

THE END OF THE AGE OF INNOCENCE

- AND THE BEGINNING OF RESPONSIBLE AGE VERIFICATION

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Introduction

Why worry about age verification? “That’s the parents’ job.” “What right does the government have to force me to protect children?” “There is no law in the United States requiring online age verification.” “Age verification devices do not always work, and cost too much.” “They interrupt our traffic flow, and cause us to lose sales.”

The same arguments have been repeated over and over in an effort to avoid implementation of functioning age verification online. However, the era of the adult website without age verification has come to an end. The adult Internet industry has matured to a level that requires acceptance of responsibility for age verification of end users. Adult webmasters can no longer avoid the issue based on the misinformation and excuses that abound in the industry.

New legislation is pending that would require all adult websites to implement a form of age verification approved by the Federal Trade Commission (FTC).¹ A “black list” of noncompliant websites would be created for some unstated purpose.² Credit card processors would only be permitted to service adult websites that incorporated some approved form of age verification.³

This bill is clearly a reaction to the dismal age verification efforts previously undertaken by the adult Internet industry. Unless webmasters decide to take this issue seriously, and adopt a high level of voluntary compliance on their own, the government will be more than happy to provide mandatory compliance requirements which will dramatically impact the ability of U.S. adult webmasters to compete in the worldwide marketplace.

Each of the other mainstream media industries figured this out on its own, before it was too late. The Motion Picture Association of America (MPAA) quickly adopted a ratings system for Hollywood movies to avoid government censorship. The video game industry adopted an even more complex and descriptive ratings system for games with violent or sexually-oriented themes.⁴ The mainstream music industry came close to mandatory warnings and labels before it

¹ Internet Safety & Child Protection Act of 2005, S. 1507.

² *Id.* at §103(2).

³ *Id.* at § 102.

⁴ See: ESRB.org

voluntarily agreed to adopt an explicit lyrics warning system on its own.⁵ These industries recognized that some degree of voluntary compliance was essential to stave off mandatory legislation. Family values groups and conservative lawmakers will always seize the opportunity and utilize an industry's failure to address child protection issues as a means to garner support, increase donations, and rally their base. The adult Internet industry is a sitting duck for this kind of political shenanigan. While the issue of how to deal with access by minors to adult material online is a complicated one, it must be addressed immediately if the adult Internet industry is to continue enjoying the level of success and free reign that it has experienced over the last decade.

Recent statistics, reported to lawmakers, on access by minors to adult material are shocking, and will certainly motivate Congress to address the problem in the absence of immediate, substantial, voluntary compliance by the industry. For example, researchers allege:

- * Only 3% of adult websites require age verification beyond the honor system.
- * The largest group of viewers of explicit materials is children between 12-17 years old.
- * 74% of adult websites display "free" content.⁶

Statistics like these, while certainly subject to debate and questions about their accuracy, will be accepted as gospel truth by the average citizen, who is fed up with receiving multiple hardcore spam emails every day in their inbox. Irresponsible promoters and affiliates who disseminate such materials are causing immense harm to the vast majority of otherwise responsible, ethical webmasters who seek to scrupulously avoid child customers. While the American lawmakers will not be able to have any impact on foreign webmasters or affiliates who are not subject to United States law, the responsible American webmaster must lead the way by implementing creative, viable, age verification, before any access is provided to sexually-explicit materials. Such efforts may head off governmental efforts to impose age verification requirements that are not realistic, functional or practical for the webmaster trying to compete in the global marketplace.

But what about the issues raised in the first paragraph of this article? Let's take them one by one:

Parents Should Protect Children From Adult Media

While it is easy to attempt to shift the obligation to protect children from exposure to inappropriate materials away from the webmaster, and toward the parents, such is not a viable option in the current social/political climate. Indisputably, parents must act as the final gatekeeper when it comes to exposure to any form of information or media. However, billion dollar industries, such as the adult Internet, take on a certain level of responsibility to protect their vast potential audience from age-restricted materials or services. This expectation is fueled partly by the substantial revenues available (or perceived to be available) in the industry. But the obligation also stems from the use of a public communication tool upon which the average citizen is becoming more and more dependent for everyday activities. Just as the airwaves are held in the "public trust" by radio and television stations, in exchange for their agreement to

⁵ The effort organized into a group known as the "Parents Music Resource Center."

⁶ *The Porn Standard*, www.thirdway.com (2005)

honor a certain code, there is a perceived obligation on the part of those utilizing the Internet to communicate or distribute commercial goods, to honor a similar implied code of good faith and fair dealing. Failure to honor that code by the adult Internet industry will result in a public backlash.

While most Internet users do not inadvertently become exposed to adult materials online, the rampant exposure to adult-oriented spam email, along with the common use of misleading domain names redirected to adult websites, has resulted in increased accidental exposure to sexually-explicit materials by both adults and children. The public has had enough, and demands some form of voluntary compliance or governmental regulation to deal with this issue. Thus, while we can all agree in principal that parents have the primary obligation of protecting children from exposure to explicit materials, or anything else that they do not want their children to view, the freedom to use the Internet as a tool for profiting from the distribution of erotic materials brings with it socially-imposed responsibility to ensure that age restricted materials are directed at, and consumed by, the appropriate audience.⁷

“Age Verification Does Not Work”

There can be no dispute about the fact that online age verification has not reached a level of perfection. Underage users will inevitably break through any form of age verification currently on the market. Pending developments in biotechnology will ultimately allow websites to screen users by retina imaging, fingerprints, or bone mass scans. However, the level of advancement that has been achieved thus far should not constitute a reason for failing to implement one or more forms of age verification. Neither the government, nor society, demands perfection in this regard. Minors regularly purchase alcohol and cigarettes; yet these products continue to be available on a widespread basis. Should legislation like Representative Lincoln’s Bill, described above, become law at some point, the approved forms of age verification that webmasters must implement will not be 100% perfect, either. However, what is expected by society, and the government that represents it, is some good faith attempt to exclude minors from adult websites.

Most state laws that forbid the sale of pornography to underage individuals contain a “safe harbor” defense, allowing retailers to escape prosecution if they undertook some good faith effort to prevent the sale of age restricted media to minors. This can be something as simple as requiring the clerk to retrieve such items, or enforcing a strict policy of requiring identification from persons who appear under the age of thirty. While none of these efforts will prevent all minors from getting their hands on a copy of *Hustler* or *Penthouse* in the brick-and-mortar world, society is prepared to accept some degree of imperfection so long as reasonable efforts are undertaken. Thus, while each age verification device has its weaknesses, something is better than nothing. One final note: Significant incentive exists for webmasters to be among the first to implement real age verification on their websites. Those webmasters will be in a position to argue that they are doing more to protect children from exposure to inappropriate material than the vast majority of the industry. Assuming the remaining webmasters ultimately see the light, and the industry adopts age verification in *toto*, this argument cannot be made for very long.

⁷ The author does not advocate for, or against, the merits of this burden being imposed on adult webmasters. This is merely an observation based on the author’s knowledge and experience.

However, there is a unique, *albeit* fleeting, opportunity for webmasters to set themselves apart from the norm, by implementing age verification now, before it becomes the industry standard.

“Age Verification Will Decrease Traffic & Revenues”

In the short term, the implementation of any age check device will likely have an effect on both traffic and revenue. Navigation of age verification screens conflicts with the inherent laziness of the average web surfer. Some companies that have experimented with age verification devices have indicated however, that the lost traffic falls into the category of “junk” that merely eats up bandwidth and costs more than it is worth. Whether this is true or not, the industry must come to terms with the fact that protecting minors from exposure to explicit materials comes with a price. However, in paying that price, webmasters receive significant legal protection and political benefits that are invaluable. Once age verification becomes commonplace, the costs associated with implementation of these devices will be dramatically reduced, since the end user will become accustomed to, and forced to use, some form of age verification on most adult websites. The user’s option to simply choose an alternative site without age verification will quickly disappear. On balance, though, the benefits of implementing age verification far outweigh any potential revenue or traffic losses that may be experienced. Several companies that have implemented age verification on their network of websites have reported to this author that they experienced two, three, or four fold increases in profits after doing so, despite the initial expectation of decreases. While an argument can be made that those increases could have been even higher without age verification, one criminal prosecution or civil claim, resulting from access by minors, would quickly eat up any increased profitability potentially realized by omission of an age verification solution.

“There Is No Law Requiring Age Verification”

Not true. Significant misinformation has been circulated in the adult webmaster community about this issue. Initially, almost every state has adopted a statute prohibiting the retail display or sale of sexually-explicit materials to minors. Some of the statutes specifically prohibit doing so via a computer, and others are vague in their potential scope. Some of these state laws have been struck down⁸ although most are untested in the courts. A local prosecutor with a thirst for headlines could certainly initiate a criminal charge against a website operator who fails to implement a viable form of age verification. While the courts may ultimately find constitutional problems with any given state statute, prevailing in court is never guaranteed. Moreover, as the United States Supreme Court appears to be swinging towards the conservative side, civil liberties cases will become more difficult to win.

In addition to state law concerns, it should be noted that the Child Online Protection Act (COPA) requires age verification for adult websites. Commercial websites must implement age

⁸ See: *Reno v. ACLU*, supra, *American Book Sellers Foundation for Free Expression v. Dean*, 202 F.Supp.2d 300 (D. Vt. 2002); *PSI Net, Inc. v. Chapman*, 167 F.Supp. 878 (W.D. Pa. 2001), question certified, 317 F.3d 413 (4th Cir. 2003); *Cyberspace Communications, Inc. v. Engler*, 142 F.Supp.2d 827 (E.D. Mich. 2001); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *American Libraries Association v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997); *Center for Democracy & Technology v. Pappert*, 337 F.Supp.2d 2006 (E.D. PA 2004); *Southeast Booksellers Ass’n v. McMaster*, 371 F.Supp.2d 773 (D.S.C. 2005).

verification based on 1) credit cards; 2) verified passwords; or, 3) “other means” that are reasonably feasible under the current technology.⁹ While the courts have thus far preliminarily enjoined COPA,¹⁰ the case has still not been decided, and the law could still be upheld by the United States Supreme Court. The results of the pending Supreme Court nomination process may bear heavily on the outcome of this particular case when it reaches the High Court for the third time. Until then, webmasters cannot be assured that they are out of the woods with regard to COPA compliance. Moreover, the government has never promised that it will not retroactively enforce the Act against those webmasters who failed to comply while it was enjoined, assuming that the law is ultimately upheld.

In sum, both state and federal law pose potential age verification concerns for adult webmasters. Moreover, as noted above, pending legislation may soon be adopted to require use of certain forms of approved age verification by adult webmasters. To say that the law does not require age verification for adult websites is simply wrong.

Conclusion

As is evident, online age verification is about to become a reality – whether through the adoption of voluntary guidelines, or government mandate. Various online age check options are currently available, ranging from database verification to voluntary affirmation of age under the penalties of perjury.¹¹ Some combination of systems may be required, depending on the nature of the content involved, the structure of the website, and the level of compliance desired. For example, soft core free tours may require a device that is less intrusive and time consuming than a free hardcore website. Unless and until government-mandated age verification becomes a reality, compliance will be guided by the webmaster’s good faith. This good faith can pay off in the end, since functioning age verification eliminates a powerful argument for government regulation – protection of children. This theme recurs over and over again whenever the government pursues legal action against adult-oriented websites. Often, the issue of access by minors has nothing to do with the charge involved, such as in obscenity prosecutions. However, those cases are much harder to defend when the prosecution can argue that the webmaster is providing obscene materials to children. By taking away that argument, the webmaster forces the government into a pure free speech battle over censorship of erotic materials. In that way, the webmaster has dramatically increased his or her chances of success in defending just about any legal claim. In the end, the industry may do well, by doing good.

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⁹ Child Online Protection Act, 47 U.S.C. § 231.

¹⁰ ¹⁰ *American Civil Liberties Union v. Reno*, 217 F.3d 162, 169-170 (3rd Cir. 2000) *certiorari granted by, Ashcroft v. American Civil Liberties Union*, 532 U.S. 1037, 121 S.Ct. 1997, 149 L.Ed.2d 1001 (2001), *vacated by, Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002), *remanded to, American Civil Liberties Union v. Ashcroft*, 322 F.3d 240 (3rd Cir. 2003), *cert. granted by, Ashcroft v. American Civil Liberties Union*, 540 U.S. 944, 124 S.Ct. 399, 157 L.Ed.2d 274 (2003), *aff’d and remanded by, Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 124 S.Ct. 2783, 159 L.Ed.2d 690 (June 29, 2004).

¹¹ See: www.idology.com; www.electracash.com; www.aristotle.com; www.birthdateverifier.com.

United States Supreme Court over the last 40 years. All statements made in the above article are matters of opinion only, and should not be considered legal advice. Please consult your own attorney on specific legal matters. You can reach Lawrence Walters at Larry@LawrenceWalters.com, www.FirstAmendment.com or AOL Screen Name: "Webattorney."