work on minors.<sup>88</sup>

On their face, the current mandatory-specified tagging proposals before Congress do not fall into either of the categories subject to reduced scrutiny because their definition of “sexually explicit” is too broad. In these proposals, the definition of “sexually explicit” is based on 18 U.S.C. § 2256(2)(A), which defines the term to mean a number of “actual or simulated” sexual acts and displays.<sup>89</sup> That definition is appropriate for child pornography because under *New York v. Ferber*<sup>90</sup> such material may be prohibited completely.<sup>91</sup> However, by failing to consider merit and by failing to consider a work as a whole, the definition in the current tagging proposals far exceeds the scope of proscribable obscenity.<sup>92</sup> Because the harmful-to-minors test incorporates the *Miller* definition of obscenity and therefore requires that the

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84. See *Miller v. California*, 413 U.S. 15 (1973).

85. See *id.*

86. *Id.* at 24 (internal quotations and citations omitted).

87. See *Ginsberg v. New York*, 390 U.S. 629 (1968).

88. See *id.* at 646 (upholding a New York statute whose definition of material “harmful to minors” was based on the then-prevalent obscenity standard that prohibited minors from obtaining certain speech if it “(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors” (quoting N.Y. Penal Law § 484-h(1)(f)(i)–(iii) (1965))). Subsequent to *Miller*, which altered the obscenity standard, federal courts have approved statutes that incorporate *Ginsberg*’s emphasis on appeal to children into the *Miller* standard. See, e.g., *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983). Even after *Miller*, federal courts have upheld statutes that track the language of the New York statute in *Ginsberg*. See, e.g., *Upper Midwest Booksellers Ass’n v. City of Minneapolis*, 780 F.2d 1389 (1985).

89. See 18 U.S.C. § 2256(2)(A) (2000).

90. 458 U.S. 747 (1982).

91. *Id.* at 761 (1982).

92. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 247–49 (2002) (finding that this definition of “sexually explicit” fails to meet the *Miller* test).

reviewing court consider the merit of a work, the proposed legislation exceeds the scope of the *Miller* standard as well.<sup>93</sup>

Professor Lessig's "<h2m>" proposal, although a mandatory-specified tagging proposal, might fare better under these tests. The definition he proposes is coterminous with the Supreme Court's harmful-to-minors test.<sup>94</sup> So long as the court applies the harmful-to-minors standard, Lessig's proposal will not be subject to strict scrutiny. However, it is not clear whether the harmful-to-minors standard or the obscenity standard should apply. What complicates the analysis is that unlike a traditional harmful-to-minors statute, Lessig's proposal does not, by itself, require anyone to *prevent* minors from obtaining the speech. Instead, it simply provides a tool that would enable anyone to filter out such material. The most frequent users would probably be parents seeking to prevent their children from encountering sexual material. However, as with traditional filters, Lessig's tags could also be used to block the access of adults; for instance, employers could program filters to recognize the tags on workplace computers. Whether a court would subject Lessig's proposal to the harmful-to-minors standard or the obscenity standard would depend on whether the court focuses on the statute's child-protecting purpose or its potential effect in other contexts.

Commentators have extensively debated the constitutionality of unspecified-mandatory tagging proposals. Many have concluded that such proposals would be unconstitutional; they have reached this conclusion under a diverse set of First Amendment doctrinal approaches.<sup>95</sup> The variety of views may be due to the unique nature of unspecified-mandatory tagging proposals. This form of tagging proposal does not fit neatly into established categories to which courts

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93. See *supra* notes 85–88 and accompanying text.

94. See *supra* Part III (describing Lessig's <h2m> proposal); LESSIG, CODE, *supra* note 34, at 250–256.

95. See, e.g., LESSIG, CODE, *supra* note 34, at 665–66 (arguing that mandatory PICS labeling would unconstitutionally alter the architecture of speech); Nachbar, *supra* note 11, at 295–96 (arguing that it is “not even a close question” that mandatory tagging would be unconstitutional); Sullivan, *supra* note 83, at 1678–79 (1998) (finding a compelled speech problem with government requirement of self-rating in government-specified categories); David K. Djavaherian, Note, *Reno v. ACLU*, 13 BERKELEY TECH. L.J. 371, 384 n.95 (1998) (arguing that mandatory tagging probably would be unconstitutionally vague as well as extremely burdensome on speech); James V. Dobeus, *Rating Internet Content and the Spectre of Government Regulation*, 16 J. MARSHALL J. COMPUTER & INFO. L. 625, 648–49 (1998) (arguing that these proposals are unconstitutional under strict scrutiny); cf. Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH. L. REV. 395, 412 (1999) (explaining that in their belief, it “is a close question” whether mandatory PICS tagging would be unconstitutional as compelled speech). *But see* Wagner, *supra* note 11, at 780–95 (considering the possibility of rational basis review, intermediate scrutiny, or strict scrutiny, and indicating that a PICS-enforcing statute could survive even strict scrutiny); Penabad, *supra* note 49, at 367–84 (arguing that a PICS-mandating statute is content-neutral and would be subject to intermediate scrutiny).

apply strict scrutiny — for instance, they are not obviously content-based. However, given the unprecedented burden such a law would place on Internet-based speech, a medium the Supreme Court has held to deserve the strongest form of free speech protection,<sup>96</sup> any proposals in this category appear inconsistent with First Amendment principles.

For such proposals, it is probably most appropriate to analyze them under the compelled speech doctrine, which should lead to the application of strict scrutiny. Compelled speech doctrine limits the ability of the government to require people to speak.<sup>97</sup> Although the Supreme Court has upheld required disclosures deemed to be “factual and uncontroversial,”<sup>98</sup> these disclosures applied to particular, already-regulated businesses.<sup>99</sup> Unspecified-mandatory tagging proposals would, in contrast, apply to all Internet content providers subject to U.S. law. The Supreme Court has been sensitive to the level of burden created by compelled speech; it has upheld speech it deemed not burdensome.<sup>100</sup> The Court has indicated that especially burdensome speech should, in contrast, receive a more critical look.<sup>101</sup> In this vein, a court should analyze an unspecified-mandatory tagging proposal under compelled speech doctrine, which applies strict scrutiny.<sup>102</sup>

## 2. Why the Scope of Voluntary Compliance Affects the Strict Scrutiny Analysis

The extent of voluntary foreign adoption of a U.S. tagging proposal is central to the question of whether a mandatory tagging proposal would survive strict scrutiny.

The Supreme Court has consistently held that protecting children from sexual material is a compelling government interest.<sup>103</sup> Thus, the

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96. *See Reno v. ACLU*, 521 U.S. 844, 868–870 (1997) (finding that the conditions that justify additional regulation of the broadcast industry are not present with respect to the Internet).

97. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that New Hampshire could not punish a Jehovah’s Witness couple for removing “Live Free or Die” from their license plate).

98. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

99. *See, e.g., id.* at 650–52 (upholding disciplinary sanction against a lawyer who failed to disclose potential costs to clients in advertisement).

100. *See Meese v. Keene*, 481 U.S. 465, 480 (1987) (noting that the statutory term employed imposes no burden on speakers).

101. *Cf. Zauderer*, 471 U.S. at 651 (“[U]njustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.”).

102. *See, e.g., Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006) (subjecting to strict scrutiny an Illinois statute requiring “sexually explicit” video games to be sold bearing a large sticker with the number “18” on them).

103. *See Reno v. ACLU*, 521 U.S. 844, 875 (1997); *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

only question with respect to a mandatory tagging proposal would be the proposal's degree of tailoring to its child-protecting end.<sup>104</sup> To survive the strict scrutiny analysis, a program must be narrowly tailored to accomplish a compelling government interest. To be narrowly tailored, a statute must, among other requirements, be the least restrictive means for achieving the statute's compelling government purpose.<sup>105</sup> The least restrictive means test entails a comparison; if some alternative means of achieving the same end as the legislation is equally or more effective, while at the same time is less restrictive, then the legislation must be struck down.<sup>106</sup>

In this case, a court should analyze whether a mandatory tagging program constituted the least restrictive means by comparing mandatory tagging to conventional filtering. Under *Ashcroft v. ACLU*,<sup>107</sup> it is correct for a court considering legislation designed to protect minors from sexual content online to compare conventional filtering to the proposed statutory system. In *Ashcroft* the Supreme Court compared the effectiveness of enforcing COPA to the effectiveness of filtering to determine whether COPA was narrowly tailored.<sup>108</sup>

Several objections could be raised to comparing conventional filtering to tag-based filtering. However, in addition to being foreclosed by *Ashcroft*, these objections ultimately are not persuasive.

First, it could be argued that a court should consider the effectiveness of conventional filtering *combined* with tag-based filtering when comparing a tagging statute to other allegedly less restrictive means. However, the Court in *Ashcroft* makes no mention of using a combined approach to analyzing the least restrictive means question. Moreover, the way tag-based filtering would be implemented also disfavors such a comparison. It is likely that at least some parents would use tag-based filtering in place of, rather than in addition to, conventional filtering.

Second, one might argue, as Justice Breyer did in his *Ashcroft* dissent, that it is a mistake to compare a legislatively imposed solution (in this case, mandatory tag-based filtering) to conventional filtering because conventional filtering already exists without congressional action and so should not count as a legislative alternative.<sup>109</sup> However,

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104. See Lessig, *supra* note 30, at 631 (“[W]hen kids are at stake, the only relevant question is whether there is some less burdensome way to achieve the same censoring end. If there is not, the law will stand.”).

105. See *Ashcroft v. ACLU*, 542 U.S. 656, 665–66 (2004); *Reno*, 521 U.S. at 879; *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). See generally Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2421–23 (1996).

106. See *Reno*, 521 U.S. at 874.

107. 542 U.S. 656.

108. See *id.* at 667 (majority opinion).

109. *Id.* at 684 (Breyer, J., dissenting).



as the Court stated in *Ashcroft*, Congress can act to *promote* filtering. For instance, the government could fund educational programs to promote conventional filtering without violating the First Amendment.<sup>110</sup> Under prevailing law, it is therefore permissible to compare conventional filtering and mandatory tag-based filtering because Congress could fund and thus promote conventional filtering.

In response to the Court's suggestion that Congress could enact laws promoting conventional filtering, Justice Breyer argued that the Court should not hypothesize "magic" funding that Congress had not actually allocated.<sup>111</sup> Therefore, according to Breyer, it remained inappropriate to treat promotion of conventional filtering as an alternative to COPA, since the Court had no basis for assuming that Congress would choose to promote conventional filtering through a funding program.<sup>112</sup>

However, the Court in *Ashcroft* did not heed Justice Breyer's objection.<sup>113</sup> While the Court did not explain its rationale for ignoring Justice Breyer's contention,<sup>114</sup> a justification for its approach is readily available. Justice Breyer's analysis in *Ashcroft* ignores the fact that enforcement of a criminal statute, such as a mandatory tagging statute, is not costless. Further, it is unlikely that the government could recoup the cost of investigation and enforcement of such a statute through criminal fines. The practical reality of limited governmental resources makes it correct to hypothesize that the funds required for criminal enforcement of a mandatory tagging statute could be used instead to promote conventional filtering.

Finally, Professor Lessig has argued that web browsers could combine tag-based filtering with the blocking of all foreign websites through use of a geolocation program, which determines the geographic origin of Internet content.<sup>115</sup> However, there is nothing inherent in tagging legislation that requires users to choose to block all websites of foreign origin, so courts should not assume that users would do so. Moreover, geolocation programs are not always accurate, particularly when content providers do not want their websites to be accurately located.<sup>116</sup>

Therefore, it is appropriate to compare conventional filtering to tag-based filtering. Conventional filtering is certainly less burdensome

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110. *See id.* at 669–70 (majority opinion).

111. *See id.* at 688–89 (Breyer, J., dissenting).

112. *See id.*

113. *See id.* at 669–70 (majority opinion).

114. *See id.*

115. *See* LESSIG, CODE, *supra* note 34, at 254.

116. *See* Expert Report of Seth Finkelstein, *Nitke v. Gonzales*, 413 F. Supp. 2d 262 (S.D.N.Y. 2005) (01 Civ. 11476), available at <http://www.sethf.com/nitke/ashcroft.php>.

to content providers than mandatory tagging.<sup>117</sup> Under strict scrutiny then, a mandatory tagging proposal would fail constitutional muster if conventional filtering were at least as effective as mandatory tag-based filtering because mandatory tag-based filtering would not be the least restrictive means to achieve the objective.<sup>118</sup>

Because a court applying strict scrutiny to a mandatory tagging statute should compare the effectiveness of tag-based filtering to conventional filtering, the scope of foreign voluntary tagging is a crucial factor. Conventional filtering operates equally well regardless of the website's point of origin. If most foreign websites have tags, and tagging is mandatory for U.S. websites, then tagging may indeed be more effective than conventional filtering. However, if the domestically mandated tags are not widely adopted by the content providers of foreign websites, tagging will not be more effective than conventional filtering.<sup>119</sup> As a result, mandatory tagging would fail this prong of the strict scrutiny test.

#### V. WIDESPREAD VOLUNTARY COMPLIANCE WITH A TAGGING STATUTE IS UNLIKELY

Proponents of tagging systems believe that with government assistance, market forces will lead to widespread voluntary tagging by content providers. However, many of these proponents have failed to recognize that even with government involvement, content providers lack incentives to voluntarily label their works. The amount of coordination and sacrifice that would be necessary for users to create incentives to tag poses a seemingly insurmountable hurdle. Because the success of most tagging proposals depends a great deal on voluntary tagging by content providers who are not required by criminal statute to tag,<sup>120</sup> the lack of sufficient incentives for those content providers who are not coerced to tag greatly undermines the proposals. Moreover, proponents fail to recognize that providers of sexually explicit content have affirmative incentives to mislabel their websites.

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117. Professor Lessig has argued that conventional filtering imposes hidden burdens on content providers by allowing private entities to choose speech to censor without any recourse for content providers. See LESSIG, CODE, *supra* note 34, at 254–56. Nonetheless, this burden seems easily outweighed by the threat of criminal and civil sanctions, as well as the collective burden on content providers of constant vigilance against mistakenly placing an untagged website on the Web.

118. See *Reno v. ACLU*, 521 U.S. 844, 879 (1997).

119. Cf. Brief of Appellees Am. Library Ass'n et. al. at 33–34, *Reno*, 521 U.S. 844 (No. 96-511), 1997 WL 74380 (stating that in terms of effectiveness of the CDA in comparison to filters, leaving foreign material unregulated is the equivalent of “allowing children to browse in ‘adult’ bookstores after half the adult books or videos had been removed”).

120. See *supra* Part IV.

*A. Review of the Argument that Widespread Compliance Is Likely*

Several legal commentators have argued that following some government action, market forces would promote voluntary tagging.<sup>121</sup> Professor Nachbar has provided the best and most detailed elaboration of this view. His analysis centers on the role of network effects.<sup>122</sup> “Network effects” is an economic theory that explains how in certain situations “the utility that a user derives from consumption of a good increases with the number of other agents consuming the good.”<sup>123</sup> For instance, telephones and computer operating systems are networked goods — the more people who own and operate a telephone or computer operating system, the more valuable the good is to each user.<sup>124</sup> Network effects should not be confused with “positive feedback phenomena,” also known as “economies of scale,” which occurs when the cost of a good is reduced for future users.<sup>125</sup>

Nachbar explains that all forms of tagging, whether they use individual ratings or a shared ratings vocabulary, have economies of scale.<sup>126</sup> As more consumers look for a particular rating, he argues, the average cost per consumer of learning how to understand and employ that rating goes down.<sup>127</sup> It is not clear, however, that reduced cost alone would be a sufficiently strong force to lead to widespread adoption of a rating or ratings standard, particularly because there are other barriers to adoption.<sup>128</sup>

Nachbar also argues that a fully shared ratings vocabulary would have network effects, in addition to economies of scale, that would lead to widespread voluntary adoption.<sup>129</sup> The most important type of network effects occurs as a result of the relationship between content suppliers and content consumers. As content providers begin to adopt a particular tagging vocabulary, more consumers will choose to employ the tags.<sup>130</sup> As content consumers begin to demand tags more

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121. See Nachbar, *supra* note 11, at 271–76; see also Johnson, *supra* note 1, at 486 (stating that market forces will promote adoption of a popular ratings standard backed by government enforcement against those who mislabel if users only visit tagged websites); Wagner, *supra* note 11, at 771 (discussing, briefly, network effects in the context of mandatory PICS-based labeling).

122. See Nachbar, *supra* note 11, at 271–76.

123. Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 483 (1998) (quoting Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985)).

124. See *id.* at 488–94.

125. See *id.* at 494–95. Specifically, positive feedback phenomena result from fixed costs being spread over a larger number of units. *Id.* at 494.

126. See Nachbar, *supra* note 11, at 272.

127. See *id.*

128. See *id.* at 272–73.

129. See *id.* at 273–76.

130. See *id.*

widely, content providers will respond to that demand by tagging.<sup>131</sup> He believes that this will create a cycle of increasing adoption, leading to convergence on a single, shared ratings vocabulary.<sup>132</sup>

### B. Insufficient Incentives to Tag

This Note argues that, contrary to the suggestions of Nachbar and other tagging proponents, it is unlikely that many content providers will voluntarily tag their websites under most tagging proposals, primarily because the content providers lack incentives to tag. Contrary to the assumption of Nachbar, consumer demand does not neatly translate into incentives to tag. In fact, for providers of sexually explicit content, strong disincentives exist because tagging is explicitly designed to assist certain categories of visitors in avoiding their websites. Moreover, even for “clean” material, highly costly efforts by consumers would be required to translate their demand for tags into incentives for websites to tag.

Tagging could provide incentives to content providers by attracting additional viewers or by attracting especially valuable visitors, such as those who are likely to return frequently or purchase goods from the website. The existence of the search engine optimization industry, which content providers use to boost their rankings in the results of search engines and thus the number of visitors their websites receive,<sup>133</sup> demonstrates the concern many content providers have with obtaining visitors. Content providers who seek to make money from their websites through advertising have a particular incentive to maximize the number of visitors to their websites.<sup>134</sup> In part due to the ease with which online advertising systems are implemented, the online advertising business is booming.<sup>135</sup> Additional visitors, even those who are unlikely to spend money, are therefore valuable for

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131. *See id.*

132. *See id.* Nachbar also suggests two supplementary forms of network effects that he argues would occur in the market for compatible goods as tagging became popular. First, he argues that consumer demand for a particular ratings system will ratchet up demand for Internet software that can read that system, and the availability of such software will raise the use of that ratings system. *See id.* at 274. Second, he claims that new forms of Internet content consistent with the ratings vocabulary will arise in conjunction with the rise of a vocabulary system, each raising demand for the other. *See id.* at 274–75. He analogizes this situation to the rise of the Web — greater availability and use of web browsers and web content each raised demand for the other. *See id.*

133. *See* Wikipedia, Search Engine Optimization, [http://en.wikipedia.org/wiki/Search\\_engine\\_optimization](http://en.wikipedia.org/wiki/Search_engine_optimization) (as of Dec. 1, 2007, 18:00 GMT).

134. In one common online advertising model, content providers earn money every time a visitor clicks on an advertisement on the website. *See* Sajjad Matin, Note, *Clicks Ahoy! Navigating Online Advertising in a Sea of Fraudulent Clicks*, 22 BERKELEY TECH. L.J. 533, 533 (2007).

135. *See id.* at 534–35.

content providers. In many Web advertising arrangements, visitors need only view or click advertisements in order to generate revenue for the website hosting the ads.<sup>136</sup>

Specified-mandatory tagging proposals are the least likely of the different proposal forms to incentivize voluntary tagging because under such proposals only “bad” websites are tagged. Indeed, such a proposal “punishes” a tagged website by allowing the consumer to *avoid* it. Consider the incentives for a blatantly pornographic website not subject to U.S. jurisdiction. If the website tags itself, it will be blocked out by any users who filter using the tag. In this case, at least some of those users for whom the website is blocked might have accessed the website, but for the tag.

The only way a tag could produce rewards for content providers in a specified-mandatory system is if the tags drew more users to the tagged websites than the tags caused to be blocked. However, even those specifically seeking sexually explicit content are unlikely to prefer tagged websites. Because tags are typically hidden from users who filter, consumers cannot “reward” content providers who tag with additional hits. Thus, users would only notice the tags if they blocked untagged websites or if tagged websites were somehow easier for consumers to find than untagged but otherwise similar websites. The former possibility — refusing to visit any websites but those tagged as explicit — is improbable.

The latter possibility is unrealistic; tagged websites will probably not be any easier to encounter. Since tags are typically hidden to those who view websites, when people provide links to content on the Web, most are unlikely to consider whether the website is tagged or not. Moreover, tags are unlikely to be adopted as an important component of search rankings by search engines. First, they provide only limited information that might not be helpful to modern, sophisticated search algorithms. Tags necessarily include only a few crude facts about a website, such as whether it is “sexually explicit” or not. Second, search engines long ago abandoned using meta keyword tags in determining how they rate web pages.<sup>137</sup> Meta keyword tags, like the tags discussed in this Note, are a form of code hidden from typical users that content providers may place in their web pages in order to

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136. See generally Matin, *supra* note 134.

137. See Danny Sullivan, *Death of a Meta Tag*, SEARCH ENGINE REPORT (SearchEngineWatch.com), Oct. 1, 2002, <http://searchenginewatch.com/showPage.html?page=2165061> (describing how meta keyword tags were widely used by search engines in 1996 and 1997 but were abandoned by the early 21st century). Search engines have not changed their practice since the time of Sullivan’s article. See, e.g., Google Webmaster Help Center, *Why Doesn’t My Site Show Up for a Specific Keyword?*, <http://www.google.com/support/webmasters/bin/answer.py?answer=34434&topic=8523> (indicating that Google does not allow webmasters to choose keywords that Google will consider in searches).

list keywords that describe the web pages for search engines.<sup>138</sup> In sum, in specified-mandatory tagging proposals, self-interested content providers of foreign websites with sexually explicit material have a ready disguise — doing nothing.

Voluntary proposals would require efforts on the parts of a large number of consumers in order to produce significant incentives for content providers to tag. Voluntary proposals in which only “bad” web pages are tagged would fall victim to the same problems as the specified-mandatory proposals discussed above; explicit websites are incentivized not to tag. On the other hand, voluntary proposals in which all variety of Web content could be tagged leave open at least the possibility of providing incentives for content providers to tag. Users who are interested in promoting tagging might refuse to visit websites that were not tagged by adjusting the settings of their web browsers to block websites without tags. This walled garden<sup>139</sup> boycott-like approach would be necessary to provide incentives to tag.<sup>140</sup> Richard Whitney Johnson has proposed forming an organization of parents, religious groups, educators, and others to promote implementation by parents of the walled garden approach.<sup>141</sup>

It would be difficult, however, to convince a large number of users to implement a walled garden. First, users would have to be educated that such an approach would be necessary to ensure effective tagging. Johnson acknowledges that “Herculean” effort would be necessary in this regard.<sup>142</sup> The number of consumers who would willingly adopt a walled garden approach in order to promote tagging is probably limited. Many content consumers would likely be uninterested in promoting tagging and would not consider adopting a walled garden filter. Even those parents who wish to use a walled garden approach for their children might not be willing to adopt it for themselves.

Moreover, implementing a walled garden might entail a very large sacrifice for consumers if only a small portion of the Web is tagged. Users might not be willing to sacrifice access to a large portion of the Web for themselves or their children, and employers most likely would not be willing to cut their employees off from the useful portions of the Web that are not tagged. With a walled garden, the fewer the number of websites that are tagged, the more limited the

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138. See Elaine A. Nowick, *Use of META Tags for Internet Documents*, 5 J. INTERNET CATALOGING Issue 1, 69, 70 (2002); Danny Sullivan, *How to Use HTML Meta Tags*, SearchEngineWatch.com, Mar. 5, 2007, at <http://searchenginewatch.com/showPage.html?page=2167931>.

139. See *supra* note 21 and accompanying text.

140. See Johnson, *supra* note 1, at 467, 480–82.

141. See *id.* at 481–82.

142. *Id.* at 497.

content that is available for users. Thus, voluntary tagging proposals are undermined by a fundamental impasse: websites lack incentives to tag until many users erect a walled garden, and users lack incentives to erect a walled garden until many websites tag.

Unspecified-mandatory tagging proposals, in which tagging for all websites subject to United States law would be mandatory, are the most likely to produce sufficient rewards for tagging. By bringing a large portion of the Web within the walled garden, proposals that mandate tagging for all websites subject to U.S. law would render the approach more palatable for content consumers.

However, unspecified-mandatory tagging proposals are especially vulnerable to being struck down by courts under First Amendment strict scrutiny. First, a court might find that an unspecified mandatory statute is not the least restrictive means to achieve the government's compelling purpose.<sup>143</sup> An unspecified-mandatory tagging statute would be especially burdensome since it would impact all Web content providers subject to U.S. law. To determine whether an unspecified-mandatory statute is more effective than conventional filtering, a court would have to make a difficult empirical guess as to the statute's potential effectiveness. How a court would resolve this question would depend in part on whether content providers who are not subject to U.S. law would voluntarily tag their websites, since tagging by these content providers would render tag-based filtering more effective. Whether content providers would choose to tag their websites depends, in turn, on whether enough content consumers erect a walled garden against untagged websites to render tagging beneficial for content providers. Second, even if a court did find that an unspecified-mandatory statute were the least restrictive means to achieve the government's compelling interest, it is highly likely that the court would find that the statute is overinclusive. A statute is overinclusive, and therefore fails the narrow tailoring prong of strict scrutiny, if it restricts a significant amount of speech that does not implicate the compelling government interest.<sup>144</sup> The compelling government interest in tagging statutes would be to protect children from sexual material.<sup>145</sup> Since unspecified-mandatory statutes would sweep far beyond material that might be harmful to children by reaching all Web content, it is highly likely that an unspecified-mandatory statute would be deemed impermissible overinclusive.

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143. See generally *supra* Part IV.B.2 (discussing least restrictive means test).

144. See, e.g., *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120–21 (1991); see also *Volokh*, *supra* note 105, at 2421–22.

145. See *supra* note 102 and accompanying text.

In specified regimes, an additional barrier exists to the adoption of tagging by foreign content providers: cultural differences.<sup>146</sup> Cultural differences exist between different countries, regions, and peoples of the world with regard to exposure of children and adults to sexual material, violence, and other material that could be considered offensive.<sup>147</sup> Content providers for foreign websites might refuse to adopt tags that do not reflect their views of what is offensive, even if they believe tagging might be economically beneficial.<sup>148</sup> Moreover, consumers who do not accept the cultural premises upon which U.S. government-designed tags are based may not be willing to take any actions to reward websites that adopt the tags.<sup>149</sup>

### C. Incentives for Adult Foreign Websites to Mislablel

When considering the scope of voluntary adoption, it is important to consider not only the degree of accurate tagging, but also the possibility of intentional mislabeling by foreign websites.

As Professor Eugene Volokh has observed, “where there’s money to be made, foreign content providers might take up some of the slack caused by the decrease in U.S.-based supply.”<sup>150</sup> Web advertising creates incentives for content providers to maximize the number of visitors they receive. On the Internet, the party that has purchased the ads generally cannot know the age of the viewer.<sup>151</sup> This creates strong incentives to mislabel in order to maximize the number of potential visitors, since advertisers cannot know that the visitors are children, unlikely to purchase their goods or services.<sup>152</sup>

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146. Of course, views on what is offensive for adults and children vary among people within the United States as well. In a voluntary regime, some content providers within the United States probably would refuse to adopt the tags based upon objections to the messages they contain.

147. See, e.g., C. Dianne Martin & Joseph M. Reagle, *An Alternative to Government Regulation and Censorship: Content Advisory Systems for the Internet*, 15 CARDOZO ARTS & ENT. L.J. 409, 425–26 (1997); Dobeus, *supra* note 94, at 645–47 (criticizing the RASCI Internet rating scheme due to problems of cultural differences).

148. This seems particularly likely to be true of websites run by individual hobbyists, who are less likely than more professional content providers to have assets in the United States and thus are less likely to be subject to U.S. civil jurisdiction.

149. *But cf.* John F. McGuire, Note, *When Speech Is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 785–87 (1999) (arguing that PICS-based labeling is well-suited to Internet regulation given the varying laws and cultures of the United States and Germany).

150. Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 152 n.35 (1997) (discussing the effectiveness of the CDA).

151. It is not possible to verify age on the Internet without burdensome techniques, and even then such techniques are unreliable. See *Reno v. ACLU*, 521 U.S. 844, 855–57 (1997); *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 800 (E.D. Pa. 2007).

152. Indeed, advertisers cannot always be certain that visitors are human. “Click fraud,” in which content providers set up software to inflate the number of clicks advertising re-



Tagging a website to indicate that it contains offensive material is a near-certain way to lose visitors. There are certain to be consumers who block such websites categorically based on such a tag; it seems unlikely that many users would specifically seek out a website tagged as offensive.<sup>153</sup> If a content provider of a foreign website expects many consumers to implement a walled garden approach, the best way to attract users within the garden is to tag his webpages as inoffensive, whether or not the tag is accurate.

Thus, if a large number of users choose a walled garden approach, content providers of foreign websites with explicit content have incentives to mislabel their websites. The problem of deceptive mislabeling might be more limited in a specified system because U.S. courts could probably enforce judgments against foreign websites with assets in the United States.<sup>154</sup> Nevertheless, if even a relatively small number of foreign websites breach the walled garden, parents may lose confidence in that method and refrain from using it.

## VI. CONCLUSION

Congress may take measures to promote filtering.<sup>155</sup> Legislative efforts to help parents protect their children is a worthwhile goal. However, given the importance of and barriers to voluntary tagging by content providers, tagging legislation is not a good solution. Such legislation would require extraordinary efforts to convince a sufficient number of consumers to erect a walled garden. Without such efforts, voluntary proposals cannot be even minimally effective. Similarly, without sufficient incentives for content providers of foreign websites to tag, mandatory proposals, with the possible exception of Professor Lessig's scheme, would be unconstitutional. The extraordinary efforts that would be necessary to convince content consumers to create incentives for tagging are better directed towards less flashy, but more effective solutions, such as improving filtering technology and educating parents about the dangers their children face online.

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ceives on their websites, is currently a serious problem. *See generally* Matin, *supra* note 134.

153. *See supra* Part V.B.

154. *See supra* Part IV.

155. *Ashcroft v. ACLU*, 542 U.S. 656, 669 (2004).