Filtering Out Protection: The Law, the Library, and Our Legacies

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NOTE

FILTERING OUT PROTECTION:

THE LAW, THE LIBRARY, AND OUR LEGACIES

As far as February mornings go in Rocky River, Ohio,¹ this is an unusually bearable one. The sky is clear as the sunshine glints off the remnants of the preceding night’s snowfall. The thirty-degree temperature is relatively mild for this time of year so a trip to Starbucks and the local public library² is in order. I round up my two young sons, strap them into their double-stroller, and embark on a journey in pursuit of exercise, caffeine, and enlightenment. We travel the four blocks to Starbucks and satisfy our needs: for me, that means ordering a “Triple Venti Raspberry White Mocha,”³ and for the kids, it means gathering straws, empty cups, and stickers. Consuming coffee prior to visiting the library is important for me, because, between the children’s books, toys, computer programs, and Internet access, we generally spend hours within its confines.

Upon arriving at the library, I unfasten the safety straps on the double-stroller and carry the boys into the building. As we make our way to the second floor, I notice that an elderly gentleman is occupying one of the first floor computer terminals equipped with Internet access. The silver-haired computer user is wearing a heavily starched button-down Oxford shirt, khaki trousers, and a plaid vest. He seems out of place. Generally, this particular com-


² See Rocky River Public Library Website, at http://www.rrpl.org/rrpl-info.stm (last visited Mar. 25, 2003). The Rocky River Public Library is one of over 9000 public libraries in the United States. According to its Mission Statement, the Rocky River Public Library is committed to: “[p]reserving its unique atmosphere and personal service, adapting quickly and efficiently to anticipate and meet community needs, and promoting freedom of information to all.” Id.

³ The beverage is a large specialty coffee drink that includes white mocha flavoring, raspberry syrup, and three shots of espresso. See generally Reg Henry, Best to Mumble When Ordering in Coffeespeak, PITTSBURGH POST-GAZETTE, Oct. 12, 1999, at D1 (“My understanding is that venti means ‘bucket of caffeine’ in Italian.”).
puter cluster is filled with students from the Rocky River Middle School, which is approximately fifty yards away. He must be waiting for one of his grandchildren. As I bend down to tie one of my son’s shoes, I glance at the grandfatherly gentleman’s computer screen. Written across the top of the screen is “GAY PORN PALACE.” After getting over the initial shock, I whisk my children up to the second floor to decide how to proceed with this knowledge.

- Should I confront the man and instruct him against viewing pornography in a children’s area of the library?
- Should I notify a librarian that an individual is using a computer to view obscene material?
- Should I consider the fact that confronting the elderly gentleman or informing a librarian might lead to an embarrassing situation, potentially forcing the man into public shame?
- How do I balance the man’s potential public shame and embarrassment with my responsibility as a parent to keep my children free from being exposed to obscene material?

The questions quickly turn from practical to legal.

- Should public library computers be equipped with Internet filtering software?
- Is it relevant that this public library is frequented by middle school children?
- Since public libraries receive federal funds, is there a judicially recognized non-textual constitutional right to view pornography? To be free from viewing pornography?
- If Congress expends funds for public libraries to commence and maintain Internet access for their patrons, is Congress then free to condition those funds on the utilization of Internet filtering software?

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4 See Rocky River Middle School Website, at http://www.lnoca.org/~rrms/ (last visited Mar. 25, 2003). The Rocky River Middle School is a publicly funded institution consisting of 600 students enrolled in sixth to eighth grade. Id.
7 Id.
FILTERING OUT PROTECTION

I decide to wait until we are about to leave and bring up the issue with a librarian. At that time, she informs me that it is “unconstitutional” for a public library to utilize Internet filtering software and that many libraries, such as the Rocky River Public Library, generally follow an “acceptable use policy” when librarians encounter a patron viewing pornography. I nod my head, express my dissatisfaction as a parent and a taxpayer, buckle my children into their double-stroller, and question the morals of the society in which we live.

I. BACKGROUND

The battle lines over Internet filtering software in public libraries were drawn in 1998. In that year, a public librarian in only one United States federal district would have been correct in stating that utilizing Internet filtering software is unconstitutional, but due to the scarcity of litigation in this area, librarians in other federal districts likely formed that same belief. In Mainstream Loudoun v. Board of Trustees,9 adult patrons challenged the library’s use of filtering software on Internet access. Relying on the Supreme Court’s divided opinion in Board of Education v. Pico,10 which held that a school board could not authorize the removal of books from a school library because it disliked their content,11 a federal judge in the Eastern District of Virginia held that the blocking of Internet websites via filtering software ran afoul of the First Amendment.12 Thus, in public libraries situated within the

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11 Id. at 866-67.

12 U.S. CONST. amend. I: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”
bounds of the Eastern District of Virginia, the use of Internet filtering software was thought to be unconstitutional.\footnote{Mainstream Loudoun II, 24 F. Supp. 2d at 570.}


CIPA conditions private and federal monies to public libraries “on the mandatory installation and use of content blocking software on all library Internet terminals, for both adults and minors.”\footnote{Id.} It prohibits a public library from receiving two classes of funds\footnote{Id; see CIPA §§ 1712, 1721.} for Internet service from the Federal Communications
Commission or the Institute of Museum and Library Services unless the library installs Internet filtering software on all computers to block Internet access to certain content.22 Specifically, a library must certify that it is:

enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are (I) obscene; (II) child pornography; or (III) harmful to minors; and is enforcing the operation of such technology protection measure during any use of such computers by minors.23

A “technology protection measure” is defined as “a specific technology that blocks or filters internet access to visual depictions that are obscene, . . . child pornography, . . . or harmful to minors.”24 CIPA defines “minor” as an individual under seventeen years of age.25 Importantly, it provides that “[a]n administrator, supervisor, or other person authorized by the certifying authority . . . may disable the technology protection measure concerned, during use by an adult [or minor], to enable access for bona fide research or other lawful purpose.”26 The price of noncompliance is high. Since 1996, over $190 million has been disbursed to more than 5000 public libraries through the “E-rate” (universal service) Program.27 Meanwhile, the Institute of Museum and Library Ser-

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22 CIPA §§ 1712, 1721.
23 Id. § 1721(b) (quoted in Am. Library Ass’n, 201 F. Supp. 2d at 413).
24 Id. § 1703(b)(1) (quoted in Am. Library Ass’n, 201 F. Supp. 2d at 413).
25 Id. § 1721(c).
26 Id. § 1721(b) (quoted in Am. Library Ass’n, 201 F. Supp. 2d at 413). It is worth noting that in order to receive “universal service,” or “E-rate” discounts, a library administrator may only disable the technology protection measure for an adult’s bona fide research purpose. However, a library administrator may also disable the technology protection measure for a minor and continue to receive LSTA funds. Am. Library Ass’n, 201 F. Supp. 2d at 414.
vices distributed $200 million in funds in 2001, provided under the
Library Services and Technology Act of 1996.28

On March 20, 2001, one month before CIPA was to take ef-
fect, the American Library Association29 (ALA) filed a lawsuit in
the United States District Court for the Eastern District of Penn-
sylvania in an attempt to invalidate the Act.30 On July 26, 2001, a
three-judge federal district court panel denied the government’s
motion to dismiss the case.31 The trial was held from March 25,

This Note seeks to answer the question of whether Congress
overstepped its legislative bounds in enacting CIPA by exploring
the First Amendment issues raised by Internet filtering software in
public libraries. Understanding the pervasiveness of Internet com-
puter terminals in public libraries and the technology that is avail-
able to filter obscene materials and material harmful to minors is
of critical importance in this analysis.

II. EXTRA, EXTRA! GET YOUR INTERNET ACCESS HERE: THE
EVOLUTION OF THE PUBLIC LIBRARY

The government’s purpose in establishing and maintaining
public libraries is to facilitate an individual’s ability to obtain ac-
cess to speech, not to act as a speaker seeking to communicate
with a library patron.32 This ALA intellectual freedom principle
was bolstered by a fractured court in Pico, in which the plurality
“expressed concern that elected officials, not professional educa-

http://www.nclis.gov/statsurv/200OplO.pdf (report to National Commission on Libraries and
Information Science); see Plaintiffs’ Complaint, supra note 8, at 21-22.
28 See Plaintiffs’ Complaint, supra note 8, at 23.
29 See generally ALA MISSION, MEMBERSHIP, ORGANIZATION – AN OVERVIEW, at
Association, founded in 1876, is the oldest and largest national library association in the world.”
Id. The ALA’s mission is “to provide leadership for the development, promotion, and im-
provement of library and information services and the profession of librarianship in order to
enhance learning and ensure access to information for all.” Id. “As of November 30, 2001, the
ALA had 5,138 organization members, 261 corporate members, and 58,292 personal members –
a total of 63,691.” Id.
30 Plaintiffs’ Complaint, supra note 8, at 1.
31 Am. Library Ass’n v. United States, No. 01-1303, 2001 U.S. Dist. LEXIS 15920, at *3
(E.D. Pa. July 26, 2001). “After careful consideration of the pending motions and responses, we
have concluded that plaintiffs’ complaints in these actions contain enough factual allegations to
withstand dismissal. Plaintiffs are entitled to an opportunity to prove their allegations.” Id. at
*5 (Opinion of Becker, Ch. J., Fullam, Sr. J., Bartle, J.). The ultimate outcome and reasoning of
the case are discussed in Part VIII of this Note.
32 See Bernard W. Bell, Filth, Filtering, and The First Amendment: Ruminations On Pub-
lic Libraries’ Use Of Internet Filtering Software, 53 FED. COMM. L.J. 191, 220 (2001); see Am.
alaorg/policymanual/intellect.html (last modified Feb. 6, 2003).
tors," were effectively censoring reading material.\footnote{Bell, supra note 32, at 215; see Bd. of Educ. v. Pico, 457 U.S. 853, 856 (1982).} In \textit{Pico}, public school board members in a Long Island, New York school district demanded and obtained the removal of eleven "objectionable" books from school libraries, including \textit{The Naked Ape} by Desmond Morris, \textit{Black Boy} by Richard Wright, \textit{Down These Mean Streets} by Piri Thomas, \textit{Soul On Ice} by Eldridge Cleaver, \textit{Slaughterhouse Five} by Kurt Vonnegut, Jr., and \textit{Laughing Boy} by Oliver LaFarge.\footnote{Pico, 457 U.S. at 857 n.3.} Although \textit{Pico} dealt with the issue of public schools, the case is widely recognized as highly relevant to the constitutionality of public libraries' use of Internet filtering software.\footnote{See, e.g., Lawrence Lessig, \textit{What Things Regulate Speech?: CDA 2.0 v. Filtering}, 38 JURIMETRICS J. 629, 657 (1998).} Although \textit{Pico} contained six separate opinions and failed to generate a majority opinion, it is important to juxtapose the actions of removing library books and installing filtering software on computers.

In 1948, the ALA ratified the first Library Bill of Rights,\footnote{ALA Library Bill of Rights, art. I, available at http://www.ala.org/work/freedom/lbr.html (last visited Feb. 14, 2003).} which illustrated the unique role that public libraries play in our society. The Library Bill of Rights characterizes the public library as an invaluable forum and mandates that "[b]ooks and other literary resources should be provided for the interest, information, and enlightenment of all people of the community the library serves."\footnote{Id. (quoted in Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 420 (E.D. Pa. 2002)).} The Library Bill of Rights further states: "[m]aterials should not be excluded because of the origin, background, or views of those contributing to their creation."\footnote{Id. art. II (quoted in \textit{Am. Library Ass'n}, 201 F. Supp. 2d at 420).} It also says that "libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval."\footnote{Id. at 215; see Bd. of Educ. v. Pico, 457 U.S. 853, 856 (1982).}

Historically, courts have echoed the Library Bill of Rights by stressing that public libraries are traditional arenas of free expression dedicated to the communication and receipt of information.\footnote{See Plaintiffs' Complaint, supra note 8, at 18. Public libraries are "designed for free-wheeling inquiry." \textit{Pico}, 457 U.S. at 915 (Rehnquist, J., dissenting). A public library is "the quintessential locus of the receipt of information." \textit{Kreimer v. Bureau of Police}, 958 F.2d 1242, 1255 (3d Cir. 1992). A library is a "mighty resource in the free marketplace of ideas." \textit{Minarcini v. Strongsville City Sch. Dist.}, 541 F.2d 577, 582 (6th Cir. 1976).} The evolution of the public library has also brought new, dynamic roles and job functions for the typical librarian. In addition to making sure the library is current with orders for best-selling
books and subscriptions to periodicals, librarians must make sure their library's Ethernet cards are set to download 100 kilobytes per second. This is because library patrons may be more inclined to do their "freewheeling inquiry" sitting in front of a computer monitor than by traditional means of walking the library aisles in order to locate hard-copy materials.

The Supreme Court has stressed the importance of the Internet as an expansive medium for worldwide communication, analogized it to a public library, and ruled that an individual's right to receive information via the Internet is constitutionally protected. The Internet, or World Wide Web, may be divided into the "publicly indexable Web" and the "Deep Web." The publicly indexable Web includes only web pages that may be accessed through the "spidering technology" of search engines. Presently, the publicly indexable Web comprises over two billion web pages and is growing by an estimated 1.5 million pages per day. The Deep Web consists of Web pages inaccessible by search engines, and as such, it is virtually impossible to decipher the exact volume of pages and rate of growth. However, recent estimates suggest that the Deep Web's size is "two to ten times that of the publicly indexable Web." According to a recent report by the U.S. National Commission on Libraries and Information Science, approximately 96% of all public libraries provide access to the Internet. This was a dramatic increase from a 1998 study, which found that only 73% of the public libraries provided access to the Internet. This recent report revealed that significant increases in public library Internet usage occurred in all types of libraries regardless of the area's poverty or metropolitan status. In addition to the percentage increases for Internet access, this recent report also revealed that since 1998, libraries nearly doubled their number of

41. An Ethernet card is "[a] network adapter that enables a computer to connect to an Ethernet. It is a printed circuit board that is plugged into the computers on the Ethernet or may be built into their motherboards." HIGH-TECH DICTIONARY, at http://www.computeruser.com/resources/dictionary/index.html (last visited Feb. 14, 2003). An Ethernet is "[t]he most popular type of local area network, which sends its communications through radio frequency signals carried by a coaxial cable." Id. 42. Pico, 457 U.S. at 915. 43. Reno v. ACLU, 521 U.S. 844, 870 (1997). 44. Am. Library Ass'n v. United States, 201 F. Supp. 2d 402, 418-19 (E.D. Pa. 2002). 45. Id. 46. Id. at 419. 47. Id. at 418-19. 48. Id. at 419. 49. BERTOT & MCCLURE, supra note 27, at 1. 50. Id. at 10 (quoted in Am. Library Ass'n, 201 F. Supp. 2d at 422). 51. BERTOT & MCCLURE, supra note 27, at 3. 52. Id.
filtering out protection,\textsuperscript{53} and the speed of connectivity for public access Internet services sharply increased.\textsuperscript{54}

It is valuable to recognize that even rural libraries and those with poverty levels greater than 40\% are able to provide T1 access. The data show an increase of 10.1\% for rural libraries, an increase of 7.6\% for libraries with more than 40\% poverty, and an overall increase of connectivity at T1 speeds by 14.3\%.\textsuperscript{55}

As these statistics indicate, children in urban and rural areas can now receive obscene and pornographic material in a record number of public libraries, equipped with a record number of computer terminals, via state-of-the-art network connections. In response to that moral dilemma, the world of technology, aided by politicians across the country, has developed a way to decelerate one's Internet surfing session at record speeds: Internet filtering software.

III. "IT IS EMPHATICALLY THE PROVINCE AND DUTY OF THE FILTERING SOFTWARE TO SAY WHAT THE [PORN] IS.\textsuperscript{56}

A. Network-Based Internet Filtering Software

CIPA's "technology protection measure"\textsuperscript{57} statutory language may be viewed as encompassing a wide-ranging spectrum of Internet filtering software products. In designing their products, software developers seek to achieve a common goal while utilizing a variety of methods. Prior to CIPA's passage, most of the seven percent of public libraries mandating the use of Internet filtering software\textsuperscript{58} utilized network-based filtering products, such as SurfControl's Cyber Patrol, N2H2's Bess/i2100, Secure Computing's SmartFilter, and Websense.\textsuperscript{59} Once a computer user enters a do-

\textsuperscript{53} Id. at 3-4.
\textsuperscript{54} Id. at 4.
\textsuperscript{55} Id. "A T1 line is a telephone line connection for digital transmission that can handle 24 voice or data channels at 64 kilobits per second, over two twisted pair wires. T1 lines are used for heavy telephone traffic, or for computer networks linked directly to the Internet. T1 lines are normally used by small and medium-sized companies [including public libraries], with heavy network traffic. They can send and receive very large text files, graphics, sounds, and databases very quickly." HIGH-TECH DICTIONARY, supra note 41.
\textsuperscript{56} Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").
\textsuperscript{57} CIPA, supra note 17, § 1703(b)(1) (quoted in Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 413 (E.D. Pa. 2002)).
\textsuperscript{58} LIBRARY RESEARCH CENTER, supra note 8, at 17 (quoted in Am. Library Ass'n, 201 F. Supp. 2d at 426).
\textsuperscript{59} Am. Library Ass'n, 201 F. Supp. 2d at 427.
main name or an IP address into an Internet browser, these network-based filtering software products funnel the request and check the entered address against their "control list." Each filtering software product generally contains "between 200,000 and 600,000 URLs . . . and the [control] lists determine which URLs will be blocked." The software developers divide their control lists into numerous categories, including entertainment, pornography, travel, adult/sexually explicit, kids' sites, and militancy/extremist. Interestingly, the filtering software companies treat these categories as trade secrets and retain exclusive access as to which URLs exist within each category. The software customers, such as public library administrators, decide which categories to "enable," or block, and the technology allows them to go beyond "enabling" and add or remove specific URLs for their specific network.

B. Host- & Keyword-Blocking Methods

The network-based Internet filtering software products utilize a form of the host blocking method to control the receipt of Internet content. Generally, this method targets pre-selected, unacceptable Internet sites for blocking. Host-blocking filtering software has been sharply criticized for inadvertently blocking innocuous sites dealing with women's issues, homosexual issues, and environmental issues. Specifically, this type of software has blocked "university safe-sex information pages" and "the Journal of the American Medical Association's HIV/AIDS information page." The director of the Internet Filter Assessment Project,
Karen Schneider, identified two major problems with host blocking:

first and most importantly, that the decisions on which sites to block are being made by vendors and not librarians so that 'however skilled the selectors may be in their original professions, like opticians pinch-hitting for shoe clerks, their new duties do not suit them well,' and second, that host blocking is reactive rather than proactive and the site has to exist and be identified before it can be blocked.73

Schneider poignantly articulates that selecting resources from larger pools of information is what librarians do, and host-blocking software usurps their power, authority, and experience in selecting these resources in favor of the software programmer.

The advent of sophisticated, network-based Internet filtering software illustrates the recent dynamic advances in filtering technology. Prior to the influx of control lists and categories, keyword-based filtering software was the product of choice for the majority of librarians. While a handful of Internet filtering software companies currently combine host and keyword-based blocking methods into their products, pure keyword-based filtering software is presently in a distinct minority. This method targets words or strings of words to be blocked, and is utilized by the popular Cybersitter and Net Nanny.74 Critics complain that keyword-based filtering software blocks harmless material due to its inability to place keywords into context.75 Specifically, this type of software has blocked items on "breast cancer," "Essex County," "Super Bowl XXX," and "Beaver College."76

C. Platform for Internet Content Selection

A number of the network-based Internet filtering software products have recently incorporated Platform for Internet Content Selection ratings-based software (PICS) into their browsers.77 PICS is a technological infrastructure that associates metadata with Internet content, and is "designed to help exchange information

74 See Bastian, supra note 6 (discussing how various filtering services operate).
75 See Plaintiffs’ Complaint, supra note 8, at 15.
76 Id; see Bastian, supra note 6.
77 See Semitsu, supra note 16, at 517 (describing PICS as an "emerging industry protocol").
between software and ratings or resource discovery services." PICS technology allows ratings, voluntarily labeled for their content by website owners, to be exchanged with Internet filtering software. These ratings, or labels attached to the content, indicate to the filtering software whether or not the computer user is allowed to view a website. PICS software allows for ratings "from one to ten for example, under criterion ranging from 'religious content' to 'graphic sex content,'" allowing each individual network administrator to decide what numerical level is appropriate for viewing. Third-party sources determine the applicable ratings for content based upon "ratings vocabularies," thus removing the critical subjective decision concerning the appropriateness, relevance, or description of the content from judicial review. In lieu of judicial review, the Internet Content Rating Association (ICRA) oversees the ratings system and allows website owners to label their sites on the ICRA homepage.

IV. SOUNDS GOOD, BUT DOES IT WORK?

A few years before the more restrictive and controversial passage of CIPA, Congress began to investigate the efficiency of Internet filtering software. The significance of the Child Online Protection Act, in 1998, was not the rights and liabilities associated with the statute, but rather the Act’s directive to create a temporary commission of nineteen members to study protecting children on the Internet. On October 20, 2000, the Commission on Child Online Protection issued its report to Congress, illustrating its recommendations on how best to implement technological tools and methods for protecting minors from harmful Internet material. The Commission found that "no single technology or method will

79 Id.
80 Id. ("Labels are descriptions of the content.")
81 Semitsu, supra note 16, at 517-18.
82 Kuny, supra note 78.
84 47 U.S.C. § 231 (2000); see COPA COMMISSION WEBSITE, at http://www.copacommission.org/commission/faq.shtml (last visited Mar. 3, 2003) ("The Child Online Protection Act, known as COPA, was passed October 23, 1998 as part of an omnibus budget bill and was signed into law by President Clinton. The purpose of [COPA] was to prohibit online sites from knowingly making available to minors material that is ‘harmful to minors’ (sexually explicit material meeting definitions set forth in [COPA]). Commercial providers of ‘harmful to minors’ material may defend themselves against prosecution by restricting the access of minors to such material.").
effectively protect children from harmful material online," and concluded that "[t]he child-protective technologies and methods evaluated by the Commission provide an important but incomplete measure of protection" from online material that is harmful to minors.

*Consumer Reports* attempted to settle this hotly contested debate in its March 2001 issue by conducting two separate tests on six of the most widely used filtering software titles: "How well do filters block bad stuff?" and "Do filters block good stuff?" The first test revealed that only a few filters actually blocked designated inappropriate sites, the most successful being a PICS system incorporated in the AOL browser. The study showed that AOL’s Young Teen control was the most efficient by a wide margin, "allow[ing] only one site through in its entirety, along with portions of about 20 other sites." The other filters tested allowed twenty percent or more of the sites through in their entirety. The study showed some inconsistencies in various forms of filtering software; for instance, Net Nanny displays parts of websites, often with obscene words omitted but graphic images in full view.

In the second test, *Consumer Reports* found that the filters blocked harmless, legitimate sites "merely because their software [did] not consider the context in which a word or phrase is used." The test results showed that most filters blocked only a few legitimate sites, but there were exceptions. Most notably, Cybersitter 2000 and Internet Guard Dog blocked nearly one in five, [while] AOL’s Young Teen control blocked 63 percent of the [harmless] sites." AOL representatives reasoned that since its staff and subscriber parents select the sites appropriate for children, with an

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86 Id. at 10.
87 Filtering Software Test: Digital Chaperones for Kids, CONSUMER REPS., Mar. 2001, at 21 [hereinafter Digital Chaperones]. The magazine’s main test determined how accurately the filters performed in blocking objectionable content. *Consumer Reports* “configured . . . six [filtering software] products for a 13- to 15-year-old, [and] also tested AOL’s Young Teen (ages 13 to 15) and Mature Teen (ages 16 to 17) parental controls.” Id. The magazine “pitted them all against a list of 86 easily located web sites that contain sexually explicit content or violently graphic images, or that promote drugs, tobacco, crime, or bigotry.” Id.
88 Id. at 22. “To see whether the filters interfere with legitimate content, we [Consumer Reports] pitted them against a list of 53 web sites that featured serious content on controversial subjects.” Id.
89 Id. at 21.
90 Id.
91 Id. at 21-22.
92 Id. at 22.
93 Id.
94 Id.
emphasis on education and entertainment, the Consumer Reports
test sites may have been blocked because they failed to match AOL's pre-selected sites.\textsuperscript{95}

On the basis of this less-than-ringing endorsement of filtering
software, Consumer Reports concluded that "[f]iltering software is
no substitute for parental supervision."\textsuperscript{96} In the current state of
filtering technology, even librarians can fall prey to the inexactitude. In a study on the effects of filtering software in public librar-
ies, The Internet Filter Assessment Project (TIFAP) recently re-
ported that filtering software blocked librarians from seeking in-
formation needed to answer a question thirty-five percent of the
time.\textsuperscript{97} These types of results have opened some eyes throughout
the media and computer industries: "Perhaps the greatest crime
here is the use of names like 'sitter' and 'nanny; to market these
products, implying that they'll keep young, impressionable minds
safe on the Internet."\textsuperscript{98}

The Commission's recommendations, the Consumer Reports
testing, and the TIFAP study clearly indicate that the filtering
technology has improved in the last couple of years, but that the
current technology is far from perfect. Currently, there are over
144 different filtering software programs available for use on li-
brary computers, and the number is rapidly increasing.\textsuperscript{99} Many
scholars believe the future of filtering technology revolves around
the PICS ratings-based system,\textsuperscript{100} but right now even PICS might
allow obscenity and pornography to flow freely right onto your
child's desktop.

\textbf{V. HOUSES DIVIDED: FILTERING SOFTWARE IN PUBLIC LIBRARIES
BEFORE THE CHILDREN'S INTERNET PROTECTION ACT}

\textbf{A. Pre-CIPA Trends in Filtering Software Use}

Prior to the passage of CIPA, the vast majority of public lib-
braries left it to library administrators to formulate policies that
allowed librarians to police computer terminals. One recent study
found that 95\% of all libraries providing public Internet access

\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} See Schneider, \textit{supra} note 73 (evaluating the performance of filters in a library setting).
\textsuperscript{98} Larry Greenemeier, \textit{Protecting Minors: Filters Fail to Keep Kids Safe}, \textit{INFORMATION
\textsuperscript{99} Kathleen Conn, \textit{Protecting Children From Internet Harm (Again): Will The Children's
\textsuperscript{100} See Kuny, \textit{supra} note 78 (explaining PICS and other technologies being used to filter
content on the Internet).
have a written policy or set of guidelines to "regulate public use of the Internet." In addition, among those libraries without a formal policy, the study found that 50% are "in the process" of formulating a policy and 26% are considering formulating one. A substantial number of these policies do not include Internet filtering software. The study revealed that only 17% of libraries use filters on at least some terminals for Internet access. The study further noted that a mere 7% of libraries utilized filtering software on all computer terminals. The study showed that 64% of libraries require parental permission for children's use of the Internet, perhaps in order to achieve the precise aim of filtering software. This tactical, anti-filter approach taken by public libraries was effective, at least according to the librarians.

Do we censor? Of course we do. We have signs around the computer with four broad categories we discourage the use of because they're a nuisance. The first is computer games, Star Wars, that kind of stuff. The second thing is we don't permit computers to be used to observe pornography.

The Board of Trustees of the Loudoun County (Virginia) Public Library did not share the pervasive opinion that "hanging signs" was a significant deterrent to obscenity and child pornography. No, a stronger measure needed to be in place to protect the county's children, and the library administrators joined the ranks of the 7% of libraries requiring filtering software on all computers.

B. The Loudoun County Litigation

In 1997, the Board of Trustees of the Loudoun County Public Library enacted a "Policy on Internet Sexual Harassment" which required that "'[s]ite-blocking software . . . be installed on all [library] computers' so as to: 'a. block child pornography and obscene material (hard core pornography)'; and 'b. block material deemed Harmful to Juveniles under applicable Virginia statutes and legal precedents (soft core pornography)." The policy directed the six Loudoun County library branches to install Internet
filtering software on every library computer. Specifically, each of the branch libraries installed keyword-based X-Stop filtering software, which was criticized by filtering opponents as "clumsy and ineffective, often blocking innocuous sites." A group of Loudoun County residents challenged the policy, claiming that X-Stop filtering software blocked access to protected speech, that the policy lacked "clear criteria for blocking decisions," and that it "unconstitutionally chill[ed] plaintiffs’ receipt of constitutionally protected materials."

In November 1998, the United States District Court for the Eastern District of Virginia ruled that the Board of Trustees overstepped its constitutional bounds by requiring Internet filtering software. First, Judge Leonie M. Brinkema ruled that a public library’s installation of Internet filtering software is to be construed as a removal decision, rather than as a proper discretionary acquisition decision, thereby implicating the First Amendment. Second, Judge Brinkema found that by explicitly offering expressive activity, in the form of the receipt and communication of information through the Internet, the six Loudoun County branch libraries were limited public fora. As a result, the policy’s content-based restriction had to be “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.” Third, Judge Brinkema assumed the presence of compelling state interests of “minimizing access to illegal pornography and avoidance of creation of a sexually hostile environment,” but found Loudoun County’s filtering policy to be neither reasonably necessary to further those interests nor narrowly tailored to achieve those interests. Judge Brinkema listed several less restrictive measures: utilizing privacy screens, directing the library staff to casually monitor Internet use, or installing filtering software on terminals used by minors only.

The Mainstream Loudoun decision gave life to legislation on Capitol Hill and galvanized support for Senator McCain’s efforts...
to condition federal funds on public libraries installing filtering software on their computers. As one critic observed:

[M]ost adults cannot be with their children every moment of the day and night and rarely sit beside them looking over their shoulders at the public library. Judge Brinkema and the good folks of Mainstream Loudoun couldn't care less about these parents’ rights to protect their children or the community’s interest in upholding standards of decency. If their radical interpretation of the [First] Amendment prevails, it will not only pollute the culture but debase the very liberties they claim they want to protect.\(^\text{119}\)

The groundswell of support and enthusiasm following Mainstream Loudoun was tempered by the reality that the first time Congress attempted to regulate children’s access to the Internet,\(^\text{120}\) the Supreme Court struck down the legislation because its content-based restrictions were unconstitutionally overbroad and not narrowly tailored.\(^\text{121}\) Congress’ next attempt at regulating in this area\(^\text{122}\) was moderately more successful. Two years after Congress was enjoined from enforcing the Child Online Protection Act by the United States Court of Appeals for the Third Circuit,\(^\text{123}\) the Supreme Court vacated the ruling and remanded the case.\(^\text{124}\) Finally on December 15, 2000, following its long and unsuccessful quest to protect children from obscene material and pornography on the Internet, Congress passed the Fiscal Year 2001 Appropriations Bill,\(^\text{125}\) which included CIPA.

VI. PRESIDENT CLINTON’S FINAL DAYS: THE MARC RICH PARDON AND THE CHILDREN’S INTERNET PROTECTION ACT

President Clinton’s signing of the CIPA into law turned out to be a controversial move. As briefly explained earlier, CIPA requires public libraries to install filtering software on all library Internet computer terminals as a condition to receiving certain


\(^{120}\) Communications Decency Act (CDA), 47 U.S.C. §§ 223(a)-(h) (2000). The CDA prohibited the knowing transmission over the Internet of obscene or indecent messages to any recipient under eighteen years of age. Id.

\(^{121}\) Reno v. ACLU, 521 U.S. 844 (1997).

\(^{122}\) Child Online Protection Act (COPA), 112 Stat. 2681-736 (1998) (codified at 47 U.S.C § 231(a)-(e)).

\(^{123}\) ACLU v. Reno, 217 F.3d 162, 166-67 (3d Cir. 2000).


funds that provide assistance to libraries for Internet service.126 The two funding sources at issue are the "universal service" or "E-rate" discounts to libraries provided under the Communications Act of 1934, and LSTA funds administered under the Library Services and Technology Act of 1996.127 In order to receive these funds, CIPA dictates that a public library must certify that it is "enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are (I) obscene; (II) child pornography; or (III) harmful to minors; and is enforcing the operation of such technology protection measure during any use of such computers by minors."128 CIPA includes a disabling provision, as it provides that "[a]n administrator, supervisor, or other person authorized by the certifying authority . . . may disable the technology protection measure concerned, during use by an adult [or minor], to enable access for bona fide research or other lawful purpose."129 CIPA went into effect on April 20, 2001, and libraries were to undertake action toward compliance by July 1, 2001 in order to receive the funds.130

The constitutional concerns raised in the statute's legislative history mirror those raised by the Commission on Child Online Protection report131 and the Consumer Reports study.132 Congressional testimony from librarians,133 technology experts,134 and law professors135 all pointed to general inaccuracies of filtering software and the constitutional problems associated with filtering or blocking constitutionally protected material. The Congressional Research Service analyzed CIPA and found the statute to be constitutionally questionable at best.

[I]t does not appear possible for software to block [constitutionally protected] material without simultaneously blocking constitutionally protected material. This is because it may be

126 See supra Part I.
127 See supra note 21.
128 CIPA, supra note 17, § 254(h)(6)(B).
129 Id. § 254(h)(6)(D); see also supra note 26 (regarding disabling during use by minors).
130 Id. § 254(h)(6)(E)(i).
131 See supra notes 85-87 and accompanying text.
132 See supra notes 87-96 and accompanying text.
135 See id. (testimony of Prof. Larry Lessig, Harvard Law School Professor).
impossible, in principle, to design technology that could distinguish obscenity from non-obscenity, child pornography from non-child pornography, and harmful-to-minors material from non-harmful-to-minors material.\footnote{Plaintiffs' Complaint, supra note 8, at 24 (quoting Congressional Research Service Memorandum, Sept. 1, 2000, at 15).}

The negative legislative history and the outcry from groups such as the ALA\footnote{See ALA Mission, Membership, Organization – An Overview, supra note 29. The organization's website details its attack on the constitutionality of the legislation. Id.} foreshadowed immediate legal challenges to the constitutionality of the statute. The first lawsuit was filed a month before the legislation even took effect. The future of children's safety in public libraries is now squarely before the Supreme Court. It is time to "say what the law is."\footnote{See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").}

VII. SURVIVING JUDICIAL SCRUTINY: THE "RIGHT" TO ACCESS PORNOGRAPHY

A. Conditional Spending

The first step a court should take in analyzing CIPA is a conditional spending analysis. In essence, the conditional spending framework set the following constitutional rules for Congress in enacting CIPA. First, when Congress exercises its spending power, it must do so within "the general welfare."\footnote{South Dakota v. Dole, 483 U.S. 203, 207 (1987) (quoting Helvering v. Davis, 301 U.S. 619, 640-41 (1937)).} Second, if it is conditional spending, the condition must be clear.\footnote{See Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981).} Essentially, the condition must be obvious to all parties involved; the quid and the quo must be evident. Third, the condition(s) for the receipt of federal funds must relate to the national interest.\footnote{See Massachusetts v. United States, 435 U.S. 444, 461 (1978).} Fourth, and most importantly with respect to this piece of legislation, the federal government cannot induce action with conditional spending where independent prohibitions exist.\footnote{See, e.g., Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269-70 (1985) (supporting this prong of the conditional spending analysis); see also Buckley v. Valeo, 424 U.S. 1, 91 (1976) (per curiam) (also supporting this prong of the conditional spending analysis); King v. Smith, 392 U.S. 309, 333 n. 34 (1968) (also supporting this prong of the conditional spending analysis).} Generally, a good example of this would be Congress making the statement that "in exchange for this huge pot of federal money, you have to give up your right to vote." The above garden-variety illustration of an
independent prohibition on conditional spending can be easily analogized to Congress issuing federal funds or discounts through CIPA on the condition that library patrons suspend their First Amendment rights. Assuming that the right to communicate and receive obscenity and pornography is constitutionally protected, the fact that Congress has attached it to a spending program does not insulate it from scrutiny.\footnote{See Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) (invalidating spending program restrictions under the First Amendment); Rust v. Sullivan, 500 U.S. 173 (1991) (upholding spending program restrictions under the First Amendment).} Although it is virtually inarguable that the first three-prongs of the modern constitutional conditional spending test are met by this legislation, CIPA’s constitutionality hinges on the fourth prong,\footnote{See Dole, 483 U.S. at 210 (stating that Congress may not use its spending power to induce states to engage in unconstitutional activities).} depending on whether or not the First Amendment is implicated.

B. Acquisition or Removal? Pico and the First Amendment

CIPA should not be invalidated on conditional spending grounds because the use of filtering software in public libraries does not implicate \emph{Pico}\footnote{See Bd. of Educ. v. Pico, 457 U.S. 853, 889 (1982) (Burger, J. dissenting) (“[T]here is not a hint in the First Amendment, or in any holding of this Court, of a ‘right’ to have the government provide continuing access to certain books.”).} or the First Amendment. Although the Supreme Court’s decision in \emph{Pico} dealt with school libraries, Justice Brennan’s plurality opinion interpreted the First Amendment as forbidding government officials from removing books from a school library because the officials disapproved of their subject matter.\footnote{Id. at 872.} Importantly, the Court differentiated between the removal and the acquisition of library materials,\footnote{Id. at 871.} stating “nothing in our decision today affects in any way the discretion of a local school board to choose books to \emph{add} to the libraries of their schools.”\footnote{Id.}

As the defendants articulated in \emph{Mainstream Loudoun},\footnote{Mainstream Loudoun v. Bd. of Trs., 2 F. Supp. 2d. 783, 792 (E.D. Va. 1998) [Mainstream Loudoun f].} the proper characterization of the Internet in a public library setting is as a vast “Interlibrary Loan system.”\footnote{Id. at 793.} Just as a library school board decides not to acquire certain books or periodicals for its shelves, the board may similarly decide not to acquire pornographic websites by implementing filtering software. The filtering software is wholly unrelated to a library’s current collection of

\begin{itemize}
\item \emph{Mainstream Loudoun} v. Bd. of Trs., 2 F. Supp. 2d. 783, 792 (E.D. Va. 1998) [Mainstream Loudoun f].
\end{itemize}
books and periodicals, thus the software should not be viewed as a vehicle for removal. Historically, public librarians have exercised their discretion when deciding whether to purchase bound library materials, and as such, it follows that a new generation of librarians should enjoy the same discretion in selecting appropriate websites for library patrons. Modern technological advancements in filtering software merely allow librarians to continue serving their primary role in the community. A supplemental argument may be made that the library is utilizing the filtering software to select which types of materials to make publicly available. By not viewing the utilization of filtering software as a removal decision, the principles discussed in the *Pico* plurality are irrelevant in evaluating CIPA's constitutionality. Therefore, the technology protection measure requirement outlined in CIPA would be insulated from First Amendment review.

Critics of filtering software, most notably the ALA, contend that the government is inducing action with conditional spending where an independent prohibition exists: the suppression of Internet website operators' freedom of speech and the individual public library patrons' freedom to receive information under the First Amendment. According to the critics, this attempt by Congress to suppress private speech through conditional spending can best be analogized to *Legal Services Corp. v. Velazquez*, a case in which the Supreme Court invalidated a law that prohibited federally funded attorneys from making particular legal arguments that were contrary to the desires of Congress. Neither situation involves governmental speech, and as such, the ALA argues that Congress has no authority to pen legislation that seeks to control it, whether that be through the ideas and arguments of attorneys, or through filtering software that controls what ideas and information individuals are exposed to on the Internet.

The ALA's most persuasive argument to invalidate CIPA on First Amendment grounds entails characterizing the constraint on speech as violating the right of library patrons to receive constitutionally protected expression through viewing websites. The

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151 See ALA Library Bill of Rights, supra note 36.
152 See Semitsu, supra note 16, at 527.
153 Cf. *Mainstream Loudoun I*, 2 F. Supp. 2d at 794 (finding that *Pico* was relevant in this case because it was classified as a removal decision).
154 See Plaintiffs' Response to Defendants' Motion to Dismiss, the American Library Association, et al., at 4-5, Am. Library Ass'n v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002) (No. 01-1303) [hereinafter Plaintiffs' Response Brief].
156 Plaintiffs' Response Brief, supra note 154, at 7.
157 Id. at 11.
Supreme Court has consistently held that the First Amendment protects the right to receive ideas as well as to express them.\(^{158}\) Most importantly, an individual’s right to receive ideas applies to constitutionally protected expression on the Internet,\(^{159}\) and in particular, at the public library.\(^{160}\) The ALA contends that the aims of CIPA are not designed to disseminate or promote a governmental message, but rather to hamper the transmission of private speech.\(^{161}\) Thus, the ALA concludes that CIPA implicates the First Amendment,\(^{162}\) which in turn serves as the independent prohibition on Congress’ blatant attempt to regulate speech through the “back door.”

In Mainstream Loudoun, Judge Brinkema analogized the Internet to “a collection of encyclopedias” and likened the utilization of filtering software to “redact[ing] portions deemed unfit for library patrons.”\(^{163}\) Characterizing the Board of Trustees’ action as a removal of library materials, Judge Brinkema applied Pico.\(^{164}\) The ALA finds support for Judge Brinkema’s ill-advised reasoning in studies on the evolution of the library,\(^{165}\) and likewise draws a parallel between the government removing books from a public library’s shelves and its utilization of filtering software on its computers. The nature of the technology the public library employs is critical to drawing this parallel. The library’s computer terminals offer patrons a direct connection to the Internet; in other words, the connection is always open to every site on the World Wide Web. Therefore, to block a patron from viewing even one website, pornographic or not, amounts to taking a book right off of the shelf. This leads the ALA to the conclusion that CIPA’s filtering software requirement imposes content-based restrictions on library patrons’ receipt of information in a public place, thereby infringing on individuals’ First Amendment rights.\(^{166}\)

\(^{158}\) See, e.g., Bd. of Educ. v. Pico, 457 U.S. 853, 867-68 (1982) (holding that a school board cannot authorize the removal of books from a school library because it dislikes their content).

\(^{159}\) Reno v. ACLU, 521 U.S. 844, 874-79 (1997) (finding that sexual expression on the internet is protected by the First Amendment).

\(^{160}\) Plaintiffs’ Response Brief, supra note 154, at 12 (noting that the right to receive information has been protected in the context of public libraries); see Kreimer v. Bureau of Police, 958 F.2d 1242, 1255 (3d Cir. 1992) (finding that the First Amendment includes the right to receive information, and to some extent, the right to have access to public libraries).

\(^{161}\) Plaintiffs’ Response Brief, supra note 154, at 7.

\(^{162}\) Id. at 11.


\(^{164}\) Id. at 794.

\(^{165}\) See supra Part II.

\(^{166}\) Plaintiffs’ Response Brief, supra note 154, at 11.
At the time the ALA filed its legal challenge, it was fortunate to have the lone case deciding the constitutionality of Internet filtering software on its side. However, the arguments of both the ALA and Judge Brinkema ultimately fail. A public library may enforce content-based restrictions on access to Internet speech without violating the First Amendment; therefore, CIPA meets the fourth-prong of the modern conditional spending framework test. Congress exercising its conditional spending power to interfere with an individual’s First Amendment right to receive information, through the use of Internet filtering software, is certainly not the traditional way the government regulates its general citizenry. The Internet works in such a manner that librarians are unable to make individual purchases of website material. The result would be axiomatic, if the Internet did function in such a manner, that librarians could purchase online pornography, because the bookshelf evidence shows us that librarians would decline. CIPA’s requirement of filtering software is an acquisition question, and as such, the discretion of government officials should control.

C. A Proper Analogy: Broadcasting and the First Amendment

Public libraries may use Internet filtering software to protect children from pornography or other harmful material and remain on solid constitutional ground. Similar to radio and television, the Internet is routinely accessed by children, especially in the public library setting. The Supreme Court has consistently acknowledged that there exist “limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children.” Prior to the advent of the Internet, the Court recognized that broadcasting receives the most limited First Amendment protection, far less than that afforded the print media. In *FCC v.*
Pacifica Foundation, the Court bolstered the rationale for limiting broadcasters' First Amendment protection by drawing two distinctions between print and broadcast media. The Court pointed to broadcasting's "uniquely pervasive presence in the lives of all Americans" and its "[unique accessibility] to children, even those too young to read." The Court justified regulating the speech because "[p]atently offensive, indecent material . . . confronts the citizen, not only in public, but also in the privacy of the home." The Court reasoned that the ability to turn off the radio or television set would not shield adults or children from indecency because the exposure already would have taken place.

Following the decision, courts have narrowly construed Pacifica, yet they continue to recognize it as justifying a government interest in protecting children from indecent speech. By extending the broadcasting principles enunciated in Pacifica to the Internet, the implementation of filtering software would eliminate children's exposure to pornography in the public library setting.

Applying the Pacifica test to the Internet would reduce the level of First Amendment protection our newest medium currently enjoys and resolve the constitutionality of implementing filtering software. First, is the Internet a "uniquely pervasive presence in the lives of all Americans?" Yes. A recent U.S. Department of Commerce study revealed that 54% of Americans used the Internet in 2001, up from 45% in 2000 and 22% in 1997. These increases occurred among all races, income levels, and educational backgrounds. The Internet's pervasiveness is highest in public schools and libraries. The study found that federal programs at issue in CIPA have enabled more than 95% of public libraries and

restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children." _Id._ at 749.


173 _Pacifica_, 438 U.S. at 748.

174 _Id._

175 _Id._ at 749.

176 _Id._ at 748.

177 _Id._

178 _See_, e.g., Sable Comm. v. FCC, 492 U.S. 115, 126 (1989) (declaring a statute banning indecent dial-a-porn commercial telephone communications unconstitutional because a less restrictive means to protect children existed).

179 _Cf._ Pacifica, 438 U.S. at 748.


181 _Id._ at 1-2.

182 _Id._ at 40-41.
98% of public schools to provide Internet access. In addition, 90% of children between the ages of five and seventeen (or 48 million children) now use computers. Assuming that 100% of children are exposed to radio and television, the Department of Commerce study illustrates that the Internet is quickly closing the pervasiveness gap. The proper unit of analysis may be the Internet’s pervasiveness in the lives of everyday schoolchildren, and if this were the case, the study would show a near equality in pervasiveness between the broadcast media and the Internet.

Second, is the Internet “uniquely accessible to children, even those too young to read”? Yes. The Department of Commerce report noted that more than 75% of fourteen- to seventeen-year-olds and 38% of five- to nine-year-olds use the Internet at home or school. Overall public library use is 29% for ten- to seventeen-year-olds, who use the Internet at school, but not at home. The report found the Internet to be an increasingly common daily activity for children despite concerns of possible exposure of children to unsafe or inappropriate content online. The empirical evidence strongly suggests that applying the Pacifica test to the Internet would result in a needed reduction in First Amendment protection, allowing CIPA’s filtering software requirement to be free from constitutional scrutiny. Most of all, it would protect the children.

Stretching broadcasting’s limited First Amendment protection principles to encompass the Internet is not a proposal without dissenters. For example, Phillip H. Miller proposes that Pacifica and Sable Communications, Inc. v. FCC set out a “spectrum of intrusiveness” for electronic media. Criticisms of Internet regulation, such as Miller’s, are utterly unpersuasive because they fail to acknowledge society’s affirmative duty to protect its children.

183 Id. at 39-41.
184 Id. at 42-56.
186 U.S. Dept. of Commerce, supra note 180, at 42-56.
187 Id. at 52.
188 Id. at 53-54.
191 Miller, supra note 189, at 1153-54. "At the farthest, most intrusive end of the spectrum are broadcast services that arrive in the home unsolicited, providing viewers or listeners with little prior warning or protection against unexpected program content. At the other, least intrusive end are services such as dial-a-porn and ‘pay-per-view’ that require some sort of initiating act or intervention to trigger each transmission.” Id. at 1154.
192 Ginsberg v. New York, 390 U.S. 629, 639-40 (1968) ("State also has an independent interest in the well-being of its youth.").
The documented pervasiveness of the Internet increases the chances that a child will be exposed to indecent material. Internet filtering software would protect a child when an adult decides to view obscene material, child pornography, or material harmful to minors. Child pornography is a type of expression not protected by the First Amendment, but without filtering software, a child may unwillingly be exposed to such visual depictions at a public library. Thanks to Pacifica, parents are assured that their children will not encounter indecent material through the broadcast media during daytime hours. Unless Pacifica is extended to the Internet, danger is only one click away.

D. Forum Shopping: Strictly Intermediate Scrutiny

Assuming that Internet filtering software implicates the First Amendment, a library is a non-public forum, and as such, any regulation should be subject to intermediate scrutiny. In evaluating the level of First Amendment protection afforded to an individual exercising his free speech rights on governmental property, the Supreme Court has identified and developed three distinct categories: traditional public, limited public, and non-public fora. First, a traditional public forum is a government property that has been dedicated to speech "by long tradition or by government fiat." Public sidewalks, parks, and streets are the most frequently cited examples of traditional public fora. In making a traditional public forum determination, courts generally consider the history of a site's openness to the public for all forms of expressive activity. If the government attempts to restrict speech based on content in a traditional public forum, courts will apply strict scrutiny. It is axiomatic that a public library is not a traditional public forum. In a public library, patrons must suppress certain forms of expressive activity while on the premises, such as making speeches, holding rallies, or distributing written materials. These manifestations of expression would enjoy First Amendment protection on a sidewalk or in a park, but would undermine the library's purpose and mission. In Mainstream Loudoun, Judge

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193 See, e.g., Osborne v. Ohio, 495 U.S. 105, 108 (1989) (quoting New York v. Ferber, 458 U.S. 747, 762 (1982)) ("the value of permitting child pornography has been characterized as 'exceedingly modest, if not de minimis.'").
195 Id; see also Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) ("Designated public fora . . . are created by purposeful governmental action.").
198 Perry Educ. Ass'n, 460 U.S. at 45.
Brinkema clearly articulated that a public library could not be considered a traditional public forum because libraries in the county had not been traditionally open to the public for all forms of expressive activity.\(^{199}\)

Second, a limited, or designated, public forum is defined as "public property which the State has opened for use by the public as a place for expressive activity."\(^{200}\) One example is a school board meeting or municipal theater.\(^{201}\) In *Kreimer v. Bureau of Police*,\(^{202}\) the lone case that has confronted the public library forum question, the Court ruled that the public library is a limited public forum. In *Kreimer*, a homeless man challenged a New Jersey public library’s rules governing patron behavior and personal hygiene because library personnel jettisoned him from the premises numerous times due to his disruptive manner and offensive body odor.\(^{203}\) The Third Circuit considered three factors: government intent, extent of use, and nature of the forum;\(^{204}\) it upheld all of the challenged regulations.\(^{205}\)

In *Mainstream Loudoun*, Judge Brinkema relied on *Kreimer*, applied the Third Circuit’s three-factored test, and found the Loudoun County libraries to be limited public fora.\(^{206}\) This decision was erroneous. *Kreimer* should not have been relied on in *Mainstream Loudoun*, and should not be relied on in evaluating the level of scrutiny to be given to CIPA’s filtering software requirement. The case failed to make a determination about the discretion that librarians enjoy when making acquisition decisions, but Judge Brinkema read that into the *Kreimer* holding. Applying the three-factored test, in opening public libraries, neither the Loudoun County nor the United States government created a public forum through any actions or expressed an intent to do so. Merely authorizing the opening of public library systems fails to meet the more rigorous intent test. As for extent of use, public libraries uniformly impose a great variety of restrictions on the use of their computer systems and bound collections; they do not limit the library personnel’s own discretion to restrict access. Simply because a public library proclaims in a resolution that the library is

\(^{199}\) 24 F. Supp. 2d 552, 562 (E.D. Va. 1998) ("The only issue before us, then, is whether the library is a limited public forum or a non-public forum.").

\(^{200}\) *Perry Educ. Ass’n*, 460 U.S. at 45.

\(^{201}\) See *Mainstream Loudoun II*, 24 F. Supp. 2d at 562.


\(^{203}\) *Id.* at 1247.

\(^{204}\) *Id.* at 1259-60.

\(^{205}\) *Id.* at 1246.

\(^{206}\) *Mainstream Loudoun II*, 24 F. Supp. 2d at 563.
for the use of "the people,"\textsuperscript{207} it does not follow that all aspects of the library are available to the general public. Lastly, the nature of the public library is not compatible with a number of expressive activities, including "giving speeches or holding rallies"\textsuperscript{208} as well as receiving indecent, obscene, or pornographic information on the Internet.

Third, the non-public forum is not "by tradition or designation a forum for public communication"\textsuperscript{209} and is dedicated to non-communicative uses. The government may exclude rallies, marches, and other interactive activities on properties such as military bases, polling places, airport terminals, and prisons.\textsuperscript{210} In a non-public forum, the government functions similarly to a private owner, and thus retains the power to preserve the property under its control for the use to which it is "lawfully dedicated."\textsuperscript{211} Although some communicative activities inarguably take place on the property, public libraries should be considered non-public fora.

There is Supreme Court precedent in support of this contention. In \textit{Cornelius v. NAACP Legal Defense and Education Fund},\textsuperscript{212} the Court held that a charity drive aimed at federal employees allowing them to make donations to select organizations constituted a non-public forum. Similar to the public library setting, in \textit{Cornelius}, the government did not affirmatively open the forum to general participation.\textsuperscript{213} Public libraries are simply designed to voluntarily provide members of the community with materials necessary for both convenience, educational, and recreational purposes. Similar to the government's decision to provide "health, comfort and convenience" at military exchanges,\textsuperscript{214} public library personnel select materials for purchase and make them available to library visitors. An individual blocked from downloading indecent material, obscenity, or child pornography at a public library is not restricted from engaging in expressive activity; instead, the patron is merely prevented from viewing material that library personnel have chosen not to acquire or purchase.

Since the public library should be construed as a non-public forum, CIPA's Internet filtering requirement should be subject to

\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{211} \textit{Perry Educ. Ass'n}, 460 U.S. at 46.
\textsuperscript{212} 473 U.S. 788, 802 (1985).
\textsuperscript{213} Bell, \textit{supra} note 32, at 203.
\textsuperscript{214} See \textit{General Media Comm. v. Cohen}, 131 F.3d 273, 280 (2d Cir. 1997) (upholding the Military Honor and Decency Act of 1996, which banned the sale or rental of sexually explicit material at military exchanges, and finding the exchanges to be a non-public forum).
FILTERING OUT PROTECTION

intermediate scrutiny. Thus, a reviewing body should examine whether the regulation is "reasonably related to an important governmental interest." As noted earlier, the Supreme Court has long recognized that the government has a constitutionally justified interest in protecting its children. Due to the proliferation of pornographic materials and the increasing number of children using the Internet at public libraries, it is axiomatic that utilizing filtering software to eliminate their exposure is a reasonable measure. It is inarguable that CIPA’s filtering requirement would survive intermediate scrutiny.

One of the most critical mistakes made by Judge Brinkema in Mainstream Loudoun was to apply strict scrutiny in assessing the legality of a mandatory filtering policy. In its challenge to CIPA’s constitutionality, the ALA agrees with Judge Brinkema and contends that since a public library is either a traditional or limited public forum voluntarily brought into existence by the government, a court must examine the filtering policy to determine whether it is “narrowly drawn to effectuate a compelling state interest.” Although CIPA is not technically a mandatory filtering policy, the fact that Congress has essentially offered public libraries a Hobson’s choice by conditioning vital funds on the implementation of the filtering software, the ALA believes courts should view it as mandatory and analyze CIPA under strict scrutiny. This is illustrated by the fact that, without the benefit of the federal funds at issue in CIPA, a majority of public libraries would be financially unable to provide Internet access.

E. Surviving Strict Scrutiny: How Effective is Effective Enough?

Assuming that a court were to side with Judge Brinkema and Kreimer, construe the library as a limited public forum, and apply strict scrutiny, CIPA’s content-based speech restriction would still survive because the legislation at hand proscribes the least restrictive means for achieving compelling governmental goals. The

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217 U.S. Dep’t of Commerce, supra note 180, at 42-43.
218 See Mainstream Loudoun II, 24 F. Supp. 2d at 568 (arguing that the applicable “limitation of adult access to constitutionality protected materials cannot survive strict scrutiny”).
219 Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983) (holding that preferential access to an interschool mail system does not violate the First Amendment).
220 Plaintiffs’ Complaint, supra note 8, at 29-30.
221 Plaintiffs’ Response Brief, supra note 154, at 4-5.
222 Plaintiffs’ Complaint, supra note 8, at 29-30.
goals stated by the defendant school board in Mainstream Loudoun are equally applicable to libraries on a national scale: “minimizing access to illegal pornography and avoidance of creation of a sexually hostile environment.”

The Supreme Court has accepted the argument that minimizing children’s access to indecent, obscene, and pornographic materials is a compelling governmental interest. It is the strongest and most persuasive argument in support of CIPA’s requirement of filtering software. Although the legislation at issue is aimed at public libraries, and not schools, the filtering software’s primary purpose is nonetheless to protect children from harmful material. The government is acting well within its constitutional authority when it attempts to minimize the chances that children may be exposed to harmful websites. In Sable Communications, Inc., the Supreme Court ruled that obscenity and child pornography do not warrant First Amendment protection and stated that the government may even shield children from material falling short of legally obscene. Furthermore, in Reno v. ACLU, the Court stressed that the protection of children’s physical and psychological well being is a compelling interest while adding that since the use of the Internet to transmit child pornography and obscene material is a violation of federal law, filtering software that blocks such transmissions would also serve as a compelling governmental interest. Furthermore, neither the plaintiffs nor Judge Brinkema in Mainstream Loudoun denied that “minimizing access to illegal pornography and avoidance of creation of a sexually hostile environment” were compelling governmental interests. Therefore, a court reviewing CIPA’s filtering policy should follow the principles illustrated in Sable, Reno, and Mainstream Loudoun and determine that the compelling interest prong of the strict scrutiny test is satisfied.

223 Mainstream Loudoun II, 24 F. Supp. 2d at 565.
224 See e.g., Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 755 (1996) (agreeing with the argument that “protection of children is a ‘compelling interest,’ while disagreeing with the assertion that ‘segregate and block’ requirements properly accommodate the speech restrictions they impose and the legitimate objective they seek to attain.”).
225 Sable Communications, Inc. v. FCC, 492 U.S. 115, 125 (1989) (“We hold today that there is no constitutional stricture against Congress’ prohibiting the interstate transmission of obscene commercial telephone recordings.”).
226 Id. at 126 (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.”).
228 Id. at 877 n.44; see also Semitsu, supra note 16, at 537-38.
Assuming a court was to find a compelling governmental interest, Supreme Court precedent dictates that under strict scrutiny, CIPA's content-based regulation must be narrowly tailored to fit that compelling interest.\(^\text{230}\) If a reviewing court were to find that less restrictive measures or alternatives would be as effective in meeting this compelling interest, then CIPA's policy would be invalidated.\(^\text{231}\) CIPA's critics believe that the legislation's downfall resides in this analysis. They rely on the fact that empirical evidence shows that even the newest and most technologically advanced filtering software is imperfect at screening out indecent or obscene websites, and websites that are harmful to minors.\(^\text{232}\) The key question is, how close to perfect does the filtering software have to be at screening out this troublesome material?

A court must decide how effective, percentage-wise, the filtering software has to be in order to meet the government's compelling interest of minimizing children's exposure to pornographic material. A court must also examine alternative policies that libraries can implement in order to achieve the same goal of protecting children.\(^\text{233}\) Finally, a court must determine the net residual difference between CIPA's filtering policy and the alternative means available, if any, and decide if the difference is great enough that the filtering policy is truly the least restrictive way to meet the compelling governmental interest. The major obstacle in this proposed analysis is that it is difficult to quantify the effectiveness of "tap-on-the-shoulder policies" and privacy screens. Judge Brinkema evaluated this by referring to the minute number of documented problems arising in public libraries utilizing such alternative policies in Loudoun County, the state of Virginia, and across the country.\(^\text{234}\) This is a simplistic and dangerously narrow approach to determining the effectiveness of alternative, less restrictive means of meeting the government's compelling interest. Judge Brinkema's approach fails to account for unreported violations of the alternative policies, the level of enforcement of these

\(^{230}\) Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

\(^{231}\) Id.

\(^{232}\) Digital Chaperones, supra note 87, at 22-23.

\(^{233}\) Mainstream Loudoun II, 24 F. Supp. 2d at 567. Judge Brinkema found that less restrictive means were available to the library, such as installing filtering software on only certain Internet terminals limited to minors, using privacy screens, and employing casual monitoring of Internet use by library staff members. Id.

\(^{234}\) Id. at 566 (stating that there had been only "three isolated incidents nationally, one very minor isolated incident in Virginia, no evidence whatsoever of problems in Loudoun County, and not a single employee complaint from anywhere in the country").
policies, and the general moral problems that can be associated with young children viewing obscene and pornographic material that may manifest themselves in violence or family disruption in the future.

However misguided and ill-advised Judge Brinkema’s analysis may have been, she was correct that the inadequacy of the current state of filtering software falls short of guaranteeing perfection.235 Judge Brinkema and CIPA’s critics miss the main point: the filtering software does not have to be perfect to minimize children’s exposure to pornography. As the defendants in Mainstream Loudoun articulated, the only alternative to implementing filtering software is “to have librarians directly monitor what patrons view.”236 This type of restriction would be “far more intrusive than using filtering software,”237 would be more expensive, would increase the likelihood of physical altercations, and would undoubtedly still be imperfect. In addition, PICS ratings-based software has been incorporated and improved upon by companies such as Microsoft, Netscape, and AOL, and there is guarded optimism that near-perfection may be attained in the future.238 Therefore, in analyzing CIPA, a court should rule that Internet filtering software is the most effective means of reducing children’s exposure to indecent, obscene, and harmful material, and that a less restrictive method to meet the government’s compelling interest simply does not exist.

F. The Filtering Mandate and Disabling Provisions

1. Block One, Block All

Assuming CIPA’s filtering software requirement implicates the First Amendment and is subject to strict scrutiny, the government will have a difficult time justifying the extensive restrictions on public libraries that must be complied with in order to receive the funds at issue. As noted earlier, in order to receive “E-rate” discounts and LSTA funds,239 public libraries must certify that a technology protection measure, or filtering software, is utilized at all times, on all library terminals with Internet access, during use by both adults and minors.240 The ALA finds CIPA’s requirement

235 See Digital Chaperones, supra note 87, at 22-23.
236 Mainstream Loudoun II, 24 F. Supp. 2d at 566.
237 Id.
238 Semitsu, supra note 16, at 517.
239 See supra note 21.
240 CIPA, supra note 17, § 254(h).
for the implementation of the filtering software on computers bought by the library, without the use of these funds, particularly troublesome.\textsuperscript{241} A simple example is helpful to illustrate this point. Picture a rural public library housing two computers. The library purchased the first computer with its own funds, or through a private contribution, and likewise paid for the computer's Internet access. Meanwhile, the library purchased the second computer and an additional line for Internet access courtesy of an "E-rate" discount or the LSTA funds. Under CIPA, the library would be forced to utilize the Internet filtering software on both computers; otherwise, it would be ineligible for any future funding. This leaves a library with a decision of either imposing content-based restrictions on all of its computers, which may be against the will of the library's particular community, or losing the funds, thereby rendering it unable to provide Internet access to members of that same community.

2. \textit{Chilling Provisions}

CIPA's drafters recognized the constitutional vulnerability of this overbroad restriction on speech, as well the imperfections of current Internet filtering software, and attempted to safeguard CIPA's chances of being invalidated on constitutional grounds. Therefore, they attached "disabling provisions" to sections 1712 and 1721, which provide that library administrators may disable the filtering software for "bona fide research or other lawful purpose[s]."\textsuperscript{242} Through these provisions, Congress reconciled its stated compelling governmental interest of "protecting children from exposure to sexually explicit material,"\textsuperscript{243} with the reality that filtering software may prevent adults from conducting computer research on sensitive topics. The ALA criticizes this as a vague and ambiguous directive as to when the software disabling should take place; argues that the provision places Article III power in the hands of librarians;\textsuperscript{244} and points out that librarians may deny legitimate, lawful requests to disable the filtering software.\textsuperscript{245} The ALA paints the librarians' decisions as "neither constrained by any defined standards nor reviewable by a court," thus cutting against

\textsuperscript{241} Plaintiffs' Response Brief, \textit{supra} note 154, at 10 (stating that libraries would have to block speech on computers that were paid for with non-federal money).

\textsuperscript{242} CIPA, \textit{supra} note 17, § 1721(b).

\textsuperscript{243} S. REP. No. 106-141, at 7 (1999).

\textsuperscript{244} Plaintiffs' Response Brief, \textit{supra} note 154, at 26 (noting that CIPA allows but does not require library authorities to disable Internet filtering software).

\textsuperscript{245} \textit{Id}. 
our founding principles of law. The ALA also asserts that the disabling provisions may serve to chill the constitutionally protected speech of individual library users.

Consider the silver-haired grandfather figure depicted in the opening of this Note. The Internet filtering software would restrain him from viewing potential constitutionally protected speech on his chosen website. Furthermore, considering his age and possible stature in the upper-middle-class community, the disabling provisions may deter and chill his pursuit of alternative lifestyle information. It is highly unlikely that the elderly gentleman will volunteer to the librarians that he would like to view a website that depicts pornographic homosexual acts. Even if he makes such a request, a librarian would then have to decide if disabling the filtering software would serve a "bona fide research or other lawful purpose." Furthermore, the librarian may maintain a bias against homosexuals and improperly refuse a legitimate, lawful request to disable the software. The ALA argues that CIPA's vagueness with respect to the disabling provisions, the grant of plenary power to the librarians in making constitutional decisions, and the impermissible negative chill that results should cause CIPA's downfall.

While the ALA's position is moderately persuasive, the drafters of the legislation at issue were on solid constitutional ground when they included the disabling provisions. The legislators were cognizant of Urofsky v. Gilmore, a timely Fourth Circuit decision upholding on First Amendment grounds, a Virginia statute designed to prohibit state employees from accessing sexually explicit material on the state's computers without prior permission. The court reasoned that the state as an employer enjoys wider First Amendment latitude when it regulates the speech of its employees than it does when it restricts the speech of the general citizenry. Commentators have agreed that Urofsky will be read by courts reviewing the constitutionality of CIPA's disabling provisions as an endorsement of the request procedures outlined in sections 1712

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246 Id.; see Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992) ("The First Amendment prohibits the vesting of such unbridled discretion in a government official.").

247 Plaintiffs' Response Brief, supra note 154, at 23 (noting that the Supreme Court has recognized the chilling effect on forcing citizens to request access to disfavored, but constitutionally protected speech); see also Denver Area Educ. Telecomm. Consortium, 518 U.S. 727, 754 (1996) (noting that the Supreme Court has recognized the chilling effect of forcing citizens to request access to disfavored, but constitutionally protected, speech).

248 See Bastian, supra note 6.

249 CIPA, supra note 17, § 254(h).

250 167 F.3d 191, 196 (4th Cir. 1999).

251 Id. at 194.
FILTERING OUT PROTECTION

and 1721, and that librarians will be permitted to use their discretion in determining whether a patron is legitimately attempting to access a website for a "bona fide research or other lawful purpose."\textsuperscript{252} 

\textbf{G. Secondary Effects: Time, Place, and Manner Restrictions}

There is more than one way for CIPA's Internet filtering software requirement to be upheld as constitutional. The above analysis suggests that utilizing filtering software in a public library will pass constitutional muster under a content-based restriction test. The same end can be reached by characterizing the filtering software in a constitutionally opposite light, without addressing the content of the Internet material. Libraries may utilize the filtering software as a time, place, and manner restriction, which in turn triggers intermediate scrutiny. In \textit{Mainstream Loudoun}, the defendants unsuccessfully relied on \textit{City of Renton v. Playtime Theatres}\textsuperscript{253} in mounting their argument on this issue.\textsuperscript{254} In \textit{Renton}, the Supreme Court held that a city zoning ordinance that prohibited adult movie theaters from locating within 1000 feet of neighborhoods and churches, which was designed to prevent the occurrence of harmful secondary effects, was a content-neutral time, place, and manner restriction.\textsuperscript{255} The Court stated that the ordinance properly addressed the secondary effects of the adult theaters, such as preserving the quality of the neighborhoods, preventing crime, and protecting retail trade.\textsuperscript{256} The Court ruled that the ordinance could be justified without reference to the content of the speech in the adult theaters.\textsuperscript{257} Most importantly, the Court pointed out that the content of the movies was unrelated to the harmful secondary effects, even to the effect of decreasing property values.\textsuperscript{258} Although a more recent Supreme Court ruling intimated that blanket restrictions on speech may not be analyzed as time, place, and manner regulations,\textsuperscript{259} the Court has never expressly overruled \textit{Renton}.

The secondary effects resulting from public libraries providing unfettered access to Internet pornography are numerous. Li-
brary patrons downloading and displaying graphics uses considerable amounts of computer resources. Pornographic newsgroups commandeer large amounts of limited bandwidth on a library’s computer network, resulting in slower connectivity for other library patrons. In addition, the secondary effects propounded by defendants in Mainstream Loudoun – preventing a “sexually hostile environment” from developing on the premises and complying with “obscenity, child pornography, and harm to juveniles laws” – are highly persuasive. The jump from adult movie theaters to Internet pornography is not a long one. If the Supreme Court can wholly ignore the content of adult movie theaters while restricting the owner’s right to operate a business, there should not be a moment’s hesitation in declaring Internet filtering software a content-neutral time, place, and manner regulation.

VIII. JUDGMENT DAY

On May 31, 2002, one month before public libraries were supposed to certify their compliance with CIPA’s requirements, the United States District Court for the Eastern District of Pennsylvania issued its ruling in American Library Association v. United States. Chief Circuit Judge Edward R. Becker relied on the inadequacy of Internet filtering software and the resultant “overblocking” of constitutionally protected speech, and declared that CIPA sections 1712(a)(2) and 1721(b) to be facially invalid under the First Amendment. The court held that CIPA requires libraries to violate their patrons’ First Amendment rights, and it further held that the disabling provisions failed to cure the constitutional defects. The court declined to rule on whether CIPA’s filtering requirement constitutes an unconstitutional condition, but indicated that the ALA presented highly persuasive arguments on the issue. In addition, the court failed to reach the plaintiffs’ alternative theories of invalidity: CIPA’s function as a prior restraint on speech and its language being unconstitutionally vague. Judge Becker offered extensive findings of fact regard-

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260 Semitsu, supra note 16, at 528.
261 Id.
263 Id.
265 Id. at 479.
266 Id. at 490.
267 Id. at 489.
268 Id. at 490 n.36.
269 Id. at 490.
ing the Internet, filtering software, and public libraries, and thoroughly articulated his reasoning, but he clearly missed the point: the filtering software does not have to be perfect.

A. Findings of Fact

1. The Internet in Public Libraries

In his extensive factual findings, Judge Becker unveiled four interests that motivate public libraries to implement Internet use policies. First, libraries have attempted to protect patrons, children in particular, from viewing harmful material that other patrons are viewing. Second, libraries have shaped their policies to protect patrons from accidentally accessing sexual material. Third, libraries have actively sought to block patrons from intentionally downloading sexually explicit or inappropriate material. Fourth, libraries have enforced use policies seeking to prevent harmful secondary effects that result from patrons viewing unacceptable material. In order to serve these interests, libraries installed privacy screens, deployed filtering software, established links to “recommended websites,” created a “Library Channel,” installed “recessed monitors,” and constructed children-only access areas. By articulating what may be viewed as compelling governmental interests, and then listing virtually every known alternative to filtering software, Judge Becker laid the foundation for CIPA’s downfall.

2. Internet Filtering Technology

Judge Becker tipped his hand in discussing filtering software alternatives, and his evaluation and criticism of current Internet filtering software slammed the constitutional door shut on CIPA. The court reviewed the most popular network-based filters used in public libraries: SurfControl’s Cyber Patrol, N2H2’s Bess/i2100, Secure Computing’s SmartFilter, and Websense. In describing

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270 Id. at 423.
271 Id.
272 Id.
273 Id.
274 Id.
275 Id. at 424-25. The Westerville, Ohio Library utilized this service which restricted children’s Internet access to a group of 2000-3000 websites selected by the library’s staff. Id.
276 Id. at 425. “Recessed monitors are computer screens that sit below the level of a desk top and are viewed from above.” Id.
277 Id. at 424-26.
278 Id. at 427. The functioning of these filtering programs is discussed in Part III.
the methods filtering software companies use in developing their “control lists,” Judge Becker credited the opinion of plaintiffs’ expert Dr. Geoffrey Nunberg and stated:

First, they [filtering software companies] must collect or “harvest” the relevant URLs from the vast number of sites that exist on the Web. Second, they must sort through the URLs they have collected to determine under which of the company’s self-defined categories (if any), they should be classified. Judge Becker assumed that these two phases result in a “tradeoff between overblocking” and underblocking and criticized each phase individually. First, the judge stated that the “harvesting” phase, consisting of software companies utilizing search engines to identify websites for classification purposes, suffers from numerous limitations and leads to substantial underblocking. These limitations include the impossibility of search engines to recognize Deep Web sites and their inability to search images. This inability to search URLs by images throttled Judge Becker, in light of the fact that CIPA only covers “visual depictions.” Second, the judge expressed his displeasure with the “winnowing” or categorization phase, which consists of filtering software companies utilizing key word analysis tools to evaluate the content of harvested Web sites and then categorizing them. The court stressed the limitations of keyword-based filters, including the fact that “no string of words can identify all sites that contain sexually explicit content,” which leads to underblocking and overblocking. In addition, the court found that the human review of websites employed by the software companies is theoretically a good idea, but is ultimately ineffective due to limited staffing and the explosive Internet growth rate.

279 Id. at 428.
280 Id. at 430.
281 Id. at 430-31. The court defined overblocking as “the blocking of content that does not meet the category definitions established by CIPA or by the filtering software companies.” Id.
282 Id. at 431. The court defined underblocking as “leaving off of a control list a URL that contains content that would meet the category definitions defined by CIPA or the filtering software companies.” Id.
283 Id.
284 Id.
285 Id.
286 Id. at 432.
287 Id.
288 Id. at 433. The court added that the Internet’s explosive growth prevents software companies from reviewing sites or pages already categorized, resulting in even more overblocking. Id. at 435-36.
The court attempted to justify its criticism of the software companies' methods by attempting to quantify underblocking and overblocking rates. Interestingly, Judge Becker noted the difficulty involved in calculating these rates, and then proceeded to discredit the government expert witness' study and testimony. The judge disapproved of one of the government's expert witnesses, Cory Finnell's, methodology in studying Internet logs of three public libraries, and concluded that Finnell understated underblocking and overblocking rates. Judge Becker went so far as to state that Finnell's 6%-15% estimated range of overblocking rates "states the lower bounds" of the actual rates. The judge was much more eager to credit a study by expert witness Benjamin Edelman, who fed a list of 500,000 URLs through the four filtering programs, and found that 6777 URLs were erroneously blocked by one or more of the programs. The erroneously blocked web sites related to religion, career, politics, education, travel, sports, and health.

3. Factual Conclusions

The court found that current Internet filtering software products are incapable of blocking sexually explicit content without also blocking a substantial amount of constitutionally protected speech. According to Judge Becker, even the most effective product blocks "countless thousands of Web pages, the content of which does not match the filtering company's category definitions, much less the legal definitions of obscenity, child pornography, or harmful to minors." Judge Becker then pronounced that there is no technology in existence today that can judge if a visual depiction is legally obscene, child pornography, or harmful to minors, and that there will not be one in the near future. That is certainly true, but requiring computer software to make legal

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289 See id. at 437 ("The fundamental problem with calculating over- and under-blocking rates is selecting a universe of websites or web pages to serve as the set to be tested.").
290 Id. at 439-40.
291 Id. at 442.
292 Id. at 443.
293 Id. at 446-47.
294 Id. at 448.
295 Id.
296 Id. at 449.
297 Id.
judgments is another prime example of Judge Becker's unrealistic expectations and utopian reasoning.

B. Level of Scrutiny

After applying *South Dakota v. Dole* and finding that a public library can never comply with CIPA without also blocking constitutionally protected speech, the court began its analysis to determine if CIPA's filtering software requirement offended the First Amendment. The court stated at the outset that the Supreme Court's holding in *United States v. Playboy Entertainment Group* supported the proposition that content-based restrictions, such as software filters, are subject to strict scrutiny. However, the court also noted that if the restriction applies only on government-owned and controlled public libraries, strict scrutiny may be inapplicable. In order to determine the appropriate level of scrutiny, the court first attempted to answer the forum question.

1. The "Vast Democratic Forum"

Judge Becker believed that the relevant forum should be defined by the specific access sought by the plaintiffs, and not by the physical limits of the government property. In a public library setting, the forum distinction is drawn between "the library's collection as a whole [and] the library's provision of Internet access." The court found that since the rights at issue in the case centered on accessing and publishing information on the Internet, the relevant forum was the one created by the library when it provided patrons access to the World Wide Web. Judge Becker quickly dismissed the government's argument that a public library constitutes a non-public forum, similar to an airport terminal, military base, or public transit vehicle, and ruled that a public library is a designated or limited public forum. The judge reasoned that a public library's purpose of providing Internet access is to allow for

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298 Id. at 450–51 (citing South Dakota v. Dole, 483 U.S. 203, 207-10 (1987)).
299 Id. at 453.
301 Am. Library Ass'n, 201 F. Supp. 2d at 454.
302 Id. (citing Int’l Soc’y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1991)).
303 Id. at 454.
304 Id. at 464; see Reno v. ACLU, 521 U.S 844, 868 (1997).
306 Id. at 455.
307 Id. at 456.
308 Id. at 457.
dissemination and reception of information, which is expressive activity easily analogized to a university meeting facility, school board meeting, or municipal theater.\(^{309}\)

2. *Acquisition or Removal?*

The government’s rational basis review argument that filtering software is a content-based restriction on speech, utilized by a library for the narrowly specified purpose of making decisions about which Internet content to make publicly available, fell on deaf ears.\(^{310}\) Judge Becker was not receptive to the government’s astute and proper analogy that a library’s decision to “acquire books about gardening but not golf,” subject only to rational basis review, is no different that its decisions selecting which Web sites library patrons may be allowed to view.\(^{311}\) The court spelled out the First Amendment difference between using Internet filters and the editorial decisions involved in selecting certain books:

[B]y providing patrons with even filtered Internet access, the library permits patrons to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers, without attempting to restrict patrons’ access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable.\(^{312}\)

The court distinguished CIPA’s filtering requirement from cases upholding the government’s right to restrict speech, based on the fact that a governmental actor, such as a librarian, does not review the disfavored Internet content.\(^{313}\) In so doing, the court disregarded testimony by librarians, who stated under oath that they apply the same standard in choosing print materials as they do in selecting appropriate websites for patrons, and found that providing Internet access opens library doors to “vast amounts of speech” unsuitable for a library’s print collection.\(^{314}\) The court also reasoned that the Internet is a forum open to anyone in the world,

\(^{309}\) *Id.*

\(^{310}\) *Id.* at 457-61.

\(^{311}\) *Id.* The court did agree, however, that a public library’s controversial decision to purchase the works of Shakespeare instead of John Grisham novels would be subject to rational basis review. *Id.* at 462.

\(^{312}\) *Id.* at 462.

\(^{313}\) *Id.*; see Nat’l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (holding that a statute requiring the NEA to ensure that grant applications are judged on artistic merit and excellence, and also to consider decency and respect for diverse views, did not interfere with First Amendment rights).

\(^{314}\) Am. Library Ass’n, 201 F. Supp. 2d at 463.
while a library’s print collection is limited to speakers evaluated and subsequently chosen by human librarians.  

In determining the limitations on the government’s power in a public library, the court stated that “the more narrow the range of speech the government chooses to subsidize . . . the more deference the First Amendment accords the government.” According to the court, since the government’s use of the Internet opens public libraries for broad, diverse speech by the public and designates the fora for expressive activity, the government’s use of filtering software to exclude particular disfavored speech triggers strict scrutiny. Interestingly, the court distinguished the basis for its view, that restrictions on a library’s print collection are different than restrictions on Internet access, from the rationale expressed by the court in Mainstream Loudoun. In that case, Judge Brinkema based the distinction on the lack of time and resources required to view a World Wide Web site, as compared with the money and shelf-space needed for print materials. Judge Becker disagreed with that approach, and inexplicably focused on the amount of time patrons must wait to use library computers: “Just as the scarcity of a library’s budget and shelf space constrains a library’s ability to provide its patrons with unrestricted access to print materials, the scarcity of time at Internet terminals constrains libraries’ ability to provide patrons with unrestricted Internet access.”

In order to further justify his application of strict scrutiny, Judge Becker distinguished CIPA’s filtering software requirement from the government actions in Rust v. Sullivan, Arkansas Education Television Communication v. Forbes, and National Endowment for the Arts v. Finley, and instead analogized the ac-

315 Id.
316 Id. at 458.
317 Id. at 461. The court compared CIPA’s exclusion, or “singling out,” of private speech in a public library to discriminatory taxes on the press. Id.; see Arkansas Writers’ Project, Inc. v. Ragland, 481 U.S. 221 (1987) (holding that Arkansas’ publishing tax scheme of taxing general interest magazines but exempting newspapers and religious, professional, trade, and sports journals, violates the First Amendment).
318 Am. Library Ass’n, 201 F. Supp. 2d at 465 n.25.
320 Am. Library Ass’n, 201 F. Supp. 2d at 465 n.25.
321 500 U.S. 173 (1990) (reviewing HHS regulation prohibiting Title X of the Public Health Service Act from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning).
322 523 U.S. 666 (1998) (holding that state-owned public television broadcasting exclusion of an independent political candidate from a debate did not violate the First Amendment because the debate was a non-public forum).
323 524 U.S. 569 (1998); see also text accompanying note 313.
tions to those in *Rosenberger v. Rector & Visitors*,324 *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*,325 *Southeastern Promotions, Ltd. v. Conrad*,326 *FCC v. League of Women Voters*,327 and *Legal Services Corp. v. Velazquez*.328 329 Finally, the judge bolstered his decision by depicting the Internet as a modern-day sidewalk, public park, or town square, and declaring that all are subject to the same level of scrutiny.330

C. Application of Strict Scrutiny

1. Compelling Interests

In the court’s view, the government’s interests of preventing the dissemination of obscenity, child pornography, and material harmful to minors were on solid constitutional ground.331 In finding these interests to be compelling, Judge Becker relied on Supreme Court precedent recognizing a compelling interest in protecting the well being of minors, specifically cases upholding laws criminalizing the possession and distribution of child pornography, and the distribution of harmful material to minors.332 The court found that protecting the unwilling viewer from offensive, non-obscene material has never been recognized as a compelling governmental interest, and, as a result, ruled that a public library “might have a compelling interest in protecting library patrons and staff from unwilling exposure.”333 However, the court rejected that preventing patrons’ unlawful or inappropriate conduct, such as public masturbation and harassment of the library staff, could serve as a compelling interest.334 Thus, the court felt that as long

325 429 U.S. 167 (1976) (holding that a school board could not prevent teachers’ union from speaking in opposition to an agency shop proposition at a public school board meeting).
326 420 U.S. 546 (1975) (holding that respondent municipal board’s rejection of allegedly obscene theatrical production constituted a prior restraint).
327 468 U.S. 364 (1984) (finding unconstitutional a section of the 1967 Public Broadcasting Act that forbid any noncommercial educational broadcasting station receiving a grant from the Corporation of Public Broadcasting to “engage in editorializing.”).
328 531 U.S. 533 (2000) (holding unconstitutional Legal Services Corporation funding restriction prohibiting the making of certain legal claims).
329 Am. Library Ass’n v. United States, 201 F. Supp. 2d 401, 465-66 (E.D. Pa. 2002) (holding that the law must serve a compelling state interest, be narrowly tailored in furtherance of that interest, and be no more restrictive than necessary).
330 Id. at 470.
331 Id. at 471-72.
332 Id. at 472.
333 Id. at 474.
334 Id. at 474-75.
as the implementation of Internet filtering software was narrowly tailored and employed the least restrictive means, CIPA's First Amendment concerns would vanish.

2. Narrow Tailoring

In his narrow tailoring analysis, Judge Becker’s obsession with the small, and often harmless, inadequacies of current filtering software products reared its ugly head. The judge reiterated his concerns of excessive underblocking and overblocking and the flawed research study conducted by the government’s expert witness, and quickly concluded that the use of filtering software is not narrowly tailored to further any compelling interest due to the amount of constitutionally protected speech it erroneously blocks.\textsuperscript{335} The inherent “tradeoff between overblocking and underblocking” in current filtering software products, and the government’s failure to produce a product not susceptible to overblocking, were the overriding factors in Judge Becker’s decision: \textsuperscript{336} “[A]ny filter that blocks enough speech to protect against access to visual depictions that are obscene, child pornography, and harmful to minors, will necessarily overblock substantial amounts of speech that does not fall within these categories.”\textsuperscript{337}

The court soundly rejected the government’s argument that it is necessary to restrict constitutionally protected speech in a public library in order to “suppress the dissemination of constitutionally unprotected speech.”\textsuperscript{338} Although it is clear to this observer that Judge Becker was demanding perfection, the judge actually stated that the “First Amendment does not demand perfection.”\textsuperscript{339} Instead, he supported his ruling by referring to filtering software products’ “substantial amounts of erroneous blocking” being more than “de minimis instances of human error.” Therefore, the court held CIPA to be facially invalid.\textsuperscript{340}

The court then dashed the government’s last hope for constitutionality when it ruled that CIPA’s disabling provisions,\textsuperscript{341} whether interpreted broadly or narrowly, failed to cure the statute’s lack of narrow tailoring.\textsuperscript{342} Judge Becker added that even if Con-

\textsuperscript{335} Id. at 475-76.
\textsuperscript{336} Id. at 477.
\textsuperscript{337} Id. at 476-77.
\textsuperscript{338} Id. at 477. The court relied on Ashcroft \textit{v. Free Speech Coalition}, 535 U.S. 234 (2002), in which the Supreme Court rejected the same governmental argument regarding a statute criminalizing the distribution of constitutionally protected “virtual” child pornography. \textit{Id.}
\textsuperscript{339} \textit{Am. Library Ass’n}, 201 F. Supp. 2d at 479.
\textsuperscript{340} Id.
\textsuperscript{341} CIPA, \textit{supra} note 17, § 1721(b) (discussing the scope of disability provisions).
\textsuperscript{342} \textit{Am. Library Ass’n}, 201 F. Supp. 2d at 486.
gress meant to grant library administrators permission to unblock all erroneously blocked constitutionally protected websites, the disabling provisions would still fail to pass muster because the provisions require library patrons to “ask a state actor’s permission to access disfavored content.” Stressing the impermissible chilling effect of such restrictions, the court likened CIPA’s disabling provisions to the unconstitutional speech restrictions in Lamont v. Postmaster General, Denver Area Educational Telecommunications Consortium, Inc. v. FCC, and Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission. The court indicated that CIPA’s disabling provisions would impermissibly chill a patron from seeking information on the Internet relating to sexual identity, sexually transmitted diseases, and medical conditions. Specifically, Judge Becker relied on plaintiffs’ witnesses, Emmalyn Rood, blocked from accessing information concerning her sexual identity, and Mark Brown, blocked from researching breast cancer, who both testified that they would have been unwilling to approach a library administrator. The court also frowned on the fact that unblocking requests generally are not immediately reviewed.

3. Less Restrictive Measures

Even after invalidating CIPA on constitutional grounds, the court found that less restrictive alternatives existed to further the government’s compelling interests. The court identified a number of alternatives: posting Internet use policies in prominent places; examining Internet use logs and issuing warnings when violations are discovered; requiring patrons to either physically or electronically sign Internet use agreements; adopting “tap-on-the-shoulder” policies; using blocking software for minors only; giving patrons the option of using filtering software; segregating filtered from unfiltered computer terminals; installing privacy screens; and deploying recessed monitors. It is axiomatic that

343 Id. 344 381 U.S. 301, 307 (1965) (finding unconstitutional a law that required an addressee to send a reply card before receiving his mail). 345 518 U.S. 727, 754 (1996) (finding that a requirement that leased channel operators segregate and block certain programming was not narrowly tailored to protect children). 346 896 F.2d 780, 785 (3d Cir. 1990) (affirming decision that found that requiring users to apply for an access code for public utility use chilled First Amendment rights). 347 Id. at 487. 348 Id. at 489. 349 Id. at 479-80. 350 Id. at 480-84.
these measures fall short of perfection, but Judge Becker hid behind United States v. Playboy Entertainment Group, Inc.\footnote{529 U.S. 803, 824 (2000).} and finally revealed his true standards, stating that "unless software filters are, themselves perfectly effective," the government may not successfully argue that the alternatives are imperfect.\footnote{Am. Library Ass'n, 201 F. Supp. 2d at 481.} This perfection requirement is the base of Judge Becker's holding as well as his underlying reasoning, and as he said himself, does not square with the First Amendment.

IX. A LOOK AHEAD

Judge Becker's misguided ruling served two purposes: first, it prevented CIPA from going into effect, and second, it provided the Supreme Court with an opportunity to instruct Congress on the filtering software efficiency level required for legislators to regulate speech in public libraries. Once the Supreme Court resolves the question of CIPA's constitutionality, the decision will affect a substantial percentage of Americans. If CIPA stands, parents should breathe easier, knowing that the government has reduced the likelihood that their children will be unwillingly exposed to pornography at the local public library. The government should closely monitor the implementation of the filtering software and continue to pursue more effective methods of rooting out indecent and obscene material. The ALA and its affiliate libraries will have a decision to make: implement the filtering software or lose vital funding. If CIPA falls, the government must either revise the legislation in its current form, or consider alternatives to filtering software. Even today, there exist alternatives on the horizon that may be palatable to Congress.

Daniel Orr and Josephine Ferrigno-Stack, graduate students at the Annenberg School for Communication of the University of Pennsylvania, present one such alternative.\footnote{Daniel Orr & Josephine Ferrigno-Stack, Childproofing on the World Wide Web: A Survey of Adult Webserver, 41 JURIMETRICS J. 465, 472 (2001).} Orr and Ferrigno-Stack conducted a study that revealed that only 2.1\% of content on the Internet is adult-oriented, and concluded that further attempts at regulation would "likely chill more legitimate speech than it would shield children from adult content."\footnote{Id.} The two graduate students advocate a novel idea that would serve the government's compelling interest of protecting children from exposure to harmful material. Orr and Ferrigno-Stack encourage the Internet Cor-
poration for Assigned Names and Numbers (ICANN) to adopt an adult-oriented domain name, such as "xxx" or "sex." In the authors' opinion, these new Top Level Domain names would not violate the First Amendment. The authors also contend that it would be easier for filtering software to recognize and filter all websites with the same "xxx" domain name. While a commendable approach, Orr and Ferrigno-Stack's new domain name would only foster an "adults only" section of the Internet. This squares with current cable television regulation, but the question is whether the generation that gave rise to the Internet should be the same one that tears it down by appealing to society's lowest common denominator.

A second alternative is for children to access the Internet on filtered computers and allow the adults the choice between filtered and non-filtered computers. In order for this proposal to sufficiently meet the government's compelling interest, the computers must be situated in different rooms, grouped together according to their filter status.

A third alternative is to abandon attempts to shield children from indecent material and instead, discuss their exposure to Internet pornography with them. New York Law School Professor Carlin Meyer proposes that Americans "ignore the growing presence of cybersmut and concentrate instead on expanding access—especially for young people—to online sexual discussion and depiction."

These proposed alternatives are common in two distinct ways: they likely would be free from First Amendment scrutiny, and they would not sufficiently protect children. Instead of a specific plan, I advocate the creation of a new Bureau within the FCC, which would be chiefly responsible for monitoring advancements in filtering software technology. The Bureau and leading filtering software companies would work in unison, with an eye toward creating a Universal Software Filter (USF). The USF would be

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356 INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, at http://www.icann.org (last visited Mar. 25, 2003). ICANN was incorporated in 1999 to coordinate all domain name and IP address allocation. The organization accepted proposals for new Top Level Domains until late 2000, but ultimately rejected the "xxx" domain name because of a potential inability to shift existing adult sites to the new domain. See also Orr & Ferrigno-Stack, supra note 355, at 473 (noting that the "xxx" domain was proposed and rejected).

357 Orr & Ferrigno-Stack, supra note 355, at 472.

358 Id. at 473.


361 Id.
targeted for use solely in public libraries; thus, our capitalist system will not be threatened by any trade secrets disclosed by software companies. Upon completion and testing of the USF, Congress should pen legislation virtually identical to CIPA, and persuade the ALA and eventually the courts that the new filtering product is the least restrictive means to meet the compelling governmental interest of protecting children. At first blush, this proposal appears overly simplistic. The reality, however, is that it strikes at the heart of CIPA's one true constitutional vulnerability: the efficiency of current filtering software. That is the precise vulnerability that gives hope to the silver-haired grandfather viewing "GAY PORN PALACE," while sitting next to a 7-year-old child at the Rocky River Public Library.

ADDENDUM

The Supreme Court heard oral arguments on the Children's Internet Protection Act on March 5, 2003.362

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