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Burning the Library to Roast the Pig? Online Pornography and Internet Filtering in the Free Public Library

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NOTES

BURNING THE LIBRARY TO ROAST THE PIG? ONLINE PORNOGRAPHY AND INTERNET FILTERING IN THE FREE PUBLIC LIBRARY*

Over the last decade, as public libraries have rushed to tap the seemingly limitless information available on the Internet, advocates for child protection have warned of the perils that face children with unfettered access to the medium. Because the Internet includes pornography and other content that could be harmful to children, these advocates call for the use of Internet filtering software to sanitize the medium, especially when government funds support the Internet access, as in public libraries. Civil libertarians and defenders of the First Amendment, on the other hand, suggest that the mandatory use of Internet filtering software is a misguided and ineffective form of censorship[1] that simultaneously fails to protect children from the very harms it is intended to prevent, denies children access to much safe and useful information, and reduces the Internet content available for adults to that which would be acceptable for children.[2]

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[1] Nancy Willard, an Oregon educator who has written student Internet safety guides based on self-responsibility, says the use of Internet filters is "nothing more than stealth censorship." John Schwartz, *Internet Filters Block Many Useful Sites, Study Finds*, N.Y. TIMES, Dec. 11, 2002, at A28. Barbara Dority, Executive Director of the Washington Coalition Against Censorship, states the case in her bluntly titled article *Filtering: Just Another Form of Censorship*, HUMANIST, Mar./Apr. 1999, at 39, *cited in* 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, 397 (2002).

[2] The American Library Association ("ALA") explains that it rejects Internet filtering in libraries because filters

> block access to information that is legal and useful. . . . The ALA also is concerned that the use of filters may give parents a false sense their children are protected when this is not the case. Filters are not effective in blocking all "objectionable" material, and they do not protect against pedophiles and other

Especially in the context of the public library, which courts have described as a "mighty resource in the free marketplace of ideas"[3] that is "designed for freewheeling inquiry[,]"[4] free speech advocates suggest that it is inappropriate to protect youthful innocence by preventing even adults from accessing any Internet material that might be unacceptable for children. For those who see Internet filters as merely the latest attempt to interfere with that bastion of First Amendment information access,[5] the free public library, and its mission of providing free and unmediated access to information, "childproofing" the information available in a public library by sanitizing the Internet is, with apologies to Justice Frankfurter, surely burning the library to roast the pig.[6]

The rapid growth of the Internet over the last decade has made an enormous volume of information available to any person with access to a networked computer. A 2000 study estimated that eleven million sites would exist by September, 2001[7] on the World Wide Web, the most well-traveled segment of the information superhighway.[8] Research suggests that there

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> interactive aspects of the Internet. . . . Filters do not protect children, education does.

American Library Association, *Libraries, Children and the Internet*, *at* http://www.ala.org/parents/librariesandinternet.html (last visited Jan. 21, 2003), *cited in* Leah M. Perkins, *Children's Internet Protection Act Signed Into Law*, LAWYERS J., Feb. 2001, at 2.

[3] Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 582-83 (6th Cir. 1976) (citing Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting)).

[4] Bd. of Educ. v. Pico, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting).

[5] Describing the free public library, Charles E. Cummings, a historian and staff member of the Newark Public Library, recently observed (in an unrelated context), "That's what the library is about, the First Amendment. We are totally a bastion of free speech." Maria Newman, *Poet Laureate Stands By Words Against Israel and Won't Step Down*, N.Y. TIMES, Oct. 3, 2002, at B8. Professor Richard J. Peltz describes the public library as "the quintessential venue for citizens to exercise their First Amendment right to receive information and ideas." Peltz, *supra* note 1, at 397.

[6] *See* Butler v. Michigan, 352 U.S. 380, 383 (1957). In *Butler*, the Supreme Court evaluated a Michigan statute that made it illegal to make available to the general public materials that might be harmful to youth, and found that the law restricted freedom of speech by reducing the material available to the adult population to only what was fit for children. In writing for the Court, Justice Frankfurter described the Michigan law as "quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence" and suggested, "[s]urely, this is to burn the house to roast the pig." *Id.*

[7] Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 419 (E.D. Pa. 2002).

[8] Rolando Jose Santiago, *Internet Access in Public Libraries: A First Amendment Perspective*, 32 URB. LAW. 259, 262 (2000) (explaining that the Internet includes the World Wide Web, as well as e-mail, automatic mailing list services,

are in the range of two billion individual pages presently available on the Web,[9] and thousands of new pages are added daily.[10] In evaluating the first Congressional attempt to protect children from Internet harm,[11] the United States Supreme Court correctly described the Internet as "an international network of interconnected computers"[12] that "allows users to search for and retrieve information stored in remote computers."[13]

While this ability to access information on computers throughout the world effectively gives Web users entry into a great archive of useful information, it also presents significant risks, as users may encounter a broad range of dangerous, offensive, indecent and obscene content.[14] Estimates suggest that approximately 100,000 Web sites provide free access to sexually explicit material,[15] creating significant challenges for those who seek to protect children from the Web's darker content while ensuring their access to useful and educational material.[16] In homes across the country, one can reasonably expect, parents have devised myriad policies to prevent their children from accessing inappropriate Web sites.[17] With almost

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newsgroups and chat rooms).

[9] *Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 419. *See also* Peter Lyman & Hal R. Varian, *How Much Information?*, *at* http://www.sims.berkeley.edu/research/projects/how-much-info/internet.html (last visited Jan. 21, 2003) (suggesting that there are 2.5 billion documents on the publicly available Web, or "surface [W]eb," and a total of 550 billion Web-connected documents contained within the "deep" Web, including Web-connected databases, intranet sites and all other "[W]eb-accessible information").

[10] American Civil Liberties Union, *Cyber Liberties: Censorship in a Box: Why Blocking Software is Wrong for Public Libraries* (Feb. 13, 2002) *at* http://www.aclu.org/news/newsprint.cfm?id=9336&c=59 (last visited Jan. 21, 2003), *cited in* Santiago, *supra* note 8, at 263.

[11] Reno v. ACLU (Reno I), 521 U.S. 844 (1997) (evaluating the constitutionality of the Communications Decency Act of 1996); *see also infra* Part II.A.

[12] *Reno I*, 521 U.S. at 849, *cited in* Santiago, *supra* note 8, at 262.

[13] *Reno I*, 521 U.S. at 852, *cited in* Santiago, *supra* note 8, at 262.

[14] Sarah E. Warren, *Filtering Sexual Material on the Internet: Public Libraries Surf the Legal Morass*, FLA. B.J., Oct. 1999, at 52 ("[T]he Internet is . . . host to significant amounts of sexually explicit material—as many as 28,000 hard-and soft-core pornography sites." (citing S. REP. NO. 105-226, (Internet Filtering Systems)).

[15] *Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 406. Another study suggests there are fifteen million Web pages with pornographic content. Angela Xenakis, Comment, *Keeping Children from the Internet's 'Red Light District': Increased Regulation or Improved Technology?*, 3 N.C. J.L. & TECH. 333, 333 (2002) (citing study by Dr. Steve Lawrence and Dr. Lee Giles, researchers at the NEC Research Institute).

[16] A 2000 Study estimated that by 2005, forty-four million children under the age of eighteen will be using the Internet. Xenakis, *supra* note 15, at 334 (citing Press Release, Grunwald Associates, Children, Families and the Internet (June 7, 2000), *at* http://www.grunwald.com/survey/newsrelease.html (last visited Jan. 21, 2003)).

[17] Parents, of course, are free to control what information their children are

all schools[18] and libraries[19] now providing children with access to the Internet, policymakers, teachers and librarians have struggled to devise policies that serve the same goals as parental policing.

This Note explores Congressional attempts to protect children from Internet-based harm, particularly in the public library setting, without running afoul of the First Amendment. Many of the issues surrounding Internet filtering in public libraries mirror concerns about the use of such technology in school classrooms or school libraries. The unique historical function of the free public library, however, distinguishes it from these other educational venues and requires a distinct analysis of library-based Internet filtering.[20]

To assess library-based Internet filtering, therefore, this Note evaluates judicial and scholarly perspectives on Internet filtering software generally, as well as on the specific nature of the public library. This evaluation suggests that patrons who access the Internet in public libraries do so in a designated public forum for patron-initiated information access and exchange,[21] unlike the school setting, where teachers or school officials control the educational goals of information access.[22] In such a public forum, the First Amendment prohibits the government from excluding certain speech based on its

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exposed to without violating the First Amendment, unlike public institutions. As Al Gore has observed, "[b]locking your own child's access to offensive speech is not censorship—it's parenting." Geoffrey Nunberg, *The Internet Filter Farce*, AM. PROSPECT, Jan. 1, 2001, *available at* http://www.prospect.org/print/V12/1/nunberg.html (last visited Feb. 7, 2003). That home use of Internet filters by parents is constitutionally unobjectionable, however, does not insulate library- or school-based filtering from constitutional attack.

[18] In the fall of 2001, 99% of public schools in the U.S. had Internet access, and Internet access in instructional rooms has grown from 3% in 1994 to 87% in 2001. National Center for Education Statistics, *Internet Access in U.S. Public Schools and Classrooms: 1994–2001*, *available at* http://nces.ed.gov/pubs2002/internet/3.asp (last visited Jan. 20, 2003).

[19] A 2000 study found that Internet connectivity in public libraries was 95.7%, up from 83.6% reported in 1998, and that 94.5% of public libraries provide public access to the Internet. Press Release, U.S. National Commission on Libraries and Information Science, 2000 Public Library Internet Study (Sept. 20, 2000), *available at* http://www.nclis.gov/news/pressrelease/pr2000/plis2000.html (last visited Jan. 20, 2003).

[20] *See* Kathleen Conn, *Protecting Children From Internet Harm (Again): Will the Children's Internet Protection Act Survive Judicial Scrutiny?*, 153 EDUC. L. REP. 469, 481-82 (2001).

[21] *See* Bernard W. Bell, *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries' Use of Internet Filtering Software*, 53 FED. COMM. L.J. 191, 218-26 (2001).

[22] Bd. of Educ. v. Pico, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting).

disfavored content,[23] unless it uses the most narrowly tailored means. Presently available Internet filters alone cannot cleanse the Internet's information resources with the necessary precision, and, thus, they ultimately censor communications that are protected by the First Amendment.

Part I of this Note discusses the way in which the extreme rhetoric employed by both advocates and critics of Internet filtering has produced a political environment in which politicians have little incentive to compromise on the issue. As a result, Congressional leaders have repeatedly passed legislation that lets them appear "tough" on Internet smut, but that reviewing courts have held to be unconstitutional.

To explain why courts have found that these laws unconstitutionally infringe First Amendment rights, Part II of this Note will examine judicial responses to Internet filtering laws, both within and outside the library setting. Part II first focuses on the Supreme Court's treatment of laws designed to regulate Internet filth, including those authorizing criminal penalties for Internet transmission of pornography. The Supreme Court decisions in *Reno v. ACLU*,[24] (*"Reno I"*) evaluating the Communications Decency Act of 1996,[25] and in *Ashcroft v. ACLU*,[26] responding to the Child Online Protection Act of 1998,[27] provide an important background, as do lower court decisions evaluating the nature of the public library as a public forum, including *Kreimer v. Bureau of Police*[28] and *Mainstream Loudoun v. Board of Trustees*.[29] Part II then addresses the constitutionality of the Children's Internet Protection Act of 2000,[30] which conditioned federal library funds on a recipient library's use of Internet filtering software.

Part III of this Note will suggest that it may be possible to protect children in a public library setting from Internet harm without running afoul of the First Amendment, even while using a system that relies partially on Internet filtering.

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[23] *See* Bell, *supra* note 21, at 203-04.

[24] 521 U.S. 844 (1997).

[25] 47 U.S.C. § 223(a)-(3) (1998).

[26] 122 S.Ct. 1700 (2002).

[27] 47 U.S.C. § 231(a)-(3).

[28] 958 F.2d 1242 (3d Cir. 1992).

[29] Mainstream Loudoun v. Bd. of Trs. (Mainstream Loudoun II), 24 F. Supp. 2d 552 (E.D. Va. 1998); Mainstream Loudoun v. Bd. of Trs. (Mainstream Loudoun I), 2 F. Supp. 2d 783 (E.D. Va. 1998).

[30] 47 U.S.C. § 254(h) (2002); 20 U.S.C. § 9134(f).

In so concluding, this Note proposes alternative solutions to the dilemma posed to librarians and First Amendment advocates who value protecting children but resist censorship, a problem that librarian Jeannette Allis Bastian described as "a question bedeviling thousands of public librarians who have rushed to embrace this seemingly limitless and economical information source only to find that it includes a distinctly dark and dirty side."[31]

I. INTERNET FILTERS: PROTECTING CHILDREN OR PROMOTING CENSORSHIP?

A. *The Public Debate over Internet Filtering in Public Libraries*

Proponents and critics of Internet filtering laws have cast the debate over such mandates as a battle between civil libertarians concerned with protecting Americans' First Amendment freedoms and those who would protect children from nefarious harm. Strong rhetoric and absolutist language have characterized public debate over the measures. Critics of Internet filtering liken the practice to book burning and other forms of censorship,[32] while filtering advocates warn of the dangers to children whose minds might be "molested by cyberpornography."[33]

Conservative pundits and "family values" advocates emphasize the ubiquity of online pornography and the menacing danger it poses to American children.[34] Before the Supreme Court, Solicitor General Theodore Olson recently emphasized the "substantial, incalculable damage to our children"[35] caused by Internet pornography. As Janet LaRue, senior director of legal studies with the conservative Family Research Council, has argued, "[b]ecause of the policies of the

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[31] Warren, *supra* note 14, at 53.

[32] *See, e.g.*, Joan E. Bertin, *A Necessary Evil?*, CENSORSHIP NEWS ONLINE, *at* http://www.ncac.org/cen_news/cn77views.html (last visited Oct. 29, 2002).

[33] *Id.*

[34] That substantial segments of the nation fear the online smut menace is reflected by the growth of the Internet filtering industry. A 2001 report estimated that the content filtering industry exceeded $150 million a year and would reach $1.3 billion by 2003. Nunberg, *supra* note 17.

[35] Transcript of Oral Argument at 3, Ashcroft v. ACLU, 535 U.S. 564 (2002) (No. 00-1293) (defending COPA); *see also* Linda Greenhouse, *Justices Revisit the Issue of Child Protection in the Age of Internet Pornography*, N.Y. TIMES, Nov. 29, 2001, at A28.

American Librarian Association [opposing filtering in libraries], public libraries with unrestricted Internet access are virtual peep shows open to kids and funded by taxpayers . . . ."[36] Conservative radio talk show host Dr. Laura Schlessinger "has called on her daily listeners to picket libraries that supply children with pornography."[37]

With equally sweeping rhetoric, opponents of Internet filtering compare it to the most despicable forms of censorship, and claim filtering strikes at the very heart of American democracy. Judith Krug, director of the Office for Intellectual Freedom of the American Library Association ("ALA"), has criticized Internet filtering laws. Krug maintains that, "[a]ny legislative endeavor that seeks to restrict the information that is available to the citizens of the United States strikes at the heart of our Constitution. . . . Without information that is readily available and accessible, we cannot govern ourselves effectively. We cannot govern ourselves period."[38] The ALA spotlights the central role played by the public library in fostering the informational exchange required in a self-governing society, proclaiming that "free access to the books, ideas, resources, and information in America's libraries is

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[36] Jean Hellwege, *Civil Liberties, Library Groups Challenge the Latest Law Restricting Web Access*, 37 TRIAL 93 (2001).

[37] Junichi P. Semitsu, *Burning Cyberbooks in Public Libraries: Internet Filtering Software vs. the First Amendment*, 52 STAN. L. REV. 509, 511 (citing The Official Dr. Laura Web site, *at* http://www.drlaura.com (last visited Oct. 29, 2001)). As Semitsu notes, some of Dr. Schlessinger's objections to unfiltered Internet access may stem from the fact that "some of the pornographic images available on the Internet happen to be nude photos of Dr. Laura herself that were taken by an ex-lover and sold to an X-rated website." *Id.* at 511-12.

[38] Hellwege, *supra* note 36, at 93. Janet Axelrod, a Trustee of the Cambridge, Massachusetts Public Library, puts it more succinctly: "Libraries are about preserving democracy. Nothing less." Libraries for the Future Web site, *at* http://www.lff.org/about/contact.html. The ALA's Krug has emphasized that "[t]he importance of the First Amendment . . . is that it provides us with the ability to govern ourselves, because it guarantees that you have the right to access information. The filters undercut that ability." Schwartz, *supra* note 1. Advocates like Krug root their objections to Internet filtering in the First Amendment's proscriptions against government censorship. In so doing, they tap into a long tradition of opposition to censorship that traces back to the Framers. As James Madison observed near the end of his life, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 437 (Marvin Meyers ed., 1973).

imperative for education, employment, enjoyment, and self-government."[39]

The ALA has adopted a position of unequivocal opposition to government censorship in its "Resolution on Opposition to Federally Mandated Internet Filtering,"[40] that provides in part:

> Whereas, The American Library Association has as its cornerstone the First Amendment and free and open access to the information people need and want regardless of the format in which that information appears; and
>
> Whereas, Millions of our nation's library users cannot afford computers . . . and therefore rely on public access computers in their local libraries for Internet access; and . . .
>
> Whereas, The ALA strongly believes that educating children to use the Internet wisely provides children their best protection, now and in the future; and . . .
>
> Whereas, The ALA does not endorse blocking or filtering Internet content in libraries because there is no proven technology that both blocks out all illegal content and allows access to all constitutionally protected material . . .
>
> Resolved, That ALA will initiate litigation against [federally mandated filtering laws] to ensure that the people of America have unfettered access to information . . . .[41]

Groups like the American Civil Liberties Union ("ACLU") join the ALA in its objections to federally mandated Internet filtering. The ACLU has united with the ALA to file suits against successive congressional attempts to sanitize the content of the Internet.[42]

Litigation inspired by Internet filtering policies has not been limited to suits against federally mandated filtering, such

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[39] American Library Association, *Libraries: An American Value*, *available at* http://www.ala.org/alaorg/oif/lib_val.html (last visited Dec. 31, 2002). Krug emphasizes that "Free people read freely . . . . We must work to preserve this basic American right and ensure access to the broadest range of information." Press Release, American Library Association, ALA Raises Red Flag on Recent Bush Executive Order (Mar. 1, 2002), *available at* http://www.ala.org/news/v8n3/executiveorder.html (last visited Jan. 20, 2003).

[40] American Library Association, *Resolution on Opposition to Federally Mandated Internet Filtering*, *available at* http://www.ala.org/alaorg/oif/mandatedfiltering.pdf (last visited Nov. 3, 2002).

[41] *Id.*

[42] *See, e.g.*, Press Release, American Civil Liberties Union, ACLU Promises Legal Challenge as Congress Adopts Bill Imposing Internet Blocking in Libraries, *at* http://www.aclu.org/news/2000/n121800a.html (last visited Nov. 3, 2002).

as those initiated by the ALA and the ACLU. Individuals have also filed suits against libraries that adopted filtering policies independent of congressional mandates. Library patrons have sued libraries that installed protective Internet filtering software on their own initiative, alleging that mandatory filtering abridges their First Amendment rights to access information.[43] Suits are not limited to those challenging libraries that filter Internet content, however; libraries that have chosen not to filter have also found themselves accused in court.[44] In a noteworthy California case, a mother whose son had downloaded an extensive portfolio of pornography at the local library sued the library, seeking to bar public officials from spending public funds on library computers from which minors could access sexually explicit material.[45]

Given the heated rhetoric and passionate advocacy surrounding the issue of Internet filtering, librarians are faced with the daunting decision of whether to adopt policies that require Internet filtering software. Professional librarians across the country have come to different conclusions, with some library systems adopting Internet use policies requiring universal filtering, and other systems refusing to install filters on any computers.[46]

B. *Congressional Responses to the Dangers of Internet Pornography*

If librarians have differed in opinion over the wisdom of using Internet filters, congressional responses to dangerous Internet speech have more uniformly reflected the influence of

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[43] *See, e.g.*, Mainstream Loudoun II, 24 F. Supp. 2d 552 (E.D. Va. 1998).

[44] As a result, libraries deciding whether or not to filter may be facing a "damned if you do, damned if you don't" position. Kathleen R. v. City of Livermore, 104 Cal. Rptr. 2d 772, 776 (Cal. Ct. App. 2001), *cited in* Peltz, *supra* note 1, at 399.

[45] See Semitsu, *supra* note 37, at 522 (citing Pamela Mendels, *Family Sues Library for Not Restricting Children's Internet Access*, N.Y. TIMES, June 14, 1998, *at* http://www.nytimes.com/library/tech/98/06/cyber/articles/14library.html (last visited Jan. 17, 2003)). *See also* Warren, *supra* note 14, at 56 (citing Kathleen R. v. City of Livermore, No. V-015266-4, slip op. (E.D. Cal. May 28, 1998)).

[46] Less than 17% of those libraries with public Internet access use filters in some capacity, while less than 7% of those libraries with public Internet access use filters on all computer terminals. Complaint for Declaratory and Injunctive Relief, Am. Library Ass'n, Inc. v. United States, No. 01-CV-1301, para. 56 (E.D. Pa. 2001), *available at* http://www.ala.org/cipa/cipacomplaint.pdf (last visited January 30, 2003), *cited in* Peltz, *supra* note 1, at 433, n.256, 257; *see also TIFAP: The Internet Filter Assessment Project*, *at* http://www.bluehighways.com/tifap (last visited Jan. 17, 2002).

pro-filtering groups like the Family Research Council.[47] Legislators face substantial political pressure to ensure that no public funds allow access to pornography through libraries, and "[t]he pro-filtering side is much stronger in legislative bodies. Very few representatives have voted against or publicly opposed . . . the various filtering bills."[48] Congressional efforts, led by former Senator Dan Coats and Senators John McCain and Rick Santorum, among others, have resulted in the adoption of several laws over the past seven years, each of which takes a slightly different approach to harmful Internet material.

With the Communications Decency Act ("CDA") in 1996,[49] Congress imposed criminal penalties on those who knowingly transmitted obscene or indecent materials to children under the age of eighteen.[50] The Child Online Protection Act ("COPA"), passed in 1998,[51] imposed criminal penalties as well as civil sanctions on those who published Web sites that were harmful to minors.[52] Most recently, the Children's Internet Protection Act ("CIPA") of 2000[53] banned the use of certain federal funds by public schools and libraries that refused to install Internet filters on all computers.[54]

Though congressional supporters of these laws have defended them as necessary to combat the dangers new technology poses to children,[55] judicial responses to date reflect

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[47] *See, e.g., Congress Weighing Internet Filtering for Schools, Libraries*, CNN, Oct. 15, 2000, *at* http://www.cnn.com/2000/TECH/computing/10/15/internetfiltering.ap/ (last visited Jan. 17, 2003). According to John Albaugh, chief of staff for Representative Ernest Istook, "This is insuring that the government is not paying for access to pornography through libraries . . . . We have received tremendous support from the public on this. It just seems like it's a no-brainer to the average Joe." *Id.*

[48] *Filtering Software Debate Continues*, TECH L.J. (Dec. 21, 1998), *at* http://www.techlawjournal.com/censor/19981221.htm (last visited Jan. 17, 2002).

[49] 47 U.S.C. § 223(a)-(e) (1998).

[50] *See infra* Part II.A.

[51] 47 U.S.C. § 231(a)-(3).

[52] *See infra* Part II.A.

[53] 47 U.S.C. § 254(h) (2002).

[54] *See infra* Part II.C.

[55] Representative Bob Franks, an initial sponsor of CIPA in the House, explained the rationale for laws designed to protect children from Internet harm.

> Within seconds, our children can find up-to-date information on every conceivable subject they are studying in school. But this extraordinarily powerful learning tool can also have a dark and threatening side . . . The reality is that materials breeding hate, violence, pornography and even personal danger can be waiting only a few "clicks" away.

Supporters of Internet Filtering in Schools and Libraries Back Franks-McCain Bill, TECH. L.J. (March 3, 1999), *at* http://www.techlawjournal.com/censor/19990303.htm

several of the points advanced by civil libertarians.[56] The cool judicial reception to laws aimed at online pornography stems from the conclusion that, even if intended solely to protect children, the laws are drafted in unacceptably broad terms that result in the censorship of constitutionally protected speech among adults.

The Supreme Court held that the CDA unconstitutionally burdened protected speech in the 1997 case of *Reno v. ACLU.*[57] Though the Supreme Court has not yet definitively assessed COPA's constitutionality,[58] several Justices have raised questions about the Act[59] and have suggested they may ultimately find it runs afoul of the First Amendment.[60] Finally, the Supreme Court will decide a constitutional challenge to CIPA for the first time this term,[61] after the District Court for the Eastern District of Pennsylvania held CIPA unconstitutional[62] and enjoined the government from enforcing it.[63] Because both COPA and CIPA suffer overbreadth defects similar to those that made the CDA unconstitutional, it is likely both will ultimately be struck down as unconstitutional. As a result, while congressional

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(last visited Jan. 17, 2003).

[56] *See, e.g.*, *Filtering Software Debate Continues*, *supra* note 48. ("[T]he anti-filtering side has much more support in the judicial branch. Judges do not stand for re-election, or face voter wrath. Moreover, the judicial branch has a long tradition of protecting many forms of reprehensible speech . . . .").

[57] 521 U.S. 844 (1997).

[58] *See* Ashcroft v. ACLU, 122 S.Ct. 1700 (2002) (remanding challenge to COPA to the Third Circuit for clarification of various issues).

[59] Linda Greenhouse, *Justices to Review Internet Pornography Filters*, N.Y. TIMES, Nov. 13, 2002, at A24.

[60] *See, e.g.*, *Ashcroft*, 122 S.Ct. 1716 (Kennedy, J., concurring) (noting that there is "a real likelihood" that COPA is "overbroad and cannot survive" a constitutional challenge since "content-based regulations like [COPA] are presumptively invalid abridgments of the freedom of speech").

[61] The Supreme Court has agreed to hear the challenge to CIPA in its current term. *See* Greenhouse, *supra* note 59.

[62] Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 419 (E.D. Pa. 2002). The District Court for the Eastern District of Pennsylvania heard the case on March 25, 2002. Plaintiffs in the suit included libraries, library users, state library associations and the Freedom to Read Foundation. Both the ALA and the ACLU filed similar challenges, and the two cases were consolidated by the court and heard together. *See* American Library Association, *CIPA Court Date Pushed Back to March 25*, *at* http://www.ala.org/news/v7n14/cipare.html (last visited Jan. 20, 2003).

[63] Predictably, filtering opponents embraced the decision enthusiastically. The ALA's Judith Krug announced "I am ecstatic . . . . We couldn't have wanted anything better." Ann Beeson, litigation director of the ACLU's technology and liberty program, proclaimed "The court has barred the law from turning librarians into thought police armed with clumsy filters . . . ." John Schwartz, *Court Blocks Law that Limits Access to Web in Library*, N.Y. TIMES, June 1, 2002, at A1.

leaders have seized the political high ground of protecting children from Internet dangers, in the end, they will have accomplished little, passing a series of unconstitutional measures.

In spite of the worthwhile intention of protecting children from harmful Internet material, a goal "devoutly to be wished,"[64] Congress will be able to achieve this goal in the library context only by refining its approach and narrowing the filtering mandates of CIPA to reflect the First Amendment principles articulated by the Supreme Court.[65] Political leaders may not see a political advantage in "compromising" on issues relating to children and Internet pornography,[66] instead seeing an opportunity for political gain in attacking opponents—and the courts—for being "soft" on Internet smut.[67] However, unless congressional leaders move beyond their attempts to gain political capital by passing "tough"—but unconstitutional—laws, they will fail to control the content children may access on library computers. Only by significantly narrowing their approach will congressional backers of filtering laws successfully mandate the use of Internet filtering software on public library computers used by children without running afoul of the First Amendment.

II. JUDICIAL RESPONSES TO REGULATION OF THE INTERNET AND PUBLIC LIBRARIES

A. *The Supreme Court's Consideration of the CDA and COPA*

In order to assess the possibility of constitutionally mandating the use of Internet filtering software in public libraries, it is necessary to examine the judicial responses both

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[64] *Am. Library Ass'n, Inc.*, 201 F. Supp 2d at 410.

[65] *See infra* Part III.

[66] *See* Adam Goldstein, Note, *Like a Sieve: The Child Internet Protection Act and Ineffective Filters in Libraries,* 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1187, 1190-94, 1201-02 (2002) (explaining that, in adopting CIPA, Congress included filtering measures in spite of recommendations by a congressional child safety committee that specifically rejected the use of filters, and suggesting that legislators may have been moved to do so, in part, by polls showing significant public support for library Internet filtering).

[67] *Senate Holds Hearing on Internet Indecency*, TECH L.J., Feb. 10, 1998, *at* http://www.techlawjournal.com/censor/80210cda.htm (last visited Nov. 3, 2002) (quoting Senator Dan Coats's attacks on the Supreme Court for choosing "to put the rights of pornographers ahead of the welfare of children" and on the Clinton administration for being soft on Internet indecency).

to regulation of speech on the Internet generally, as well as to the role of the public library as a forum for communication. Such an examination begins with an analysis of the Supreme Court's reaction to the CDA in *Reno v. ACLU*,[68] and to COPA, in *Ashcroft v. ACLU*.[69]

In early 1996, President Clinton signed into law the first congressional attempt to protect children from offensive Internet materials, the Communications Decency Act, as part of the more comprehensive Telecommunications Act of 1996.[70] The CDA criminalized the use of a "telecommunications device" to knowingly transmit "obscene" or "indecent" communications to children under the age of eighteen.[71] In addition, the Act made unlawful the communication of "patently offensive" sexually explicit material to minors through any Internet means, including e-mail, listservs, newsgroups and chat rooms.[72]

The ACLU swiftly challenged the CDA, requesting an injunction against enforcement of the Act in the District Court for the Eastern District of Pennsylvania.[73] The ACLU claimed, inter alia, that the Act was unconstitutional because it was vague and overbroad, failed to adequately define what materials were "indecent" or "patently offensive" and failed to require the use of the least restrictive means of achieving a compelling government objective.[74] Judge Ronald L. Buckwalter granted a temporary restraining order enjoining enforcement of the Act,[75] and a three-judge panel subsequently granted a preliminary injunction against enforcement.[76] The Government then filed a direct appeal to the Supreme Court, which granted certiorari in late 1996.[77]

Following the lower court's logic,[78] the Supreme Court struck down the CDA in *Reno*.[79] Writing for a 7-2 majority of

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[68] 521 U.S. 844 (1997).

[69] 535 U.S. 564 (2002).

[70] Steven C. Jacques, Comment, Reno v. ACLU: *Insulating the Internet, The First Amendment, and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945, 1970 (1997).

[71] *Id.* at 1972-73.

[72] Conn, *supra* note 20, at 471-72.

[73] Jacques, *supra* note 70, at 1974 (citing ACLU v. Reno, No. Civ. A. 96-963, 1996 WL 65464, at *1 (E.D. Pa. Feb. 15, 1996)).

[74] *Id.* at 1974-75. (citing ACLU v. Reno, No. Civ. A. 96-963, 1996 WL 65464, at *1 (E.D. Pa. Feb. 15, 1996)).

[75] *Id.* (citing ACLU v. Reno, No. Civ. A. 96-963, 1996 WL 65464, at *4).

[76] *Id.* at 1978 (citing ACLU v. Reno, 929 F. Supp. 824, 857 (E.D. Pa. 1996)).

[77] *See* Reno I, 521 U.S. 844 (1997).

[78] *See* Jacques, *supra* note 70, at 1978.

the Court, Justice Stevens explained first that the Act was unconstitutionally vague, since ambiguities in language rendered the Act "problematic for purposes of the First Amendment."[80] Justice Stevens noted that the Act included language criminalizing both "indecent" and "patently offensive" material and concluded that "[g]iven the absence of a definition of either term, this difference in language will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean."[81] The Court deemed the CDA unconstitutionally vague because of its ambiguities and imprecise language.[82]

Perhaps more significantly, the Court concluded that the CDA was unconstitutional because, as written, it was overbroad. Stating that "the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech,"[83] Stevens explained that in order "to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive . . . ."[84] Stevens went on to state that the "breadth of the CDA's coverage [was] wholly unprecedented[,]"[85] and that the "breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so."[86]

In holding the CDA to a "least restrictive alternative" analysis, Stevens explained that strict scrutiny of the CDA was appropriate both because the statute imposed criminal sanctions and because it was a content-based restriction on speech.[87] Because the criminal penalties of the CDA would lead to an unacceptable "burden on adult speech,"[88] the Court found the Act overbroad, even while acknowledging the government's

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[79] *See Reno I*, 521 U.S. 844.

[80] *Id.* at 870.

[81] *Id.* at 871.

[82] *Id.* at 874.

[83] *Id.*

[84] *Reno I*, 521 U.S. at 874.

[85] *Id.* at 877.

[86] *Id.* at 879.

[87] *Id.* at 871-72. *See generally* Brigette L. Nowak, *The First Amendment Implications of Placing Blocking Software on Public Library Computers*, 45 WAYNE L. REV. 327, 335-37 (1999) ("Content-based restrictions on speech are subject to strict scrutiny. Thus, the regulation must serve a compelling state interest and be narrowly drawn to achieve that goal.").

[88] *Reno I*, 521 U.S. at 874.

interest in protecting children from harmful materials.[89] Advancing this admittedly compelling interest, however, would require a narrower approach than that taken by the CDA, since "the Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'"[90] To do so would be to limit adult communications by way of what has been described as the "sandbox" effect.[91] The Supreme Court conclusively held that the sanitization of adult speech through the "sandbox" effect imposed an impermissible burden on adults' First Amendment rights.

After the Supreme Court struck down the CDA, Congress attempted to "refine its approach"[92] in light of the Court's decision in *Reno v. ACLU*, passing the Child Online Protection Act in 1998.[93] Like the CDA, COPA mandated criminal sanctions for the transmission of communications that are "harmful to minors."[94] COPA also provided civil penalties for such transmissions.[95] Although COPA specified a broader range of penalties than the CDA, it had a more narrow reach, applying only to materials communicated on commercial sites on the World Wide Web[96] and calling for evaluation of material deemed "harmful to minors" under the *Ginsberg* test.[97]

Congress, in drafting COPA, measured what speech could be considered "harmful to minors" under Supreme Court tests, and aimed to insulate the laws by adhering to Supreme Court precedent, which had recognized a compelling state interest in protecting children.[98] The leading precedent,

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[89] *Id.* at 875.

[90] *Id.* (citing Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 759 (1996) (internal citations omitted)).

[91] *Id.* (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74-75 (1983) (holding that, with respect to regulating the mailing of adult materials, "regardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.")). *See* Santiago, *supra* note 8, at 267.

[92] Conn, *supra* note 20, at 471 (citing JOHN MCCAIN, COMMERCIAL DISTRIBUTION OF MATERIAL HARMFUL TO MINORS ON THE WORLD WIDE WEB, S. REP. NO. 105-225, at 5 (1998)).

[93] 47 U.S.C. § 231(a)-(e) (1998).

[94] *Id.* § 231(a)(1).

[95] *See* Conn, *supra* note 20, at 471-72.

[96] *Id.*

[97] *See* Ginsberg v. New York, 390 U.S. 629 (1968) (upholding a New York statute prohibiting sale of obscene material to minors under the age of seventeen, even if not obscene by adult standards). *See also* Conn, *supra* note 20.

[98] *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996); Sable Communications v. FCC, 492 U.S. 115 (1989); *Ginsberg*, 390 U.S. at 629.

Ginsberg v. New York, involved a storeowner charged with violating the New York Penal Code for selling "girlie" magazines to a sixteen-year-old boy.[99] In upholding the statute in question, the *Ginsberg* Court found that a state may "regulate the sale of material that is 'harmful to minors' under the age of seventeen if such material (1) predominantly appeals to the prurient, shameful, or morbid interest of minors, (2) is patently offensive to prevailing standards, and (3) is utterly without redeeming social importance to minors."[100] The Court further refined this test in *Miller v. California*,[101] in which the Court clarified that the trier of fact should measure prevailing standards by asking whether "the average person, applying contemporary community standards,"[102] would find the communications obscene.

Soon after COPA's passage, the ACLU and other challengers of the CDA proceeded to follow their previously successful script, seeking injunctive relief once more in the Eastern District of Pennsylvania.[103] As it did when confronted by the CDA, the district court issued an injunction against COPA's enforcement.[104] The Third Circuit then affirmed the injunction.[105] On May 21, 2001, the Supreme Court agreed to hear the case.[106] The Court heard arguments on November 28, 2001,[107] and decided *Ashcroft v. ACLU* on May 13, 2002.[108]

In the district court, the plaintiffs advanced their facial challenge to COPA by alleging several constitutional infirmities, all relating to their fear that they could be prosecuted under COPA for publishing Web sites with material that, while valuable for adults, could be construed as harmful to minors in some communities.[109] They alleged that COPA violated adults' First Amendment rights "because it (1)

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[99] *Ginsberg*, 390 U.S. at 631, *discussed in* Kimberly S. Keller, Comment, *From Little Acorns Great Oaks Grow: The Constitutionality of Protecting Minors from Harmful Internet Material in Public Libraries*, 30 ST. MARY'S L.J. 549, 579 (1999).

[100] Conn, *supra* note 20, at 472 (citing *Ginsberg*, 390 U.S. at 645-47).

[101] 413 U.S. 15 (1973).

[102] *Id.* at 24.

[103] ACLU v. Reno (Reno II), 31 F. Supp. 2d 473 (E.D. Pa. 1999). *See also* Liza Kessler & Gregory G. Rapawy, *Cyberspeech and the First Amendment: Can Community Standards be Determined on the Internet?*, 2 ANN. 2000 ATLA-CLE 1605 (2000).

[104] *Reno II*, 31 F. Supp. 2d 473, 477.

[105] ACLU v. Reno (Reno III), 217 F.3d 162 (3d Cir. 2000).

[106] Ashcroft v. ACLU, 532 U.S. 1037 (2001) (granting review).

[107] Ashcroft v. ACLU, 122 S.Ct. 1700 (2002).

[108] *Id.*

[109] *Id.* at 1706.

create[d] an effective ban on constitutionally protected speech by and to adults; (2) was not the least restrictive means of accomplishing any compelling governmental purpose; and (3) [was] substantially overbroad."[110] In granting an injunction barring government enforcement of COPA, the district court concluded that because COPA involved a content-based regulation of speech protected by the First Amendment, it was "presumptively invalid" and "subject to strict scrutiny."[111] The court suggested that COPA would likely fail strict scrutiny analysis because it did not appear to be the least restrictive means of protecting children.[112]

On appeal, while the Third Circuit affirmed, it based its decision on a narrow ground that "was not relied upon below and that was 'virtually ignored by the parties and the amicus in their respective briefs.'"[113] The court of appeals held that COPA was substantially overbroad because it used "contemporary community standards to identify material that [was] harmful to minors . . . ."[114] The court noted that "because of the peculiar geography-free nature of cyberspace, a 'community standards' test would essentially require every Web communication to abide by the most restrictive community's standards,"[115] allowing decisions on the appropriateness of communications to be made for the nation by "the most puritan of communities."[116] Thus, according to the Third Circuit, COPA remained flawed as a result of a "puritanical community" principle similar to the "sandbox" effect, where communications among adults were limited to what was acceptable to the most easily offended.

The Third Circuit distinguished the COPA case from precedents in which the Supreme Court approved subjecting the same conduct to varying community standards,[117] arguing that unlike phone-sex operators, who could effectively restrict their services to certain geographic communities, Web publishers have "no such comparable control. Web publishers

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[110] *Id.* (internal citations omitted).

[111] *Id.* (internal citations omitted).

[112] *Ashcroft*, 122 S. Ct. at 1706.

[113] *Id.* (citing Reno III, 217 F.3d 162, 173-74 (3d Cir. 2000)).

[114] *Id.*

[115] *Reno III*, 217 F.3d at 175.

[116] *Id.*

[117] *See, e.g.*, Sable Communications v. FCC, 492 U.S. 115, 125-26 (1989) (holding that company providing obscene material in "dial-a-porn" service bears burden of complying with obscenity definitions of each respective community).

cannot restrict access to their site based on the geographic locale of the Internet user visiting their site."[118] The court noted that Web publishers of material that might be deemed "harmful to minors" must "comply with the regulation imposed by the [community] with the most stringent standard or [entirely] forego Internet communication of [their] message."[119]

Before the Supreme Court, Solicitor General Theodore Olson argued for the government that the Third Circuit had misinterpreted COPA. Rejecting the contention that the use of a "contemporary community standard" in COPA would limit speech to that acceptable to a "puritanical community," Olson argued that the government could accept a single, national "contemporary community standard," since, in adopting COPA, "Congress felt . . . there would not be substantial variation between what the average adult would feel would be harmful to minors."[120] The Court addressed the narrow issue of whether the use of a single, national community standard rendered COPA unconstitutional, but did not address the range of overbreadth concerns the district court considered below.

In a fractured decision that featured four separate rationales,[121] the Court vacated the Third Circuit's judgment and remanded the case for clarification of several issues the Third Circuit had found it unnecessary to reach. Justice Thomas's plurality opinion, joined only by Chief Justice Rehnquist and Justice Scalia, stated that "COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially

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[118] *Reno III*, 217 F.3d at 176.

[119] *Id.* (quoting Am. Libraries Ass'n, Inc. v. Pataki, 969 F. Supp. 160, 182-83 (S.D.N.Y. 1997)).

[120] Ashcroft v. ACLU, No 00-1293, oral arguments, Nov. 28, 2001, at 8; *see also* Greenhouse, *supra* note 35. COPA's congressional defenders supported this interpretation of "community standards." A brief submitted to the Court by Senator John McCain and retired Representative Thomas Bliley argued that

> What is harmful to minors isn't decided by a geographical community. Instead it is based on the views of the American adult community as a whole. The law was to be adapted to the World Wide Web by using a new standard of what the American adult-age community as a whole would find prurient and offensive to minors.

Xenakis, *supra* note 15, at 339 (citing Scott Ritter, *Court Weighs Shielding Children from Web Smut*, WALL ST. J., Nov. 26, 2001, at B14).

[121] *See* Linda Greenhouse, *Justices Give Reprieve to an Internet Pornography Statute*, N.Y. TIMES, May 14, 2002, at A17 (describing *Ashcroft v. ACLU* as "a fractured decision . . . [that was] as messy a product as the court has brought forth in several years").

overbroad for purposes of the First Amendment."[122] A majority of the Justices agreed that the case should be remanded for clarification of various issues, but their reasoning varied. Justices O'Connor and Breyer authored opinions suggesting that a single national standard, rather than a range of separate community standards, should be used in applying COPA, while Justice Kennedy argued that several remaining issues needed to be clarified by the lower courts before the Supreme Court could definitively judge whether COPA passed constitutional muster. Only Justice Stevens suggested that the Third Circuit's decision should be affirmed.

Justice Kennedy, joined by Justices Souter and Ginsburg, wrote that there was "a very real likelihood that [COPA] is overbroad and cannot survive" strict scrutiny.[123] Kennedy suggested that even if a national community standard were used, there would be some variation in its application in different communities. According to Kennedy, this "national variation in community standards constitutes a particular burden on Internet speech."[124] Because the Third Circuit decided the case on a particularly narrow ground without considering how to construe various aspects of COPA, however, Kennedy wrote that the Supreme Court could not definitively assess its constitutionality. Too many questions of correct interpretation remained unresolved, according to Kennedy, who insisted that the court of appeals undertake a "comprehensive analysis"[125] of COPA before the Supreme Court could make any final assessment. While Kennedy concurred in the decision to remand for clarification to the Third Circuit, he did so while suggesting that, because the law placed "a substantial burden on Internet communication," there were "grave doubts that COPA is consistent with the First Amendment."[126]

While the discord among the Justices in *Ashcroft* suggests that they are far from unanimity in evaluating COPA's constitutionality, they likely will strike down the Act when it eventually returns to the Court. Commentators have suggested that Justice Kennedy's cautious opinion lies closer to

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[122] *Ashcroft*, 122 S. Ct. at 1713.

[123] *Id.* at 1716 (Kennedy, J., concurring).

[124] *Id.* at 1720.

[125] *Id.*

[126] *Id.* at 1722.

the Court's "center of gravity"[127] and that a majority may eventually find COPA insufficiently narrow to survive strict scrutiny. Though the final outcome is impossible to predict with certainty, it appears probable that the Supreme Court will find COPA, like the CDA, overbroad and unconstitutional for placing an impermissible burden on constitutionally protected communications between adults.

B. *First Amendment Information Rights in the Public Library*

The decisions of the Supreme Court striking down the CDA and suggesting that COPA will eventually be found unconstitutional establish important principles that impact the possibility of regulating the Internet in the broadest context. In assessing the constitutionality of Internet filtering regulation in the narrower context of the free public library, however, it is necessary to examine judicial perspectives on the library itself, which courts have characterized as the "quintessential locus of the receipt of information."[128] In order to see how courts have evaluated restrictions on speech in this unique venue, it is first necessary to distinguish the government's power to control the content of its own speech from its ability to regulate the content of communications that take place within a government-funded forum. In applying this distinction to public libraries, the insights provided by *Kreimer v. Bureau of Police*[129] and *Mainstream Loudoun v. Board of Trustees*[130] help clarify the library's status as a government-funded forum.

i. The First Amendment Right to Access Information and Ideas

The Supreme Court has clearly distinguished situations in which the government acts as a speaker from those in which the government acts as a facilitator of communications between

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[127] Greenhouse, *supra* note 121 (explaining that COPA "barely survived an initial Supreme Court test . . . in a fractured decision suggesting that the court may ultimately find the law unconstitutional."); *see also* David L. Hudson, Jr., *Online Porn Law Gets Another Chance*, ABA J. E-REPORT, May 17, 2002, *available at* http://www.abanet.org/journal/ereport/m17copa.html (last visited Oct. 12, 2002) (suggesting that while "The U.S. Supreme Court has resuscitated" COPA, "the law still appears to be on life support").

[128] Kreimer v. Bureau of Police, 958 F.2d 1242, 1255 (3d Cir. 1992).

[129] 958 F.2d 1242 (3d Cir. 1992).

[130] 24 F. Supp. 2d 552 (E.D. Va. 1998).

private speakers. When the government expends funds to promote a specific message, it may dictate to the recipient of those funds specific guidelines about what speech the funding may or may not underwrite.[131] In these situations, the government effectively deputizes the grantee to transmit the government's own message, and therefore has a clear interest in ensuring the content and accuracy of that message. Accordingly, "[w]hen the government disburses public funds . . . to convey a government message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[132] When the government underwrites the communication of a specific message, government itself is effectively the speaker, and its power to control the content of its own speech is substantial.

Conversely, when the government expends money not to speak itself, but rather to facilitate communications among private actors, the state's power to restrict the content of that speech is far more limited. The Supreme Court has recognized this category of government spending programs, which are "designed to facilitate private speech, not to promote a governmental message."[133] The Court explained the logic behind this distinction in *Rosenberger v. Rector & Visitors of the University of Virginia*, which concerned the university's decision to fund certain student newspapers while refusing to fund newspapers that advocated a religious viewpoint.[134] The Court held that the university, a state actor, had a legitimate interest in determining the content of its own speech, but not that of student groups whose speech it helped facilitate.

> When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message . . . It does not follow, however, . . . that viewpoint-

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[131] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991). In *Rust*, the Supreme Court found that funds appropriated by Congress for a family planning program may properly be conditioned upon a recipient's agreement not to counsel patients regarding abortion. Explaining the logic of the decision by analogy, the Court noted that "[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." *Id.* at 194.

[132] Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 833 (1995).

[133] Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001).

[134] *Rosenberger*, 515 U.S. at 820.

> based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.[135]

As the Court concluded in *Rosenberger*, when the government spends money to facilitate communication among and between members of the public, its power to exclude certain messages based on their content or viewpoint is significantly circumscribed.

The First Amendment's limitations on government's power to restrict the content of private speech give private actors a freedom to speak, and a right to receive communications free from governmental censorship, since "the right to receive ideas follows ineluctably from the sender's First Amendment right to send them."[136] In granting freedom both to transmit and to receive information, the First Amendment "afford[s] the public access to discussion, debate, and the dissemination of information and ideas."[137] In evaluating the constitutionality of a public library's rules of patron conduct, the oft-cited *Kreimer*[138] decision shed light on the power of the state to restrict the public's access to information and ideas within the public library context.

ii. *Kreimer* and Information Freedom in the Public Library

When library officials repeatedly ejected a homeless man, Richard Kreimer, from the Morristown Public Library in New Jersey, he sued the library,[139] challenging the constitutionality of the policies that had authorized his removal.[140] The Third Circuit upheld the library's policies, noting with approval the district court's characterization of them as content-neutral rules of patron conduct designed to

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[135] *Id.* at 833-34 (internal citations omitted).

[136] Bd. of Educ. v. Pico, 457 U.S. 853, 867-68 (1982). *See generally* Keller, *supra* note 99, at 573-77 (analyzing the right to receive speech and the implications of factors, including age, on the individual's right to receive certain communications).

[137] First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978).

[138] Kreimer v. Bureau of Police, 958 F.2d 1242 (3d Cir. 1992).

[139] *Id.* at 1246.

[140] No stranger to litigation, Kreimer has filed claims against Woodbury, New Jersey claiming that a loitering ban was unconstitutional, as well as against the New Jersey Attorney General's office and prosecution and election offices in Morris County for denying him access to files about him. Joseph P. Fried, *More Legal Battles for a Lawsuit Veteran*, N.Y. TIMES, Oct. 6, 2002, § 1, at 37.

ensure "a quiet and orderly atmosphere . . . conducive to every patron's exercise of their constitutionally protected interest in receiving and reading written communications."[141] Inherent in the court's reasoning was the acknowledgement that the First Amendment encompasses not only the right to speak but to receive speech.[142] In recognizing this right of public access to information and ideas within the public library, the *Kreimer* court also characterized the public library as a "limited public forum" for purposes of First Amendment analysis.[143]

The *Kreimer* court reviewed several Supreme Court cases in determining that the First Amendment's application within the context of the public library included a right to receive information.[144] The court turned first to a 1943 case, *Martin v. City of Struthers*,[145] in which a Jehovah's Witness urged the repeal of an ordinance prohibiting the distribution of religious leaflets. The *Martin* Court held that the statute in question violated the appellant's First and Fourteenth Amendment rights, observing that the Framers "knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature . . . and *necessarily protects the right to receive it*."[146] The *Martin* Court concluded that "the freedom to distribute and receive information was 'so clearly vital to the preservation of a free society'. . . that it 'must be fully preserved.'"[147]

The *Kreimer* court next cited *Lamont v. Postmaster General*,[148] which struck down a statute requiring certain mail be held until the addressee was notified and requested delivery.[149] The Court in *Lamont* found the statute an "undue

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[141] *Kreimer*, 958 F.2d at 1262 (quoting Kreimer v. Bureau of Police, 765 F. Supp. 181, 187 (D.N.J. 1991)).

[142] *Id.* at 1251.

[143] *Id.* at 1259.

[144] *See generally* Katherine L. Scurria, Government Funding of Public Libraries: Legislative, Administrative and Judicial Perspectives 68-71 (July 10, 1997) (unpublished manuscript for Libraries for the Future, on file with author).

[145] 319 U.S. 141 (1943).

[146] *Id.* at 143 (internal citations omitted) (emphasis added), *cited in Kreimer*, 958 F.2d at 1251.

[147] *Kreimer*, 958 F.2d at 1251 (citing *Martin*, 319 U.S. at 146-47).

[148] 381 U.S. 301 (1965).

[149] *See* Scurria, *supra* note 144, at 69.

burden on the flow of ideas to the public"[150] that "stifled the 'uninhibited, robust and wide-open' debate and discussion that are contemplated by the First Amendment."[151] The *Kreimer* court characterized Justice Brennan's "oft-quoted remark in *Lamont*"[152] as "the hallmark of the right to receive information: '[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them . . . . It would be a barren marketplace of ideas that had only sellers and no buyers.'"[153]

Further explaining the First Amendment's guarantee of the people's right to receive information, the *Kreimer* court turned to *Griswold v. Connecticut*,[154] which recognized that the First Amendment "guarantees, . . . the 'penumbral' right to receive information to ensure its fullest exercise."[155] The *Kreimer* opinion then offered the observation from *Stanley v. Georgia*,[156] summarizing the foregoing precedent, that "[i]t is now well established that the Constitution protects the right to receive information and ideas."[157]

The *Kreimer* court finally addressed the case of *Board of Education v. Pico*,[158] in which the Supreme Court first confronted the right to receive information within the library context, albeit within a school library. In *Pico*, the Supreme Court rejected as unconstitutional the Board of Education's decision to order the removal from the high school and junior high school library of certain books the school board considered "anti-American, anti-Christian, and anti-Sem[i]tic, and just plain filthy."[159] In a fractious decision that included seven separate opinions, the *Pico* plurality recognized that the First Amendment protects more than the right to self-expression; it also guarantees "public access to discussion, debate, and the dissemination of information and ideas."[160] Even the *Pico*

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[150] *Kreimer*, 958 F.2d at 1252 (interpreting *Lamont*, 381 U.S. at 307).

[151] 381 U.S. at 307 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[152] 958 F.2d at 1252.

[153] *Id.* (quoting *Lamont*, 381 U.S. at 308 (Brennan, J., concurring)).

[154] 381 U.S. 479 (1965).

[155] 958 F.2d at 1252 (citing *Lamont*, 381 U.S. 483).

[156] 394 U.S. 557 (1968).

[157] *Id.* at 564, *cited in Kreimer*, 958 F.2d at 1252.

[158] 457 U.S. 853 (1982).

[159] *Id.* at 857. *See* Scurria, *supra* note 144, at 70-71; Adam Horowitz, *The Constitutionality of the Children's Internet Protection Act*, 13 ST. THOMAS L. REV. 425, 439-40 (2000).

[160] *Kreimer*, 958 F.2d at 1254 (quoting *Pico*, 457 U.S. at 866 (internal citations

dissenters "made no contention that the First Amendment did not encompass the right to receive information and ideas."[161] Instead the dissenters argued that, given the educational purpose of a *school* as opposed to a *public* library, the school board should be granted greater deference in decision making concerning collections.[162] Justice Rehnquist specifically contrasted the educative function of school libraries with that of public libraries, which were "designed for freewheeling inquiry."[163]

After concluding that the First Amendment "does not merely prohibit the government from enacting laws that censor information, but additionally encompasses the positive right of public access to information and ideas,"[164] the *Kreimer* court went on to acknowledge that this right "includes the right to some level of access to a public library, the quintessential locus of the receipt of information."[165] Having acknowledged that the First Amendment includes some right to information access in the public library setting, the *Kreimer* court noted that the "next step is to identify the nature of the forum,"[166] since the extent to which the government may regulate access to information depends upon whether the forum is public or nonpublic.[167]

In assessing the impact of the First Amendment on government's power to regulate communications, the Supreme Court has developed three types of government fora: traditional public, limited public and non-public.[168] As the *Kreimer* court observed, traditional public fora include public spaces which "have immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[169] The government's right to limit First Amendment activity in these "quintessential" public spaces—exemplified by parks and

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omitted)).

[161] *Id.* at 1254.

[162] *See generally* Bell, *supra* note 21, at 215-16.

[163] *Kreimer*, 958 F.2d at 1255 (quoting *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting)).

[164] *Id.*

[165] *Id.*

[166] *Id.* (citing Cornelius v. NAACP, 473 U.S. 788, 797 (1985)).

[167] *Id.*

[168] Bell, *supra* note 21, at 200; *see also* Santiago, *supra* note 8, at 267-70.

[169] *Kreimer*, 958 F.2d at 1255 (internal citations omitted).

public sidewalks—is "sharply circumscribed"[170] and permissible only where "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."[171]

The second class of government fora, termed limited or designated public fora, consists of "public property which the state has opened for use by the public as a place for expressive activity."[172] While the government is not *required* to open these spaces to the public for First Amendment purposes, "once it does so, the government is bound by the same limitations as exist in the traditional public forum context."[173] A limited public forum would be created if, for example, the government chose to provide free advertising space on the sides of public buses. If it did so, the government could not permit advertisements for Republican issues, while denying advertising space for Democratic concerns.

The last type of government forum, the non-public forum, is a space that is not traditionally open for public communication,[174] like a military base. In a non-public forum, the government's power to regulate speech is at its greatest.[175]

According to the analysis applied in *Kreimer*, "the Library constitutes a limited public forum, a type of designated public fora."[176] The *Kreimer* decision concluded that "as a limited public forum, the Library is obligated . . . to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum."[177] Accordingly, while it would be acceptable for a Library to forbid certain types of patron conduct[178]—giving impassioned speeches in the silent reading room, for example—enforcing viewpoint discrimination would not be acceptable. Once the library used government funds to create a forum for free information access, the government could not then limit what information was exchanged based on its disfavor for the views expressed.

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[170] *Id.* (internal citations omitted).

[171] *Id.* (internal citations omitted).

[172] *Id.* (internal citations omitted); *see also* Bell, *supra* note 21, at 202-03.

[173] *Kreimer*, 958 F.2d at 1255 (internal citations omitted).

[174] *Id.* at 1256 (internal citations omitted).

[175] *Id.* (internal citations omitted); *see also* Bell, *supra* note 21, at 203.

[176] *Kreimer*, 958 F.2d at 1259; *see also* Bell, *supra* note 21, at 218-26.

[177] *Kreimer*, 958 F.2d at 1262.

[178] *Id.* at 1262-63.

iii. The Constitutionality of Library Internet Filters: *Mainstream Loudoun*[179]

In addressing the question of "whether a public library may, without violating the First Amendment, enforce content-based restrictions on access to Internet speech[,]"[180] the *Mainstream Loudoun* court examined, in a case of first impression, the relevance of the First Amendment's Free Speech Clause to public libraries' content-based restrictions on Internet access. The case arose after the trustees of the Loudoun County Public Library adopted a policy that required library staff to install Internet filtering software on all the library's computers.[181] The ACLU, joined by the People for the American Way, filed suit against the library on behalf of community residents and Internet providers who claimed the library's policy denied them access to constitutionally protected material and violated their First Amendment rights.[182]

Extending the *Kreimer* court's judgment that the public library is a designated or limited forum, Judge Leonnie M. Brinkema of the Eastern District of Virginia concluded in *Mainstream Loudoun* that a public library "need not offer Internet access, but, having chosen to provide it, must operate the service within the confines of the First Amendment."[183] As with other types of communications, the government was under no affirmative duty to permit or provide Internet access, but once it did so, it could enforce content-based restrictions on the communications only by satisfying strict scrutiny.[184] Judge Brinkema, a former librarian,[185] concluded that "[w]hile the

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[179] The Mainstream Loudoun case consists of two separate rulings, made on motions to dismiss and for summary judgment. Judge Brinkema authored her final decision (Mainstream Loudoun II) on November 23, 1998. In an earlier ruling, issued on April 7, 1998 (Mainstream Loudoun I), Judge Brinkema recognized the plaintiffs' First Amendment claims, and resolved issues of standing and immunity. *See also* Peltz, *supra* note 1, at 450.

[180] Mainstream Loudoun v. Bd. of Trs. (Mainstream Loudoun I), 2 F. Supp. 2d 783, 792 (E.D. Va. 1998).

[181] *Id.* at 787. The library trustees justified their decision to install filtering software both in order to "block material deemed Harmful to Juveniles" as well as to avoid any sexual harassment liability to librarians or other library employees for allowing the development of a hostile working environment. *Id.* According to the policy, "Library pornography can create a sexually hostile environment for patrons or staff." Warren, *supra* note 14, at 54.

[182] Warren, *supra* note 14, at 54.

[183] *Mainstream Loudoun I*, 2 F. Supp. 2d at 796.

[184] *Id.* at 795.

[185] Horowitz, *supra* note 159, at 442.

nature of the public library would clearly not be compatible with many forms of expressive activity, such as giving speeches or holding rallies, we find that it is compatible with the expressive activity at issue here, the receipt and communication of information through the Internet."[186] If the government chose to provide Internet access within the public library setting, then it could not "selectively restrict certain categories of Internet speech because it disfavors their content."[187]

Judge Brinkema compared the library's decision to limit access to certain Internet sites with the school board's decision in *Pico* to remove certain books from the school libraries.[188] Explaining that by "purchasing Internet access, each Loudoun library has made all Internet publications instantly accessible to its patrons,"[189] Brinkema rejected the assertion that offering access to some Internet sites and not others was analogous to a library's traditional decisions regarding collection development, to purchase some books but not others. Unlike those latter decisions, which required choices involving the use of limited funds, extending Internet access to filtered sites did not require expenditure of additional resources.[190] In fact, once the library provided Internet access, it actually required additional resources to *limit* the sites available. As a result, Judge Brinkema concluded that Internet filtering could be described by the "analogy of a collection of encyclopedias from which [the library has] laboriously redacted portions deemed unfit for library patrons. As such, the Library Board's action [was] appropriately characterized as a removal decision."[191] While the

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[186] *Mainstream Loudoun II*, 24 F. Supp. 2d at 563.

[187] *Mainstream Loudoun I*, 2 F. Supp. 2d at 795-96.

[188] *Id.* at 793. *See also* Nowak, *supra* note 87, at 349-51; Semitsu, *supra* note 37, at 527.

[189] *Mainstream Loudoun I*, 2 F. Supp. 2d at 793.

[190] *Id.*

[191] *Id.* at 793-94. Judge Brinkema's determination that a library's use of blocking software is analogous to a library removing books from its shelves has not been without critics. *See, e.g.*, Mark S. Nadel, *The First Amendment's Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Librarians Exclude?*, 78 TEX. L. REV. 1117, 1119 (2000) (suggesting that "[c]ontrary to the rationale used in the *Loudoun* decision, there is no constitutionally significant difference between the library's discretion to manage its bookshelves and the discretion to manage its Internet access terminals"). Judge Brinkema, however, directly addressed the contention of critics like Nadel by explaining that the decision to block or filter information from Internet sites is more akin to removing books from library shelves than to purchasing materials selectively. *See also* Peltz, *supra* note 1, at 460-64, 470-75 (critiquing Nadel's thesis, arguing that the reasoning by the *Mainstream*

Library Board's decision to restrict access to certain information was analogous to the School Board's decision to remove school library books in *Pico*, the analyses were not identical. Unlike the school libraries in *Pico*, the public libraries at issue in *Mainstream Loudoun* "lack[ed] the inculcative mission that is the guiding purpose of public . . . schools"[192] and school libraries.

Describing public libraries as "places of freewheeling and independent inquiry"[193] and characterizing the decision to bar access to certain Internet sites as a restriction on unfavored speech, Judge Brinkema applied the strict scrutiny required to assess a content-based regulation of speech in a limited public forum. The court evaluated the plaintiffs' claims by examining whether the board narrowly drafted the regulation in question to advance a compelling governmental interest.[194]

While acknowledging that the government had a compelling interest in protecting children from harmful communications,[195] Judge Brinkema concluded that the use of Internet filters was not the least restrictive means to achieve this goal,[196] since it required limiting the communications on all of the library's computers to those which would be acceptable for children. Evoking the *Reno* Court's invocation of the "sandbox" effect, Brinkema wrote, "it is clear that defendants may not, in the interest of protecting children, limit the speech available to adults to what is fit for 'juveniles.'"[197] Thus, the *Mainstream Loudoun* decision found the Library Board's policy mandating the use of Internet filtering software an unconstitutionally overbroad regulation on speech, much as the Supreme Court had found the CDA overbroad in *Reno v. ACLU*.[198]

Loudoun Court was sound, and concluding that "filtering can be properly characterized only as removal").

[192] *Mainstream Loudoun I*, 2 F. Supp. 2d at 795.

[193] *Id.*

[194] *Id. See also* Warren, *supra* note 14, at 54.

[195] *Mainstream Loudoun I*, 2 F. Supp. 2d at 796-97.

[196] *Mainstream Loudoun II*, 24 F. Supp 2d at 566. *See also* Warren, *supra* note 14, at 55 (emphasizing less restrictive options including: establishing Internet use policies; setting time limits on usage; educating patrons; allowing adult use of non-filtered computers; relocating computers; using privacy screens; and enforcing criminal laws).

[197] *Mainstream Loudoun I*, 2 F. Supp. 2d at 797.

[198] Judge Brinkema's decision finding the mandatory filtering policy unconstitutional was soundly rejected by the child protection advocates who support

The Supreme Court's jurisprudence on the First Amendment rights to send and receive information, together with the *Kreimer* and *Mainstream Loudoun* decisions emphasizing that libraries providing Internet access are designated public fora created for the exchange of ideas and information, provide the backdrop against which courts must assess any federally mandated library filtering legislation. All these principles were implicated when a group of plaintiffs including the ALA and the ACLU brought a challenge in the Eastern District of Pennsylvania[199] against Congress' most recent attempt to protect children from Internet harm, CIPA.[200] CIPA explicitly conditions the receipt of federal funding on the use of Internet filters in public libraries, and determinations of its constitutionality will pave the way for future child-protection legislation and policies.

C. *The Constitutionality of CIPA's Library Provisions*

Designed to protect children "in those places where we want to believe they are most secure," CIPA requires schools and libraries to use filtering technology if they accept federal subsidies to connect to the Internet.[201] The legislation is more

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filters. Linda Chavez, President of the Center for Equal Opportunity, renounced the decision as a

> baseless and dangerous decision. . . . Judge Brinkema's decision goes far beyond any reasonable interpretation of the "free speech" clause of the First Amendment and sets dangerous legal precedent that left unchallenged will debase the political freedoms of citizens in a democracy to enact sensible policies designed both to protect children and uphold community standards of decency and decorum in public places.

Filtering Software Debate Continues, *supra* note 48.

[199] Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

[200] 47 U.S.C. § 254(h) (2002).

[201] *Supporters of Internet Filtering in Schools and Libraries Back Franks-McCain Bill*, TECH L.J., (1999), *at* http://www.techlawjournal.com/censor/1999030-3.htm (last visited Jan. 17, 2003). The Children's Internet Protection Act is actually a somewhat misleading name, in that the label functions as a general shorthand which actually encompasses two separate acts passed by the 106th Congress. American Library Association, *Questions and Answers on Children's Internet Protection Legislation*, *available at* http://www.ala.org/cipa/q&a.html (last visited Oct. 31, 2002) (explaining that Congress combined three distinct bills, originally sponsored by Senators McCain and Santorum and Representative Istook, into the "Children's Internet Protection Act" and the "Neighborhood Children's Internet Protection Act," provisions of which have subsequently been described under the general label of "CIPA."). The two pieces of legislation inserted similar language into three statutes: The Elementary and Secondary Education Act ("ESEA"); subtitle B of the Museum and Library Services Act, known as the Library Services and Technology Act ("LSTA"); and the section of the Communications Act of 1934, as amended by the Telecommunications

restrained than the CDA and COPA in its response to the perils of Internet harm. CIPA's approach to protecting children centers on ensuring that they are denied access to offensive content, focusing on children as the recipients of communications, rather than on the initial transmission of such communication. Instead of authorizing criminal or civil penalties for transmitting harmful content on the Internet as a whole, CIPA only prohibits the spending of federal funds on computers that are operated with unfiltered access to the Internet or on Internet service in the school or library setting.[202]

CIPA requires the blocking of Internet materials containing visual depictions of child pornography or material that is obscene or harmful to minors.[203] It requires schools and libraries to institute Internet safety policies that include technology protection measures[204] to be eligible to receive discounted Internet access or to receive federal funds to purchase computers or access to the Internet.[205] CIPA conditions the receipt of federal funding on a school's or a library's decision to install Internet filtering software on all of its computers.[206]

Act of 1996, extending universal services to schools and libraries in the form of telecommunications discounts ("E-rate"). *Id.* For the sake of simplicity, this Note refers to the various modifications of the ESEA, LSTA and E-rate statutes under the umbrella term "CIPA."

[202] CIPA's defenders emphasize its narrowly tailored scope, but critics vehemently disagree and reject the Act as a sweeping example of censorship. According to Chris Hansen, Senior Staff Attorney at the ACLU, CIPA represents

> the first time since the development of the local, free public library in the 19th century that the federal government has sought to require censorship in every single town and hamlet in America[.] More than 100 years of local control of libraries and the strong tradition of allowing adults to decide for themselves what they want to read is being casually set aside.

Press Release, American Civil Liberties Union, ACLU Promises Legal Challenge as Congress Adopts Bill Imposing Internet Blocking in Libraries (Dec. 18, 2000), *available at* http://archive.aclu.org/news/2000/n121800a.html (last visited Jan. 17, 2003).

[203] *Id. See* 47 U.S.C. § 254(h)(6)(B)(i).

[204] 47 U.S.C. § 254(h)(6)(B)(i).

[205] *Id.* § 254(h)(6)(A)(i). This aspect of CIPA stems from the section of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, granting schools and libraries telecommunications discounts.

[206] 47 U.S.C. § 254(h)(7)(i) ("The term 'technology protection measure' means a specific technology that blocks or filters Internet access to the material covered by" the Act's prohibition of child pornography and material that is obscene or harmful to minors.). The legislation mandates the use of filters not just on computers used by children, but those used by adults as well. *See id.* § 254(h)(6)(C)(i). CIPA also requires public notice and hearings regarding the adoption of the Internet use policy and stipulates the mechanisms for certifying compliance that allow a school or library to maintain eligibility for federal funds.

In *American Library Ass'n, Inc. v. United States*, ("*ALA*") the District Court for the Eastern District of Pennsylvania examined whether CIPA's mandatory Internet filtering provisions passed constitutional muster when applied to Internet-equipped computers in public libraries. A three-judge panel held in May, 2002 that CIPA was facially invalid under the First Amendment.[207] The court concluded that "[i]n view of the severe limitations of filtering technology and the existence of . . . less restrictive alternatives . . . it is not possible for a public library to comply with CIPA without blocking a very substantial amount of constitutionally protected speech, in violation of the First Amendment."[208]

Echoing *Kreimer* and *Mainstream Loudoun*, the *ALA* court reasoned that "when the government provides Internet access in a public library, it has created a designated public forum."[209] Citing *Kreimer*'s conclusion that the library "represents a 'quintessential locus of the receipt of information'"[210] and noting that the "right to receive information is vigorously enforced in the context of a public library,"[211] the *ALA* court explained that:

> [b]y providing its patrons with Internet access, public libraries create a forum in which any member of the public may receive speech from anyone around the world who wishes to disseminate information over the Internet. Within this "vast democratic forum," which facilitates speech that is "as diverse as human thought," software filters single out for exclusion particular speech on the basis of its disfavored content.[212]

The court further explained that under "public forum doctrine, where the state creates such a forum . . . the state's decision selectively to exclude certain speech on the basis of its content is subject to strict scrutiny, since such exclusions risk distorting the marketplace of ideas that the state has created."[213] To satisfy strict scrutiny, the regulation must

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[207] Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

[208] *Id.* at 490.

[209] *Id.* at 457.

[210] *Id.* at 466 (quoting Kreimer v. Bureau of Police, 958 F.2d 1242, 1255 (3d Cir. 1992)).

[211] *Id.* (quoting Sund v. City of Wichita Falls, 121 F. Supp. 2d 530, 547 (N.D. Tex. 2000)).

[212] *Am. Library Ass'n, Inc.*, 201 F. Supp. 2d. at 470 (internal citations omitted).

[213] *Id.* at 489.

accomplish a compelling state interest and must use the narrowest available means.[214]

CIPA's proponents defend the Act's content-based speech restrictions by arguing that its goal of protecting children from exposure to the harmful material lurking online clearly responds to a compelling government interest.[215] Indeed, courts have recognized this sort of child protection as a compelling objective. Although the Supreme Court has granted full First Amendment protection to speech that includes "[s]exual expression which is indecent but not obscene"[216] when evaluating the free speech rights of adults, it has treated the same material differently in the context of children. In *Reno v. ACLU*, the Court emphasized that it had "repeatedly recognized the governmental interest in protecting children from harmful materials."[217] *Reno*'s reiteration of the compelling state interest in protecting children is but one in a long line of cases establishing the importance of this goal.[218] Indeed, the *ALA* court affirmed the government's "interests in preventing patrons from accessing visual depictions of obscenity, child pornography, or in the case of minors, material harmful to minors."[219]

Under a strict scrutiny analysis, however, regardless of how compelling CIPA's ends are,[220] it must still utilize the narrowest possible means of protecting children in order to

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[214] *See* Sable Communications v. FCC, 492 U.S. 115, 126 (1989) (holding that the state may regulate the content of speech if the regulations are the least restrictive means of achieving a compelling state interest).

[215] As John McCain explained, CIPA "allows local communities to decide what technology they want to use, and what to filter out, so that our children's minds aren't polluted." John Schwartz, *Law Limiting Internet in Libraries Challenged*, N.Y. TIMES, Mar. 25, 2002, at A18.

[216] *Reno I*, 521 U.S. 844, 874 (1997) (quoting *Sable*, 492 U.S. at 126).

[217] *Id.* at 875.

[218] *Sable*, 492 U.S. at 126 (recognizing the Government's compelling interest in protecting children); Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 743 (1996) (asserting compelling interest in protecting children from sexually explicit material); Stanley v. Georgia 394 U.S. 557, 567 (1969) (stressing importance of state interest in protecting children); Ginsberg v. New York, 390 U.S. 629, 639 (1968) (recognizing importance of governmental interest in protecting children from harmful materials).

[219] *Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 410.

[220] Besides responding to the compelling interest in protecting children from Internet harm, laws like CIPA may address additional government interests. Bell, *supra* note 21, at 222-25 (suggesting that such laws could advance the interests in: protecting library staff from sexual harassment or other offensive exposure; preventing secondary effects of objectionable Internet content, such as changing the character of the library; or assisting patrons in "winnowing" voluminous Internet content).

survive First Amendment scrutiny.[221] If the methods it uses are either under- or over-inclusive, or if there are alternate means available to protect children that do not restrict speech, courts should find CIPA unconstitutional. Because CIPA's mandated Internet safety policies require the use of Internet filtering software, and because of limitations in presently available filtering software,[222] CIPA uses means of controlling speech that are both under- and over-inclusive, allowing access to some information that it purports to restrict, while preventing speech that is constitutionally protected. As the court found in *ALA*, "it is currently impossible, given the Internet's size, rate of growth, rate of change, and architecture . . . to develop a filter that neither underblocks nor overblocks a substantial amount of speech."[223] CIPA's requirement that public libraries use these ineffective filters, therefore, is not narrowly tailored to further the government's concededly important interest.[224]

To withstand constitutional scrutiny, a content-based restriction on speech must, at the very least, accomplish the compelling government interest toward which it is directed.[225] If a measure is under-inclusive, suppressing speech while *not* accomplishing the compelling goal, it will not be upheld.[226] Perhaps because Congress tailored CIPA more narrowly than the CDA or COPA, it is under-inclusive and fails to accomplish its stated goals. First, because the legislation limits the scope of its prohibitions to visual images that may harm children, it does not protect youngsters from harmful textual materials.[227] Children may access indecent, or even obscene, text without triggering the restrictions of CIPA.[228] Second, harmful Internet

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[221] *See generally* Keller, *supra* note 99, at 605-11 (applying strict scrutiny requirements of compelling interest and narrow tailoring to proposed legislation authorizing library Internet filtering).

[222] *See infra* notes 230-50 and accompanying text; *see also* Expert Report of Benjamin Edelman, Am. Library Ass'n, Inc. v. U.S., 201 F. Supp. 2d 401 (E.D. Pa. 2002) (No. 01-1332), *available at*, http://cyber.law.harvard.edu/people/edelman/pubs/-aclu-101501.pdf (last visited Jan. 23, 2003); Kessler & Rapawy, *supra* note 103.

[223] *Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 437.

[224] *Id.* at 410.

[225] *See, e.g.*, Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104-05 (1979).

[226] *See id.* at 110 (Rehnquist, J., concurring).

[227] *See* Conn, *supra* note 20, at 488.

[228] During the trial assessing CIPA's constitutionality, Edward R. Becker, Chief Judge of the Court of Appeals for the Third Circuit, expressed surprise while looking at a filtered "text-only" version of a pornography site. Judge Becker responded, "But this has extraordinarily graphic text," and asked, "[a]re you saying that anybody can access this text [without triggering CIPA's proscriptions]?" The witness responded simply, "That's right." Iver Peterson, *Access to Pornography on Net is at Center of*

materials transmitted via a medium other than the Web, such as streaming video or e-mail, may fall into CIPA's categories of restricted speech. Yet, existing filtering software, which filters only Web-based content, will not screen this material.[229]

Some of CIPA's under-inclusiveness stems from technological difficulties inherent in Internet filtering software.[230] Filtering software identifies objectionable sites in a variety of manners, each of which gives rise to its own problems. Some software blocks access to lists of sites that computers or humans have pre-screened and classified in various categories of offensiveness.[231] Because of the sheer volume of material on the Internet, and the rapidity with which new Web pages are added, it is virtually impossible for any filtering product to screen every Web page.[232] Thus, new pages with objectionable material may slip through filters that exclude only pre-screened sites.

Other Internet filtering software uses a technology known as "string-recognition," which may result in over-inclusiveness by restricting access to a great deal of material which does not fall into CIPA's categories of restricted speech.[233] String recognition software employs technology that searches either Web site URLs or Web pages themselves for certain sequences of letters that suggest inappropriate content.[234] Unfortunately, the sophistication of such software is limited, and it often restricts innocuous, as well as offensive, speech.[235] For example, the software may block a Web site with

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Library Fight, N.Y. TIMES, Mar. 31, 2002, at A27.

[229] Edelman Report at 25-37 ("[B]locking programs systematically fail to differentially allow access to certain Internet other than that distributed over the Web. For example, blocking programs are unable to differentially restrict access to images that meet their category definitions but are transmitted via e-mail, streaming media, or a variety of interactive systems.").

[230] *See* Semitsu, *supra* note 37, at 513-19; *see also* Peltz, *supra* note 1, at 410-16.

[231] Edelman Report at 15-20.

[232] *Id.* at 27, 33.

[233] Nowak, *supra* note 87, at 348.

[234] *Id.*

[235] The first major study of the effectiveness of filters to appear in a peer-reviewed journal suggested that students using computers with filtered Internet access were blocked from many useful health sites and other sites with references to sex and sex related terms (e.g., the Journal of the American Medical Association's site for women's health; and sites with references including "safe sex," "condoms," "abortion," "jock itch"). The study supports a view of current filtering technology as a particularly blunt instrument: filters set at the least restrictive level blocked an average of 1.4% of health sites, versus 25% when set at the most restrictive level. In contrast, the amount of pornography blocked was 87% at the least restrictive level, and only 91% at the most

information on "Mars Exploration" because it includes the letters s-e-x in order.[236] A particularly ironic example of this overbreadth, given the political forces arrayed in support of CIPA, is that certain filtering software blocked access to the Internet home page of former House Majority Leader Richard "Dick" Armey, a staunch filtering advocate, because his site contained the word "Dick."[237]

A significant problem with software filters that search text for objectionable terms is that such software is generally unable to analyze images. In *ALA*, the court recognized that "[i]mage recognition technology is immature, ineffective, and unlikely to improve substantially in the near future."[238] Because the narrowly drafted provisions of CIPA only concern "visual depictions," existing filtering software is singularly ineffective at furthering CIPA's goals.

In addition, by requiring the use of filters on computers used by adults, and not just those used by children, CIPA restricts adult speech. Even if it were possible to create a perfect Internet filter that could block access to certain materials that are indecent or harmful to children, some of these materials would be protected as communication among adults.[239] Because CIPA fails to distinguish between those

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restrictive level. Schwartz, *supra* note 1 (summarizing report in the Journal of the American Medical Association produced by the Henry J. Kaiser Family Foundation, entitled "See No Evil: How Internet Filters Affect the Search for Online Health Information"); *see also* Press Release, American Library Association, New Study Confirms Internet Filters Fail to Block Much Pornography, Deny Important Health Information to Public (Dec. 10, 2002), *available at* http://www.ala.org/alaorg/oif/kaiser-study.html (last visited Jan. 17, 2002); Christopher D. Hunter, Filtering the Future?: Software Filters, Porn, PICS, and the Internet Content Conundrum (1999) (unpublished M.A. thesis), *available at* http://www.ala.org/alaorg/oif/hunterthesis.html (last visited Jan. 17, 2002).

[236] Horowitz, *supra* note 159, at 434. *See also* Peltz, *supra* note 1, at 412-14 (cataloging list of sites inappropriately blocked by filtering software); Linda Campbell, *A Software Program Too Far?*, FT. WORTH STAR-TELEGRAM, Apr. 4, 2002, at 11 (stating that filters have blocked a Super Bowl "XXX" site, passages from St. Augustine's Confessions and pages of the U.S. Army Corps of Engineers); Julien Mailland, Note, *Freedom of Speech, The Internet, and Control: the French Example*, 33 N.Y.U. J. INT'L L. & POL. 1179, n.152 (noting that a gardening Web site with tips on growing cucumbers could be blocked, since software will detect the letters c-u-m in sequence).

[237] Press Release, American Civil Liberties Union, ACLU Promises Legal Challenge as Congress Adopts Bill Imposing Internet Blocking in Libraries (Dec. 18, 2000), *available at* http://www.aclu.org/cyber-liberties.cfm?id=8219&c=59&type=s (last vistited Oct. 30, 2002).

[238] Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 431 (E.D. Pa. 2000). The court noted further that "no presently conceivable technology can make the judgments necessary to determine whether a visual depiction fits the legal definitions of obscenity, child pornography, or harmful to minors." *Id.* at 433.

[239] *See, e.g.*, *Reno I*, 521 U.S. 844, 875 (1997).

library computers used by children and those used by adults,[240] it mandates restrictions on adult communications that, even if acceptable when relating to children, are unconstitutional when applied to the context of adult speech.

CIPA's defenders argue that the law does not unconstitutionally burden adult speech because it includes a disabling provision that allows a library administrator or other authority to disable filtering software "to enable access for bona fide research or other lawful purposes."[241] Even assuming that this disabling provision would make it possible for a library patron to access all constitutionally protected Internet content after requesting that a librarian disable filtering software,[242] however, the library patron would still be required to make an affirmative request for permission before accessing the disfavored speech.[243] The *ALA* court found that by requiring patrons to request permission before accessing Web sites containing disfavored speech, CIPA created an unconstitutional burden on speech[244] that would deter library patrons from receiving constitutionally protected communications.[245] The *ALA* court found this deterrent effect to be a matter of "common sense as well as amply borne out by the trial

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[240] 47 U.S.C. § 254(h)(6)(C)(i) (1998).

[241] 20 U.S.C. § 9134(f)(3). This section, dealing with libraries receiving LSTA grants, provides for filter disabling for "bona fide research" and presumably would allow a librarian to disable filters upon the request of either an adult or a minor performing "bona fide research." In contrast, the corresponding section dealing with libraries receiving E-rate grants, 47 U.S.C. § 254(h)(6)(D), allows for disabling of filters only "during use by an adult, to enable access for bona fide research or other lawful purpose." *See Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 484-85. There is no explanation for this anomaly in either the statutory text, or in the legislative history. *See* American Library Association, *Questions and Answers on Children's Internet Protection Legislation, at* http://www.ala.org/cipa/q&a.html#disabled (last visited Jan. 15, 2003).

[242] *See Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 485-86 (construing disabling provisions as allowing access to all constitutionally protected material, in spite of imprecisely drafted provisions).

[243] *Id.* at 486.

[244] *Id.* at 486-88. *Cf.* Conn, *supra* note 20, at 491-92 (citing Urofsky v. Gilmore, 167 F.3d 191 (4th Cir. 1999) (attaching no stigma to requirement that faculty members request disabling of filters to access sexually explicit material on state-owned computers)). Conn suggests that disabling provisions of CIPA may be constitutional. *Id.*

[245] *Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 486-89 (concluding that "laws imposing content-based burdens on access to speech are no less offensive to the First Amendment than laws imposing content-based prohibitions on speech") (citing United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 812, 826 (2000); Lamont v. Postmaster General, 381 U.S. 301 (1965); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 754 (1996); Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n, 896 F.2d 780, 785 (3d Cir. 1990)).

record."[246] At the least, it is clear that by requiring librarians to serve as gatekeepers to whom patrons must identify themselves before accessing sensitive information on, for example, health or sexuality, CIPA flies in the face of librarians' professional dedication to free and anonymous inquiry.[247]

Because CIPA requires public libraries to use Internet filters, and because all filters significantly over- and under-block, the district court found that the law was not narrowly tailored.[248] The law is also overbroad because it requires filters on computers used by adults to block content that may be harmful to minors but is protected speech in the adult context. Finally, the court concluded that CIPA fails to satisfy strict scrutiny because less restrictive alternatives are available to protect library patrons from objectionable Internet material.[249] The court suggested a variety of policies relating to the physical layout of libraries and patron conduct that might accomplish CIPA's objectives without the impermissible burden on protected speech.[250]

In attempting to protect children in schools and libraries from Internet-based harm, CIPA's sponsors have responded to the judicial disfavor for measures like the CDA and COPA by narrowing the focus of the legislation. CIPA focuses on a narrower range of visual material and seeks to protect children only in certain public venues, leaving the protection of children from Internet dangers in the home to parents. However, as the court in *ALA* properly found, in spite of its narrow focus, CIPA, as written, is still unconstitutional.[251] The law allows access to some material it purports to exclude, making it under-inclusive and ineffective. CIPA is also unconstitutionally overbroad in the same sense that the CDA and COPA are. By restricting protected, innocuous speech under the guise of controlling harmful and indecent speech,

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[246] *Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 487 (noting that plaintiffs testified that they would have been discouraged from accessing Internet material on issues including sexual identity and women's health if they had been required to first ask permission from library staff).

[247] American Library Association, *Libraries: An American Value*, *at* http://www.ala.org/alaorg/oif/lib_val.html (last visited Jan. 17, 2003) ("We protect each individual's privacy and confidentiality in the use of library resources and services.").

[248] *Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 410.

[249] *See infra* Part III.

[250] *Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 410.

[251] *Id.* at 496.

and by restricting speech between adults to that which is acceptable for children, CIPA is flawed and causes the "sandbox" effect.

CIPA represents the federal government's latest attempt to insulate children from the types of harmful material that may be found online, but like earlier congressional attempts, the Act is fundamentally flawed. By relying on the use of unsophisticated Internet filtering software, the Act restricts protected speech while failing to restrict all Internet content that is legitimately dangerous for children. In spite of the compelling governmental interest in protecting children, the First Amendment only allows the state to enforce content-based restrictions on speech when it can prove that the means used are both actually effective and the narrowest available. Because the mechanisms embodied in CIPA are simultaneously overbroad and under-inclusive, the legislation fails this narrow-tailoring prong of the strict scrutiny test. Just as the Supreme Court found the CDA unconstitutionally overbroad, and should find COPA unconstitutional upon reconsideration, the Court should ultimately deem CIPA unconstitutional.[252]

III. FILTERING THE INTERNET IN LIBRARIES WHILE FOLLOWING THE FIRST AMENDMENT

To date, congressional leaders have been less effective at passing constitutional legislation that actually protects children than at promoting *themselves* as defenders of children from menacing pornographers. Because Congress failed to respond to important First Amendment principles in passing the CDA, COPA and CIPA, all three laws unconstitutionally burden protected speech. Yet, while it remains likely that COPA and CIPA will eventually suffer the same fate as the CDA and ultimately be deemed unconstitutional, it is unlikely that the public clamor for protecting children from cyber-pornographers will abate. It is not unreasonable to expect that, following the next court case striking down an Internet safety law, voices in Congress will rise once again to try to shut down "federally funded peep shows."[253] Even if civil libertarians and

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[252] *See* Conn, *supra* note 20, at 492-93; Nowak, *supra* note 87, at 353-55.

[253] Press Release, Family Resource Council, Family Groups Raise Awareness About the Dangers of Pornography (May 2, 2001), *available at* http://www.frc.org/get/p-01e02.cfm (last visited Jan. 15, 2003). Given that pending litigation has brought the fates of COPA and CIPA into question, the Family Resource Council has redoubled its

child advocates find little reason to seek the middle ground, effective congressional leadership could still lead to productive compromise legislation. Congress might use a finely tuned, far narrower[254] and less restrictive[255] approach than those attempted to date, and could pass legislation that would constitutionally help protect children in public libraries from harmful Internet material.

The largest challenge to those who would mandate Internet filtering in public libraries is that, as they currently exist, filters cannot effectively distinguish between content that is harmful to children and content that, while offensive, is protected for adults. As a result, measures like CIPA, which call for the use of Internet filters on *all* library computers, will be unconstitutionally overbroad. A possible solution to this problem would be mandating filters on Internet terminals used by children, while not requiring filters on adult-only computers.[256] This solution would cure the overbreadth resulting from filters that restrict adults to material appropriate for children.[257] Its implementation might be problematic, however, in the many smaller public libraries that do not have separate, distinct computer facilities for children and adults, or in small, rural libraries that may have only one Internet accessible computer for public use.

A possibility for libraries with few computers would be to require the use of blocking software that could be activated when children log on to a computer, but deactivated before

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efforts to expunge Internet smut from public libraries. It exhorts librarians, and the politicians who represent them, to take action: "[A]ll of the librarians across the country who identify with the problem need to take back their libraries. Librarians, don't be a victim of porn." *Id.*

[254] *See* Semitsu, *supra* note 37, at 542-43 (listing more than a dozen Internet safety policy alternatives that employ more narrow means than current library filtering legislation).

[255] *See* Goldstein, *supra* note 66, at 1190-91, 1194 (describing less restrictive Internet safety policies proposed by congressional committee and concluding that "when Congress chose a means that is more restrictive of speech than the one recommended by its own expert commission, it has not attempted to use the least restrictive means").

[256] *See generally* Keller, *supra* note 99, at 597-98 (explaining that one early proposal for Internet filtering, Senator John McCain's proposed "Internet School Filtering Act," called for "public libraries with one or more Internet-accessible computers [to] install filtering software on at least one of the computers." By not requiring the use of Internet filters on computers used by adults–except when a library has only one computer–this proposal would have avoided some of CIPA's flaws.).

[257] Of course, overbreadth problems may remain, since filters may prevent even minors from accessing many useful sites, such as those dealing with health topics. *See supra* Part II.C.

adult use.[258] Many libraries today already require users to log on to a computer by entering a password or identification number, often to ensure that patrons using the computers have library cards or are residents of the library's specific service area. The identification numbers distributed to patrons could be coded with specific information on a patron's age that would activate the filtering software when a minor logged on to the computer.[259] Adult use of the same computer would trigger no filtering.

While this age-specific triggering of Internet filtering would seem to correct the "sandbox" effect flaws of CIPA, on closer examination it remains a clumsy solution to protecting children. Because of the technical flaws in presently available filters, a child using the Internet might inadvertently access harmful material even if filtering software were activated.[260] Further, the possibility would remain that a child, accessing educational material on her filtered Internet computer, might be exposed to harmful content displayed on an unfiltered computer used by an adult sitting in close proximity to the child.[261] In addition, because of technical limitations on filtering software, it is likely that over-filtering would prevent children from accessing a range of information which in fact is not obscene or harmful to minors. Thus, even if used only on children's computers, Internet filters alone remain both under- and over-inclusive and ineffective in furthering the compelling goal of child protection.[262]

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[258] Nowak, *supra* note 87, at 354.

[259] *See* Semitsu, *supra* note 37, at 543-44 (advocating a solution that allows parents to specify what levels of Internet access their children should be allowed, and arguing that parent-imposed filtering, unlike mandatory library-imposed filtering, does not constitute state action and is therefore not constitutionally suspect); *see also* Horowitz, *supra* note 159, at 442-43 (describing library policy in which parents prescribe what level of Internet access their child's library card will authorize: filtered, non-filtered or no access); Goldstein, *supra* note 66, at 1200 (describing filtering software that can automatically be suspended, depending on age information associated with library cards).

[260] *See* Edelman Report.

[261] David Burt, a public librarian from Oregon and founder of an organization called "Filtering Facts," conducted a study of 613 libraries and reported on the "highly disturbing type of incident [involving] adults accessing pornography in full view of children in libraries." Burt concluded that "[w]e need to have filters on every Internet terminal accessible to children in every public library." *Supporters of Internet Filtering in Schools and Libraries Back Franks-McCain Bill*, TECH. L.J. (1999), *at* http://www.techlawjournal.com/censor/19990303.htm (last visited Jan. 17, 2003).

[262] *See* Xenakis, *supra* note 15, at 343-52 (suggesting technological solution to dilemma of Internet dangers to children based not on filtering but on creation of new top-level domains (e.g., .sex or .xxx) to create an adult-only Internet "red light

If legislation mandated that children only be allowed to access the Internet in discrete, separate "children's areas" where no unfiltered adult-use computers are found, libraries with limited numbers of Internet terminals and small libraries without distinct adult and children's areas would face the difficult choice of installing filters on *all* their computers or offering no Internet access at all.[263] Alternatively, such libraries would have to declare periods of time during which the computers could be used, separately, by either children or adults. Such an arrangement would ensure children used only filtered computers but would decrease the overall time available for both children and adults to use the Internet, an undesirable consequence that would limit information access for all library patrons.

Recognizing the inherent limitations in existing Internet filtering software, Congress might pass legislation that protects children from dangerous Internet material by relying on means other than filtering software. Congress could mandate that libraries place computers used by children in high traffic areas of the library, or in close proximity to librarians, who could personally supervise children.[264] While professional librarians might well prove more reliable than automatic filtering software in distinguishing harmful from innocuous material, such a proposal would likely meet with great resistance within the librarian community. As professional information specialists, librarians might well resist serving as "babysitters," constantly looking over the shoulders of their young patrons.[265] Moreover, such monitoring is in tension with the professional ethic of anonymity that librarians honor.[266] Furthermore, with libraries across the country facing fiscal challenges and surviving with limited staffing, there is little likelihood that public libraries could spare the staff necessary to effectively monitor the Internet

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district").

[263] *See* Semitsu, *supra* note 37, at 539 (noting that nearly half of libraries with Internet access have only a single Internet terminal, and thus cannot designate different adult- and child-use Internet stations).

[264] *See* Nowak, *supra* note 87, at 354; Horowitz, *supra* note 159, at 442.

[265] *See Am. Library Ass'n, Inc.*, 201 F. Supp. 2d at 426-27 (describing "tap-on-the-shoulder" policy that requires librarians to monitor patron Internet usage and librarian reluctance to confront patrons viewing inappropriate material with a tap on the shoulder).

[266] *See supra* note 247.

usage of their young patrons without a substantial infusion of additional support.

As the above possibilities suggest, any constitutional legislation would have to use Internet filtering narrowly, employing it only on computers that were used by children. Furthermore, because no currently available filtering software is foolproof, and because all filters expose users to the risk of encountering some objectionable material, filters alone cannot protect children from all Internet dangers. To ensure children will not be exposed to the harmful material that may slip through the cracks in filtering software, a viable Internet safety law would have to use additional means to protect children. Internet accessible computers used by children would have to be physically placed such that parents, other patrons or professional librarians could monitor children's usage patterns, supplementing the protections provided by filters.[267]

CONCLUSION

For federal legislation to protect youthful Internet users in public libraries without violating the First Amendment, it would have to use filtering software sparingly while mandating other adjustments in the physical layout or staffing patterns of public libraries.[268] Such legislation could be problematic for those federalists who would leave such decisions to librarians or local governments. At a minimum, such a law would require significant additional expenditures by many, if not all, libraries. Well-equipped libraries with extensive staffing would be positioned far better than smaller libraries to implement this type of Internet safety plan, while poorer libraries, unable to devote the physical or staffing resources required under the law, would have to choose between offering Internet access in

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[267] *See* Santiago, *supra* note 8, at 278 (suggesting parental supervision of young Internet users is crucial in any viable Internet monitoring scheme).

[268] *See* John Schwartz, *No Easy Fixes Are Seen to Curb Sex-Site Access*, N.Y. TIMES, May 3, 2002, at C6 (citing a 2002 report by the National Research Council, "Youth, Pornography and the Internet"). The leader of the research project suggested that the report "will disappoint those who expect a technological 'quick fix' to the challenge of pornography on the Internet." *Id.* Because of limitations inherent in present filtering technology, the report concluded that "[t]hough some might wish otherwise, no single approach—technical, legal, economic or educational—will be sufficient. . . . Rather, an effective framework for protecting our children from inappropriate materials on the Internet will require a balanced composite of all these elements." *Id.*

violation of federal guidelines, or eliminating Internet access entirely.[269]

Ultimately, the choice to protect children from online dangers may be one of dollars and cents. The only types of federal mandates that can effectively protect children without violating the Constitution will come with substantial price tags attached. Members of Congress so eager to look "tough" when it comes to Internet pornography may find that footing the bill to do so constitutionally will prevent them from staying "tough" on spending. The price of free speech, in the context of Internet dangers in the public library, does not render impossible the constitutional protection of children. It may, however, make protecting children expensive. If Congress is willing to make the significant investment in our nation's libraries necessary to provide safe access to information for all, those who would protect children and those who would protect the First Amendment should all find something to celebrate.

J. Adam Skaggs[†]

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[269] The scenario may not be as far fetched as it seems at first glance. The San Francisco Public Library, in defiance of CIPA, has elected to ban all Internet filtering software from the library, a decision that could cost the library up to $20,000 in federal funds. As library supervisor Mark Leno noted, "Internet access that the library provides is often used by folks from different ethnic communities who may not have computers in their homes. . . . That's where the free speech issue is especially significant and unfair." Kim Curtis, *San Francisco Bans Internet Filters at Public Libraries*, N. COUNTY TIMES, Oct. 3, 2001, *available at* http://www.nctimes.com/news/-2001/20011003/64547.html (last visited Jan. 21, 2003). While a relatively wealthy city like San Francisco can afford to keep providing Internet access, even without federal support, other, less wealthy communities may be unable to do so. ALA's Judith Krug summarizes the conundrum facing libraries: with CIPA, "Congress has attempted to force libraries to choose between technology funding and censorship. . . . [CIPA] requires a terrible choice—and an unconstitutional one." Press Release, American Library Association, ALA v. U.S. Statement by Judith Krug (Mar. 25, 2002) *at* http://www.ala.org/pio/presskits/cipa/statement.html (last visited Feb. 7, 2003).

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