



Convergence-Era Content Regulation? S. 602, “The Child Safe Viewing Act of 2007”

by Adam Thierer*

In February, Sen. Mark Pryor (D-AR) introduced S. 602, the “Child Safe Viewing Act of 2007.”¹ Although it received little attention at the time, the measure is now moving and it is scheduled to be considered by the Senate Commerce Committee this week. The measure marks an important turning point in the ongoing battle over content regulation in the Information Age—in one way for the better, but in some other ways for the worse.

On the upside, the measure breaks with many other legislative efforts over the past decade that have advocated direct regulation of certain types of speech or media content. S. 602, by contrast, focuses more on empowering parents by encouraging the availability of advanced content blocking technologies. Unfortunately, the measure seeks to accomplish that goal through government actions that could have potentially troubling regulatory implications, especially because of the First Amendment issues at stake here.

S. 602 requires that the Federal Communications Commission (FCC) initiate a proceeding that would “consider measures to encourage or require the use of advanced blocking technologies that are compatible with various communications devices or platforms.” As part of that effort, the agency would “consider advanced blocking technologies that may be appropriate across a wide variety of distribution platforms, including wired, wireless, and Internet platforms” that “can improve or enhance the ability of a parent to protect his or her child from any indecent or objectionable video or audio programming, as determined by such parent.” Finally, S. 602 specifies that these new advanced content blocking technologies should “operate independently of ratings pre-assigned by the creator of such video or audio programming.” While well-intentioned, these provisions raise several concerns.

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¹ S. 602, “The Child Safe Viewing Act of 2007,” February 15, 2007, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s602is.txt.pdf

Unnecessary Regulation

To begin, the case has not been made that FCC action is needed here at all. The findings section of S. 602 states that “There is a compelling government interest in empowering parents to limit their children’s exposure to harmful television content” for a variety reasons. While that may be a worthwhile government interest, there is no reason that such empowerment should be carried out through government mandates.

To be clear, there is no market failure at work here. As I pointed out in my recent Progress & Freedom Foundation book, *Parental Controls and Online Child Protection: A Survey of Tools and Methods*, “There has never been a time in our nation’s history when parents have had more tools and methods at their disposal to help them decide what is acceptable in their homes and in the lives of their children.”² That report catalogs those many tools and methods and makes it clear that the market for parental control technologies is flourishing for every type of media content and platform. Television, in particular, has a large and growing number of advanced blocking tools that parents can tap.³

Interestingly, S. 602 also specifies that one of the advanced blocking technologies that the FCC shall “encourage or require” the use of will be tools that “can filter language based upon information in closed captioning.” But there is no need to mandate this either because such a tool already exists and is being marketed to families today. Over seven million Americans currently use technologies made by TVGuardian,[®] which bill themselves as “The Foul Language Filter.”[™] TVGuardian’s set-top boxes filter out profanity by monitoring the closed-caption signal embedded in the video signal and comparing each word against a dictionary of more than 150 offensive words and phrases. If the device finds a profanity in a broadcast, it temporarily mutes the audio signal and displays a less controversial rewording of the dialog in a closed-captioned box at the bottom of the screen.⁴ The device can also be tailored to individual family preferences to edit out references that some might consider religiously offensive.

Thus, there is no need for Congress or the FCC to mandate tools that already exist. Moreover, if the FCC starts “approving” certain technologies, it is likely to retard the development of new blocking technologies. Companies might just stick with the approved technologies and not develop new ones. In a rapidly moving technical field like this, no government agency can keep up with what the private sector is or would be doing.

However, if policymakers want to take steps to make families better aware of the parental control tools at their disposal, such a move would not raise much of a concern from a constitutional perspective. Indeed, if they wanted to promote awareness of the advanced blocking tools already on the market today, the FCC or even the Federal

² Adam Thierer, *Parental Controls and Online Child Protection: A Survey of Tools and Methods* (Washington, DC: The Progress & Freedom Foundation), p. 8, <http://www.pff.org/parentalcontrols>

³ *Ibid.*, pp. 36-46.

⁴ www.tvguardian.com

Trade Commission (FTC) could list advanced blocking tools and technologies on their websites. The FCC already hosts a website that provides detailed instructions about how to use the V-Chip.⁵ And the FTC hosts a site called OnGuardOnline.gov that deals with Internet safety and security issues.⁶ The agencies could enhance those sites by listing and linking to other parental control tools on the market today. At a minimum, both the FCC and the FTC could point to the many excellent websites that offer parents excellent advice on media ratings and parental controls, such as: GetNetWise.org,⁷ Pause-Parent-Play,⁸ Control Your TV.org,⁹ Project Online Safety,¹⁰ TV Watch,¹¹ The TV Boss.org,¹² and Take Parental Control.org.¹³ Again, such education and awareness-building efforts are preferable to government mandating that certain technologies be used.

Expanding the Scope of Content Regulation?

S. 602 is also problematic because it could potentially expand the focus and scope of the FCC's authority to meddle with private rating systems and parental control mechanisms. In demanding that regulators investigate and consider requiring blocking technologies for "wired, wireless, and Internet platforms," the measure potentially opens the door to the beginning of convergence-era content regulation at the FCC. The agency currently has no authority to regulate content (or parental control technologies or rating systems) on most media or communications platforms outside of broadcasting, and its authority over broadcasting is limited. But S. 602 would potentially give regulators the ability to begin expanding the horizons of federal content regulation.

One wonders what sort of resources the FCC would need to carry out this task. After all, we're talking about numerous platforms and a potentially enormous volume of content. The FCC would likely need a small army of regulators to ensure that all "wired, wireless, and Internet platforms" were in compliance with the law. Will there be a specific team of FCC officials devoted to monitoring advanced blocking mechanisms for the official websites of major media operators? What about YouTube.com, MySpace.com and other major websites that host both user-generated content and professional media content? What about the new media platforms and content that mobile operators are offering? Many advanced blocking tools already exist to screen or filter online content,¹⁴ but whether other types of regulation could be required under S. 602 remains unclear. Moreover, the global reach of many of these online platforms raises other enforcement issues.

⁵ www.fcc.gov/vchip

⁶ <http://onguardonline.gov/index.html>

⁷ www.getnetwise.org

⁸ www.pauseparentplay.org

⁹ www.controlyourtv.org

¹⁰ www.projectonlinesafety.com

¹¹ www.televisionwatch.org

¹² www.thetvboss.org

¹³ <http://takeparentalcontrol.org>

¹⁴ Thierer, Parental Controls and Online Child Protection, pp. 70-91.

Superseding Voluntary Ratings?

Third, and most importantly, in specifying that these new advanced content blocking technologies should “operate independently of ratings pre-assigned by the creator of such video or audio programming,” S. 602 seems to imply that existing voluntary rating and labeling systems cannot be trusted. That is a dangerous presumption.

Existing rating and labeling systems, while not perfect, are well-established and comprehensive. It is simply unrealistic to expect that all new advanced content blocking technologies will operate independent of existing rating and labeling systems, such as the television rating system, the MPAA movie rating systems, and the video game industry’s ESRB rating system. It is important to realize that these systems rate and label almost all the entertainment content produced in their respective fields. While third-party rating systems can supplement these official industry rating schemes, it is unlikely those independent schemes will ever be as comprehensive as the official industry systems.

More importantly, existing blocking tools on the market today, such as the V-Chip and cable and satellite set-top boxes, rely on those official rating and labeling systems, which most Americans are already familiar with. It is unrealistic to expect all new consumer media devices to employ alternative blocking schemes or be able to read independent rating systems.

Thus, it remains unclear what that sponsors of S. 602 are hoping to accomplish by specifying that new blocking systems “operate independently of ratings pre-assigned by the creator.” Regardless, the real danger here is that that language could fuel a push for “universal” media ratings that would be imposed by the government or a third-party which has the government’s blessing. It goes without saying that such a proposal would raise serious First Amendment concerns.

But, even setting aside the clear First Amendment concerns, there is no practical reason to believe that the government could actually do a better job of assigning ratings or creating parental control tools. If the government were responsible for assigning content ratings or labels, for example, five unelected bureaucrats at the FCC or some other regulatory agency would simply substitute their own values for those of the voluntary rating boards or other labeling organizations in existence today.

And the argument that government would provide more objective ratings or effective controls is also undermined by the grim reality of special-interest politics. Government officials would be more susceptible to various interest group pressures as they were repeatedly lobbied to change ratings or restrict content based on widely varying objectives and values. Inevitably, as has been the case with the broadcast indecency complaint process in recent years, a handful of particularly vociferous groups

could gain undue influence over content decisions.¹⁵ That possible outcome would give rise to what the Supreme Court has referred to as the “heckler’s veto” problem since a vocal minority’s preferences could trump those of the public at large.¹⁶ With private, independent rating and labeling systems, by contrast, those assigning ratings or labels are intentionally isolated from lobbying or other interest group pressures. We should keep it that way.

Conclusion

Sen. Pryor is to be commended for avoiding direct content regulation and instead focusing on empowering families to make media consumption decisions on their own. Nonetheless, in an attempt to empower parents it is important that Congress not empower regulators instead. S. 602 opens the door to an expansion of the FCC’s authority over media content on multiple platforms and threatens to undermine private, voluntary rating systems in the process. There are better ways to help parents.

¹⁵ Adam Thierer, “Examining the FCC’s Complaint-Driven Broadcast Indecency Enforcement Process,” Progress & Freedom Foundation Progress on Point 12.22, November 2005, www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf

¹⁶ Reno v. ACLU, 521 U.S. 844, 880 (1997).

Of Related Interest

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