



**Volume IX, Issue 2,  
Winter 2002-2003**

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**Protecting Children from Pornography on the Internet:  
Freedom of Speech is Pitching and Congress May Strike Out.**

**By Dawn S. Conrad\***

## INTRODUCTION

The Internet provides the First Amendment's "freedom of speech" with a world of opportunity.<sup>1</sup> Any person with access to the Internet may take advantage of a wide variety of information and communication methods. "This unique medium, known to its users as cyberspace, is located in no particular geographical location and has no centralized control point, but is available to anyone, anywhere in the world with access."<sup>2</sup> In the past twenty years, the Internet, a network of connected computers, has experienced extraordinary growth. The number of "host" computers, or those that store information and relay communications, increased between the years of 1981 and 1996 from three hundred (300) to approximately 9.4 million.<sup>3</sup> As of September 2001, 143 million Americans, or approximately fifty-four percent (54%) of the population, were using the Internet.<sup>4</sup>

One of the Internet's many faces is the World Wide Web. With just a click of a mouse, people can explore various webpages containing a wide array of information, pictures, movies, and music. The Web is partly the reason why children and teenagers use computers and the Internet more than any other age group.<sup>5</sup>

All types of businesses have taken advantage of the benefits of selling their products on the Web, including the pornography business. In 1998, there were approximately twenty-eight thousand (28,000) pornographic sites on the Web, generating approximately 925 million dollars in annual revenues.<sup>6</sup> Pornographic websites usually offer "teasers"---free pornographic images designed to entice users to pay a fee to explore the whole site.<sup>7</sup> However, Web users do not always have to pay a fee to access sexually explicit material. Although the percentage of webpages containing sexually explicit material is relatively small, the absolute number of websites containing sexually explicit material is very large, consisting of approximately one hundred thousand (100,000) sites.<sup>8</sup> Because Web software is easy to use, "minors who can read

and type are capable of conducting Web searches as easily as operating a television remote.”<sup>9</sup> As a result, pornographic material on the Internet is “widely accessible” to minors.<sup>10</sup> While some children deliberately search for pornographic websites, others accidentally stumble upon them because of techniques like a disabled back button and hidden links that prevent users from leaving a website.<sup>11</sup>

“Society recognizes that some forms of communication suitable for adults are not suitable for minors who lack maturity and emotional development.”<sup>12</sup> Unlike the learning provided at home or in an educational setting, exposure to pornography “is counterproductive to the goal of healthy and appropriate sexual development in children.”<sup>13</sup> Recognizing the ease with which minors can use the Internet to access pornography, Congress has now tried three times to limit their access to sexually explicit material on the Internet. The first two attempts of Congress were the Communications Decency Act<sup>14</sup> (“CDA”) and the Child Online Protection Act<sup>15</sup> (“COPA”). These efforts were criminal statutes that imposed heavy fines and terms of imprisonment on those posting sexually explicit material on the Internet and allowed that material to be accessed by minors.<sup>16</sup> The third and final attempt by Congress to regulate access to pornography by minors is the Children’s Internet Protection Act (“CIPA”).<sup>17</sup> This law, which went into effect in April 2001, withholds certain federal funds from public schools and libraries that fail to place filtering software on their public computers with Internet access.<sup>18</sup>

The CDA was held unconstitutional by the United State Supreme Court in 1997 because the Court found it violated the First Amendment.<sup>19</sup> COPA was tailored to the Supreme Court’s holding in that case, *Reno v. ACLU* (“*Reno I*”), but it will likely be held unconstitutional by the Third Circuit Court of Appeals on remand after the Supreme Court’s decision in *Ashcroft v. ACLU*.<sup>20</sup> . The constitutionality of CIPA was recently challenged by the American Library Association (“ALA”) and the American Civil Liberties Union (“ACLU”),<sup>21</sup> and CIPA’s

application to libraries was held to be unconstitutional by a federal district court in Pennsylvania.<sup>22</sup>

This comment seeks to answer the question of whether Congress can protect children from sexually explicit material on the Internet without infringing on the First Amendment's freedom of speech. Part I of this comment will discuss the reasons for Supreme Court's decision in *Reno I* holding the CDA unconstitutional. Part II will discuss the application of the decision to COPA and why that law will also ultimately be held unconstitutional by the Court. Part III will explore the weaknesses of CIPA and whether CIPA still may be constitutional in its application to public schools. Finally, Part IV will focus on alternative methods that may be used to protect children from sexually explicit material on the Internet. This comment concludes by agreeing with the Commission on Child Online Protection<sup>23</sup> that only a combination of public education, consumer empowerment efforts, enforcement of existing obscenity laws, and industry action can balance protecting children from sexually explicit material and maintaining adults' freedom of speech on the Internet.

#### I. THE COMMUNICATIONS DECENCY ACT---STRIKE ONE

Before 1996, criminal statutes for Internet conduct were rarely seen. The Internet was considered the "Wild West" of the broadcast media where little federal law or regulation interfered.<sup>24</sup> In 1996, Congress attempted to regulate minors' access to indecent material on the Internet by using their Commerce Clause<sup>25</sup> powers to enact Title V of the Telecommunications Act, known as the "Communications Decency Act."<sup>26</sup> Congressional support for the CDA was strong---with only 21 out of the 535 members of Congress voting against it.<sup>27</sup>

Two provisions of the CDA were immediately challenged on constitutional grounds. These sections were informally described as the "indecent transmission" provision and the "patently offensive display" provision.<sup>28</sup> The "indecent transmission" provision was section

223(a)(1)(B)(ii) which criminalizes the “knowing” transmission of “obscene or indecent” messages to any recipient under 18 years of age.<sup>29</sup> The “patently offensive display” provision was section 223(d) which “prohibits the knowing sending or displaying to a person under 18 of any message ‘that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.’”<sup>30</sup> When considering the constitutionality of these provisions, the Supreme Court quickly applied the full protection of the First Amendment to Internet communications.<sup>31</sup>

New media are usually born in captivity, and the courts may take a great deal of time---often decades---before recognizing that the First Amendment applies, much less that full protection is appropriate. In *Reno I*, rather than presuming that the Internet should receive less protection, the Supreme Court held that full First Amendment protection applies unless the government can prove otherwise.<sup>32</sup>

The Court compared the provisions of the CDA with three of their prior decisions that the government had cited in defense of the CDA.<sup>33</sup> In contrast, the Court used these precedents to question the constitutionality of the CDA.<sup>34</sup> First, in *Ginsberg v. New York*,<sup>35</sup> the Court upheld the constitutionality of a New York statute that prohibited selling to minors under the age of 17, material that was considered obscene to them even if not obscene to adults.<sup>36</sup> The Court noted that “in four important respects, the statute upheld in *Ginsberg* was narrower than the CDA.”<sup>37</sup> First, the statute in *Ginsberg* did not prevent parents from buying the prohibited material for their children if they so chose.<sup>38</sup> Under the CDA, neither the parents’ consent or participation would bar the application of the statute.<sup>39</sup> Second, the New York statute in *Ginsberg* applied only to commercial transactions, whereas the CDA was not so limited.<sup>40</sup> Third, the New York statute defined material that is harmful to minors as “utterly without redeeming social importance for minors.”<sup>41</sup> In comparison, the CDA failed to provide the Court with any definition of the term “indecent” and “importantly, omit[ed] any requirement that the ‘patently offensive’ material

covered by section 223(d) lack serious literary, artistic, political, or scientific value.”<sup>42</sup> Finally, the New York statute defined a minor as under the age of 17, whereas the CDA applied to all those under 18 years of age.<sup>43</sup>

The Supreme Court next compared the CDA with their decision in *FCC v. Pacifica Foundation*,<sup>44</sup> a case which upheld a declaratory order of the Federal Communications Commission (“FCC”) subjecting a certain broadcast to administrative sanctions.<sup>45</sup> This broadcast was a recording of a 12-minute monologue entitled “Filthy Words,” previously delivered to a live audience.<sup>46</sup> Again, the Court distinguished the CDA from this precedent. The order in *Pacifica* was issued by an agency that had been regulating radio stations for decades, and only targeted a specific broadcast that represented “a rather dramatic departure from traditional program content.”<sup>47</sup> Unlike the CDA, the regulation at issue in *Pacifica* only designated when it would be permissible to air such a program on the radio.<sup>48</sup> The CDA’s “broad categorical prohibitions” were not limited to particular times and were not dependent on any evaluation by an agency familiar with the Internet.<sup>49</sup> Also unlike the CDA, the FCC’s declaratory order was not criminally punitive, resulting only in administrative sanctions.<sup>50</sup> Furthermore, the FCC’s order applied to the radio, a medium that had historically received “the most limited First Amendment protection.”<sup>51</sup> In contrast, the Internet had no comparable history of regulation.<sup>52</sup>

Finally, in *Renton v. Playtime Theatres, Inc.*,<sup>53</sup> the Supreme Court upheld a zoning ordinance that kept adult movie theaters out of residential neighborhoods.<sup>54</sup> The government defended the CDA by stating that it constituted a sort of “cyberzoning” on the Internet.<sup>55</sup> The Court disagreed and found that the CDA applied broadly to the entire universe of cyberspace, and it was a content-based blanket restriction on speech.<sup>56</sup> Therefore, the CDA could not “properly [be] analyzed as a form of time, place, and manner regulation.”<sup>57</sup> Furthermore, because it was a content-based regulation of speech, the provisions of the CDA were so vague

and over-inclusive that they would obviously have a “chilling effect on free speech.”<sup>58</sup>

The Court also found that the Internet was not as invasive as radio or television.<sup>59</sup> It stated that “almost all sexually explicit images are preceded by warnings as to the content,” and that “ ‘odds are slim’ that a user would come across a sexually explicit [site] by accident.”<sup>60</sup> For all of these reasons, in an almost unanimous opinion,<sup>61</sup> the Court found that the CDA was not the least restrictive means by which to satisfy the government interest of shielding minors from harmful material on the Internet, and as such, was unconstitutional.<sup>62</sup> Congress’ first attempt to protect minors from sexually explicit material on the Internet had failed but they were not going to be easily dissuaded.

## II. THE CHILD ONLINE PROTECTION ACT---STRIKE TWO

### A. *Congress Takes Reno I Into Consideration*

Although it was dubbed “CDA II,” the Child Online Protection Act of 1998<sup>63</sup> did take the Supreme Court’s ruling in *Reno I* into consideration.<sup>64</sup> Congress still felt that “a prohibition on the distribution of material harmful to minors, combined with legitimate defenses” was “the most effective and least restrictive means by which to satisfy the compelling government interest” of protecting minors from sexually explicit material on the World Wide Web.<sup>65</sup> In a detailed House Commerce Committee Report, Congress explained why COPA was consistent with the decision in *Reno I*.<sup>66</sup>

First, Congress noted that COPA conformed to the harmful to minors standard identified in *Ginsberg*, as modified by the Supreme Court in *Miller v. California*.<sup>67</sup> COPA’s application was limited to “patently offensive” material, described as an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals or female breast.<sup>68</sup> Moreover, the new harmful to minors definition also included the

requirement that the material is harmful to minors only if “taken as whole, lacks serious literary, artistic, political, or scientific value for minors.”<sup>69</sup>

Since the CDA was criticized by the Supreme Court for its broad application with respect to commercial and non-commercial transactions, COPA applied “only to commercial transactions involving the display of material that is harmful to minors over the World Wide Web.”<sup>70</sup>

The Court in *Reno I* was also “concerned that the age verification systems under the CDA were not technologically feasible for certain non-commercial, private, and on-line services such as e-mail and chat rooms;” however, Congress believed that such age verification systems were easily attainable for commercial pornographic websites.<sup>71</sup> “In fact, the use of age verification means prescribed under [COPA] are standard practice among some commercial distributors of pornography on the Web.”<sup>72</sup>

Also unlike the CDA, COPA defined a minor as persons under the age of 17 and “contain[ed] no restriction on the discretion of the parent to purchase material for their children who are under the age of 17.”<sup>73</sup> Congress further emphasized the need for legislation like COPA by noting that their legislative hearings had “highlighted the problems of children getting easy access to pornography” online.<sup>74</sup> Also, Congress noted that regulation of the Internet fell within its Commerce Clause authority.<sup>75</sup> Although the other branches of the federal government did not disagree, the Department of Justice still felt that COPA was vulnerable to First Amendment challenges.

#### B. *Concerns About COPA*

“Before COPA was adopted, the Department of Justice sent a lengthy letter to the Chairman of the House Commerce Committee to express ‘serious concerns’ about the legislation, questioning its constitutionality.”<sup>76</sup> The Justice Department’s main concern was that:



enforcement of a new criminal prohibition such as that proposed in COPA could require an undesirable diversion of critical investigative and prosecutorial resources that the Department currently invests in combating traffickers in hard-core child pornography, in thwarting child predators, and in prosecuting large-scale and multidistrict commercial distributors of obscene materials.<sup>77</sup>

The Justice Department also had concerns that COPA would be challenged on constitutional grounds, “since it would [again] be a content-based restriction applicable to ‘the vast democratic fora of the Internet,’ a ‘new market place of ideas’ that has enjoyed a ‘dramatic expansion’ in the absence of significant content-based regulations.”<sup>78</sup> The Justice Department also believed that COPA would not be highly effective, since so many pornographic websites are based outside of the United States.<sup>79</sup> COPA would not attempt to address the overseas sources of Internet pornography, “and admittedly it would be difficult to do so because restrictions on newsgroups and chat channels could pose constitutional questions, and because any attempt to regulate overseas [websites] would raise difficult questions regarding extraterritorial enforcement.”<sup>80</sup>

Despite these concerns, COPA passed through Congress and “the same day that President Clinton signed [it] into law, the ACLU filed suit in the United States District Court for the Eastern District of Pennsylvania.”<sup>81</sup> The Justice Department was forced to defend the very law they had feared would be constitutionally challenged. The Pennsylvania district court “initially issued a temporary restraining order, blocking the enforcement of COPA, and in early 1999, the court granted plaintiff’s request for a preliminary injunction.”<sup>82</sup> Relying on the *Reno I* decision, the court applied strict scrutiny to the analysis of COPA.<sup>83</sup> Plaintiffs presented evidence that the age verification systems would be financially burdensome on “smaller, commercial webmasters,” and “could be such that their expression of speech could be severely diminished.”<sup>84</sup> Plaintiffs also produced evidence that suggested that the age verification systems required by COPA “would reduce the anonymity of web surfers and thus lead to a great

reduction in traffic to the websites by adult web surfers”.<sup>85</sup> The district court found that because of the economic disadvantages imposed by COPA, adult website publishers “may engage in self-censorship of constitutionally protected speech.”<sup>86</sup>

The district court also found that plaintiffs had established that COPA “would chill online speech in general, and that the government had failed to demonstrate that COPA [was] the least restrictive means of serving its purpose.”<sup>87</sup> The court “noted that any barrier erected by website operators and publishers to bar minors from accessing some of the content on their websites [would] ‘also be a barrier that adults would have to cross.’”<sup>88</sup> The government argued that COPA was limited to restricting pornographic teasers on commercial pornographic websites, but the court did not agree.<sup>89</sup> The court noted that COPA applied to any website with material considered harmful to minors.<sup>90</sup> The court believed that “if Congress had intended to adopt a narrower statute, . . . [it] might have done so without imposing ‘possibly excessive and serious criminal penalties’ or ‘without exposing speakers to prosecution and placing the burden of establishing an affirmative defense on them.’”<sup>91</sup>

Although the Third Circuit Court of Appeals affirmed the district court’s decision, it did not rely on the lower court’s analysis of the statute.<sup>92</sup> The Third Circuit noted that Congress had attempted to draft COPA more narrowly than the CDA by limiting its application to only material on the World Wide Web.<sup>93</sup> The court also recognized that Congress had attempted to clear up the confusing wording of the CDA by limiting the prohibited material to that which is “harmful to minors.”<sup>94</sup>

The problem with that interpretation, however, was that by placing the *Miller v. California* obscenity standard into COPA, Congress “attempted to apply a test to the electronic world that was designed to regulate the physical world.”<sup>95</sup> The Third Circuit disagreed with the government’s argument that the Internet could be placed on the same level as the physical world

with a non-geographic test for material that is harmful to minors.<sup>96</sup> It was for this reason, and this reason alone that the Third Circuit found COPA unconstitutional. COPA's reliance on "contemporary community standards" in the context of the electronic medium of the Web to identify material that was harmful to minors so concerned the court that they were persuaded that this aspect of COPA, without reference to its other sections, "must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute."<sup>97</sup>

The Third Circuit held that the key difference between the Internet and the physical world was the existence of boundaries.<sup>98</sup> In the physical world, it is easy to tell where one geographic location ends and another begins; however, the Internet does not have similar boundaries. In *Miller v. California*, the Supreme Court had upheld a statute that required the appellant to alter the content of the material he was mailing depending on the standards of the recipient's community because he could control what communities would receive his materials.<sup>99</sup> In contrast, a website operator cannot control who will gain access to his posted material based on their location. Internet communications cannot be blocked merely because their user is from a specific geographic area.<sup>100</sup> The Third Circuit felt that since website operators could not control whom their communications reach, they would be forced to follow the most conservative community standards under COPA.<sup>101</sup>

### *C. The Fate of COPA*

Thus, the sole issue on appeal before the Supreme Court in *Ashcroft v. ACLU*<sup>102</sup> was whether the court of appeals properly barred enforcement of COPA on First Amendment grounds because COPA relies on community standards to identify material that is harmful to minors. At first glance, the Court's opinion in *Ashcroft v. ACLU* appears to hold that community standards can be applied to define "material that is harmful to minors" on the Internet without violating the constitution.<sup>103</sup> But actually, it was only Justice Thomas, who authored the opinion

for the Court, Justice Scalia, and Chief Justice Rehnquist, who agreed completely with that conclusion.<sup>104</sup> Justice Thomas noted that COPA applied to significantly less material than the CDA and also acknowledged that “the ‘community standards’ criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.”<sup>105</sup> After discussing several obscenity precedents,<sup>106</sup> Justice Thomas concluded that when a publisher chooses to send its material to a particular community, it is the publisher’s burden to abide by that community’s standards, and this burden does not change simply because the publisher chooses to distribute his material to every community in the United States.<sup>107</sup> However, Justice Thomas also emphasized that the Court’s holding in *Ashcroft* was very limited, and did not address whether COPA was substantially overbroad for other reasons or whether it was unconstitutionally vague.<sup>108</sup> Instead, the Court found that “prudence dictates allowing the Court of Appeals to first examine these difficult issues.”<sup>109</sup>

Only Justice Stevens completely agreed with the Third Circuit that COPA’s reliance on community standards rendered the statute unconstitutional.<sup>110</sup> Two justices advocated the use of a nationwide community standard to apply to the regulation of obscenity on the Internet.<sup>111</sup> Three of the justices expressed doubts about the use of community standards, but saw the need for additional facts before they could make a determination.<sup>112</sup> Justice Kennedy’s opinion in particular expressed doubts about the application of community standards to the Internet. He wrote, “I would not assume that [COPA] is narrow enough to render the national variation in community standards unproblematic. Indeed, if the District Court correctly construed the statute across its other dimensions, then the variation in community standards might well justify enjoining enforcement of the Act.”<sup>113</sup>

The lack of consensus between the justices may not be the only reason that COPA will

most likely be held unconstitutional on remand. A majority of the Court expressed reservations about the constitutionality of COPA and the Court continued to enjoin the government from enforcing COPA.<sup>114</sup> A majority of the Court concluded that the Third Circuit should explore a wider range of constitutional issues, as the district court did, before declaring COPA unconstitutional, and they believed that further consideration **was** needed on how to apply First Amendment principles to cyberspace.<sup>115</sup>

Besides concerns about its overbreadth,<sup>116</sup> COPA's other major fault is its under-inclusiveness. Although COPA may apply to some pornographic material that may be harmful to minors, it fails to address the large amount of Internet pornography that is based overseas. During oral argument in *Reno I*, the ACLU estimated that fifty percent of indecent speech in cyberspace originates in foreign countries.<sup>117</sup> Thus, in spite of Congress's good intentions, it would appear that COPA does little more than criminalize some forms of protected speech in our own country.

### III. THE CHILDREN'S INTERNET PROTECTION ACT---STRIKE THREE

With both the CDA and COPA facing constitutional challenges, Congress's third attempt to protect minors from sexually explicit material on the Internet came in the form of an Internet filtering requirement. "Federal filtering requirements were added as an amendment to the 2001 Labor-Health and Human Services Appropriations Bill, H.R. 4577."<sup>118</sup> "Labeled the 'Children's Internet Protection Act' ('CIPA'), the amendments would condition e-rate subsidies, funding via the Elementary and Secondary Education Act, and funding through the Museum and Library Services Act on the use of content filters on Internet access terminals."<sup>119</sup> CIPA was enacted as part of the Consolidated Appropriations Act of 2001 and went into effect on April 20, 2001.<sup>120</sup> Introduced by Senator John McCain, CIPA represents a more tailored attempt to regulate

Internet content.<sup>121</sup> Unlike the CDA and COPA, it restricts only visual depictions, affects only schools and libraries, and ties restrictions to federal funds.<sup>122</sup>

### *A. Filtering*

The number of public computers with Internet access in schools and libraries has grown exponentially in recent years.<sup>123</sup> “By 1999, more than 96 percent of public libraries provided public access to the Internet.”<sup>124</sup>

This increase in Internet access has been promoted by Section 254(h) of the Telecommunications Act of 1996, which established the “e-rate” program to subsidize telecommunications services and computer networking equipment for schools and libraries. A primary goal of the e-rate program is to provide affordable Internet connections to all public schools.<sup>125</sup>

Public libraries have also increased their use of filtering software to limit access to Internet content during recent years. “In 1999, 16.8 percent of libraries that offered public Internet access reported the use of filters on some or all computer terminals, while 83.2 percent did not use filters.”<sup>126</sup> However, the majority of libraries that use filters to restrict library content also provide patrons with some unfiltered computer terminals.<sup>127</sup>

CIPA requires a “technology protection measure” that blocks or filters Internet access to visual depictions that are obscene, child pornography, or harmful to minors.<sup>128</sup> There are several types of filtering or blocking techniques available today.<sup>129</sup> The first is server-side filtering using URL lists<sup>130</sup> which is defined as “voluntary use by Internet Service Providers and Online Services of server software that denies access to particular content sources (identified by uniform resource locators) that have been selected for blocking.”<sup>131</sup> Another method is client-side filtering using URL lists, which is defined as voluntary use of filters by software purchasers “that cause the browser not to download content from specified content sources. The list of blocked sites may originate from both the software supplier and/or from decisions by the user.”<sup>132</sup> The

last method of filtering is from the server or client-side using text-based content analysis.<sup>133</sup> This is defined as “voluntary use of some combination of PC-based software and server software that conducts (when necessary) real time analysis of the content of a website and filters out content sources that fit some algorithm.”<sup>134</sup>

#### B. *CIPA's Constitutional Weaknesses*

The Commission on Child Online Protection was established by Congress in COPA to study the different methods by which to reduce access by minors to sexually explicit material on the Internet.<sup>135</sup> In their report submitted to Congress in October of 2000, the Commission did not recommend the use of filters.<sup>136</sup> In their report, all three types of filters raised First Amendment concerns because of their potential to be over-inclusive in blocking content.<sup>137</sup> “Concerns are increased because the extent of blocking is often unclear and not disclosed;” however, “[c]lient-side systems may be customized based on family choice.”<sup>138</sup>

Soon after the enactment of CIPA, both the ACLU and the ALA filed suits challenging its constitutionality in the United States District Court for the Eastern District of Pennsylvania.<sup>139</sup> Under CIPA, any challenge to the law is heard by a three-judge panel appointed by the Third Circuit Court of Appeals, and any appeal of the panel’s decision goes straight to the Supreme Court.<sup>140</sup> The ACLU claimed that they filed the suit because mandatory filters block constitutionally protected speech, and placing them on public computers furthers the digital divide.<sup>141</sup> The ACLU’s clients in the suit include public libraries from across the country; a 15 year-old girl and her aunt who do not have Internet access at home; two candidates for Congress whose websites were blocked; Planetout.com, a leading website for gays and lesbians; and Planned Parenthood Federation of America, whose website provides reproductive healthcare information.<sup>142</sup> The ACLU argued that filtering programs are flawed and “routinely and inexplicably block sites that clearly do not fall under the categories proscribed by the law.”<sup>143</sup>

Before the federal district court in Pennsylvania had the opportunity to consider the constitutionality of CIPA, another federal court had already held that a mandatory Internet filtering program in a public library failed constitutional scrutiny.<sup>144</sup> In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Public Library*, the United States District Court for the Eastern District of Virginia held that the Internet access policy for the public library in Loudoun County, Virginia was unconstitutional.<sup>145</sup> County policy required the use of blocking software at all times for all users and the court held that this violated the First and Fourteenth Amendments to the U.S. Constitution.<sup>146</sup> The court found that the mandatory filtering policy was not necessary to further a compelling government interest; it was not narrowly tailored; it restricted adult library patrons to access only information that is suitable for minors; it lacked adequate standards for restricting access to information; and it had inadequate procedural safeguards to ensure prompt judicial review of censorship decisions.<sup>147</sup> As the Supreme Court aptly noted in *Reno I*, “[r]egardless of the strength of the government’s interest’ in protecting children, ‘the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.’”<sup>148</sup> The same can be said of mandatory filtering programs.

### *C. CIPA Loses The First Round*

In an incredibly lengthy opinion, a special three-judge panel sitting in the United States District Court for the Eastern District of Pennsylvania held CIPA’s application to public libraries unconstitutional.<sup>149</sup> After an eight-day trial, in which the court heard twenty witnesses and received substantial evidence,<sup>150</sup> the court concluded that “Congress went too far when it threatened to pull certain federal funds from any public library that failed to install ‘filtering’ software to block access to sexually explicit websites.”<sup>151</sup> The suit challenged two provisions of CIPA. Section 1721(b) imposed conditions on a library’s participation in the e-rate program unless they have technology protection measures, such as filters, on their computers with public



Internet access to prevent accessing visual material that is defined to be obscene.<sup>152</sup> Section 1712(a)(2) amends the Museum Library and Services Act<sup>153</sup> to provide that no funds may be used to purchase computers with Internet access unless the library has similar technology protection measures in place.<sup>154</sup>

The court found that the majority of filtering software overblocks constitutionally protected material.<sup>155</sup> The government acknowledged that filtering software is imperfect, but maintained that it is quite effective in blocking pornography.<sup>156</sup> The government argued that the use of filtering programs is similar to a library's selection process that decides which books should be added to its collection.<sup>157</sup> Even the plaintiffs conceded that a library's selection of which books to add to its collection is a content-based decision that is subject to rational basis review.<sup>158</sup> However, the court did not agree with the analogy. Providing library patrons with Internet access was not the same as selecting books for the library collection.

In providing even filtered Internet access, public libraries create a public forum open to any speaker around the world to communicate with library patrons via the Internet on a virtually unlimited number of topics. Where the state provides access to a "vast democratic forum," . . . the state's decision selectively to exclude from the forum speech whose content the state disfavors is subject to strict scrutiny, as such exclusions risk distorting the marketplace of ideas that the state has facilitated.<sup>159</sup>

The court also considered whether Congress could enact and enforce CIPA under their spending clause power.<sup>160</sup> The court found that the Supreme Court's decision in *South Dakota v. Dole*<sup>161</sup> created the proper analytical framework.<sup>162</sup> The plaintiffs alleged that CIPA was unconstitutional under the fourth prong of *Dole*, which states that the spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional."<sup>163</sup>

The court agreed and found that because public libraries can never comply with CIPA without blocking a substantial amount of speech that is constitutionally protected, CIPA in effect, required libraries to violate the First Amendment.<sup>164</sup>

For several reasons, the court held that CIPA failed strict scrutiny analysis.<sup>165</sup> It conclusively found that today's filtering technology will "necessarily erroneously block a substantial number of webpages that do not fall within its category definitions."<sup>166</sup> Furthermore, "no presently conceivable technology can make the judgments necessary to determine whether a visual depiction fits the legal definitions of obscenity, child pornography, or harmful to minors."<sup>167</sup> Because the filtering software mandated by CIPA will block large amounts of constitutionally protected speech, the court concluded that CIPA was not narrowly tailored to serve the government's interest in protecting children.<sup>168</sup> The court also found that mandatory filters were not the least restrictive means by which to protect children from accessing pornography at public libraries.<sup>169</sup> The court concluded that both sections 1712(a)(2) and 1721(b) of CIPA were facially invalid under the First Amendment and permanently enjoined the government from enforcing those provisions.<sup>170</sup> On June 20, 2002, the Justice Department, acting on behalf of the FCC and the U.S. Institute of Museum and Library Sciences, formally notified the Supreme Court of its plans to appeal the district court's ruling.<sup>171</sup>

#### *D. Why CIPA May Still Apply to Public Schools*

Parts of CIPA also apply to public elementary and secondary schools. Most notably, the schools' receipt of e-rate funds is conditioned on whether or not they have an Internet safety policy in place on their computers with Internet access that requires a "technology protection measure" to guard against children accessing visual depictions of obscenity, child pornography, or material considered harmful to minors.<sup>172</sup> The technology protection measures (i.e., filters) can be disabled during adult use for "bona fide research or other lawful purpose."<sup>173</sup>

These provisions were not challenged in *American Library Association v. United States*, and they may yet withstand constitutional scrutiny because of the special treatment of speech in public schools. Two tests govern the regulation of speech in public schools. The first test, from

*Tinker v. Des Moines Independent Community School District*, allows regulation of speech in schools if it can be shown that the prohibited speech “would materially and substantially disrupt the work and discipline of the school.”<sup>174</sup> The second test, from *Hazelwood School District v. Kuhlmeier*, permits the school to regulate speech in school-sponsored activities “so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>175</sup> It can easily be argued that allowing students to access pornography on school computers would both substantially disrupt the work and discipline of the school and interfere with a school’s legitimate pedagogical concerns. Furthermore, the students’ use of school-owned computers with Internet access is clearly a school-sponsored activity. While it is true that the overblocking of websites by today’s filtering programs would still be a concern, this alone may not prevent enforcement of CIPA in the schools. The Supreme Court in the past has allowed non-restricted material to be deleted from a school newspaper along with the prohibited material.<sup>176</sup> CIPA’s application to public elementary and secondary schools has yet to be tested.

#### IV. ALTERNATIVE METHODS TO PROTECT CHILDREN FROM SEXUALLY EXPLICIT MATERIAL ON THE INTERNET

##### A. *Alternative Technologies*

With Congress now having tried three times to prevent minors from accessing sexually explicit material on the Internet, it clearly feels a compelling interest to protect minors from easily accessing this material. Several alternative technological methods currently exist to protect children from sexually explicit material on the Internet.

One author has recommended user-based filtering programs as a viable means of solving the problem.<sup>177</sup> These filtering programs, such as Net Nanny and Cyber Patrol, are installed by the user on his own computer and will prevent the browser from downloading content deemed inappropriate for minors by either a software company or parents.<sup>178</sup> One benefit of such

software is that it allows parents, and not the government, to determine what information is appropriate for their children.<sup>179</sup> It also alleviates First Amendment concerns by allowing the family to choose what material it wishes to access and permitting adults to override the denial of access to certain sites with a password.<sup>180</sup> However, problems still exist with these programs. For example, minors may still be able to access pornographic materials at a friend's house or a public computer, the programs tend to have flaws that may block out more than intended, and many parents are unaware of such programs.

Another author has recommended the use of digital certificates to prevent access to adult material.<sup>181</sup> Digital certificates reside in the Internet user's hard drive and provide information about the user, including his age.<sup>182</sup> When the user enters a website, the site automatically checks the certified information and permits only those over a certain age to enter the site.<sup>183</sup> The author states, "digital certificate zoning is a better alternative to filtering in that it is more accurate than stand alone blocking software" and avoids the problems of "blocking software used in conjunction with content ratings."<sup>184</sup>

Such software may run the risk of collecting too much personal information about its users. Website operators would have to be careful about what kind of information they collected about children using digital certificates or they might run afoul of the Children's Online Privacy Protection Act<sup>185</sup> ("COPPA"), enforced by the Federal Trade Commission, which prohibits websites from collecting personal information from children online absent parental consent.<sup>186</sup>

#### *B. Recommendations from the Commission on Child Online Protection*

Overall, the most sound recommendations for protecting children from sexually explicit material on the Internet came from the Commission on Child Online Protection that was established as part of COPA.<sup>187</sup> The Commission concluded that "no single technology or method will effectively protect children from harmful material online."<sup>188</sup> Instead, the

Commission recommended “a combination of public education, consumer empowerment technologies and methods, increased enforcement of existing laws, and industry action” to address this concern.<sup>189</sup>

Public education should include efforts by the government and private sector to “undertake a major education campaign to promote public awareness of technologies and methods available to protect children online.”<sup>190</sup> Consumer empowerment efforts require the industry and the government to take steps to improve child protection technologies, provide reports to the public about their capabilities, and make them more accessible online.<sup>191</sup> The Commission also recommended that all levels of government fund “aggressive programs to investigate, prosecute, and report violations of federal and state obscenity laws, including efforts that emphasize the protection of children from accessing materials” that are considered illegal under current state and federal obscenity laws.<sup>192</sup> Finally, the Internet industry should “voluntarily undertake ‘best practices’ to protect minors,” and the pornographic online industry “should voluntarily take steps to restrict minors’ ready access to adult content.”<sup>193</sup> The Commission concluded that the efforts recommended in their report “if implemented by industry, consumers, and government, [would] result in significant improvements in protection of children online.”<sup>194</sup>

## CONCLUSION

The fact that Congress has tried three times to enact legislation that would protect minors from sexually explicit material on the Internet proves that it is a compelling government interest. All three attempts have run into the same problem---any regulation that protects children from sexually explicit material on the Internet must be carefully tailored so it does not infringe on the First Amendment rights of adults. Thus, the fact that all three attempts of Congress have collided with the First Amendment proves that the government cannot remedy the problem

alone. As the Child Online Protection Commission recommended, in order to protect our children from sexually explicit material online, joint efforts by the government, consumers, parents, law enforcement, the technology industry, and the adult Internet industry will be required. This may seem like a daunting task, but with the fast pace of computer technology development, it is not an unreasonable goal.

Many technologies that individuals can place on their computers to restrict access to pornographic materials already exist. These technologies are becoming more refined everyday; the time may come when their flaws are few. In the meantime, both the government and industry can educate parents about available methods of protection, and the government can fund programs to investigate and prosecute federal and state obscenity laws. The government can also provide money to address international Internet crime, including obscenity and child pornography.<sup>195</sup> Libraries with public Internet access could offer a section of computers with filtering software dedicated to use by children and a section of unfiltered computers for adults.

Even if CIPA ultimately fails constitutional scrutiny, strike three is not the last chance for Congress to protect minors from sexually explicit material on the Internet. As the Third Circuit Court of Appeals stated, some day technology may be developed that produces reliable geographic and age-verification information on the Internet and, at such time, laws like COPA may become “constitutionally practicable.”<sup>196</sup>

\* Ms. Conrad received her B.A. from the University of Virginia in 2000 and will receive her J.D. from the University of Richmond School of Law in May 2003. Ms. Conrad would like to thank her parents for their never-ending support throughout her education.

1. “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.
2. Robert Corn-Revere, *Freedom of Speech and Content Regulation on the Internet*, 1 Internet L. & Reg.(P & F) No. 40, at FS-A1 (Oct. 2002).

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3. Reno v. ACLU, 521 U.S. 844, 850 (1997); *see also* Information Resources in Public Justice: Internet Explanations, *What is the Internet?*, at <http://library.stmarytx.edu/classes/pb1200/internet/internet/sld01.html> (last visited Nov. 11, 2002).
  4. U.S. Department of Commerce, *A Nation Online: How Americans Are Expanding Their Use of the Internet*, at 4, 53, at <http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf> (last visited Feb. 15, 2002) (using September 2001 U.S. Census Bureau data).
  5. *Id.*
  6. H.R. REP. NO. 105-775, at 7 (1998), *reprinted in* 1 Internet L. & Reg.(P & F) No. 40, at FS-78-79 (Oct. 2002).
  7. H.R. REP. NO. 105-775, at 10.
  8. Am. Library Ass'n. v. United States, 201 F. Supp. 2d 401, 419 (E.D. Pa. 2002).
  9. H.R. REP. NO. 105-775, at 9-10.
  10. *Id.* at 10.
  11. For example, a child researching the American Presidency may access information on the Web and stumble upon <http://www.whitehouse.com>, a pornographic site, instead of the correct address for the White House, <http://www.whitehouse.gov>. *Id.*; *see also* Am. Library Ass'n, 201 F. Supp. 2d at 419.
  12. Anthony Niccoli, *Legislative Reform: Least Restrictive Means: A Clear Path for User-Based Regulation of Minors' Access to Indecent Material on the Internet*, 27 J. LEGIS. 225 (2001).
  13. H.R. REP. NO. 105-775, at 12.
  14. The Communications Decency Act, 47 U.S.C. § 223 (Supp. 1999). The CDA was Title V of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56.
  15. The Child Online Protection Act, 47 U.S.C. § 231 (Supp. 1999).
  16. Violations of the CDA could result in fines up to \$250,000, and two years imprisonment. John L. Kreiger, *Will The Third Time Be a Charm or a Strike? Regulating Sexually Explicit Content on the Internet*, 10 NEV. LAWYER 12, 13 (2002). Violations of COPA could result in fines up to \$150,000 for each day of violation, and up to six months in prison. *Id.*
  17. Children's Internet Protection Act of 2001, Pub. L. No. 106-554, 114 Stat. 2763, *available at* <http://www.ifea.net/cipa.html> (last visited Dec. 20, 2001).
  18. *Id.*
  19. Reno v. ACLU, 521 U.S. 844 (1997).

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20. *Ashcroft v. ACLU*, 122 S. Ct. 1700 (2002).
  21. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002).
  22. *Id.*
  23. The Child Online Protection Act established the Commission on Child Online Protection to study methods to help reduce access by minors to certain sexually explicit material, defined in the statutes as harmful to minors. Commission on Child Online Protection (COPA), *Report to Congress*, Oct. 20, 2000, *reprinted in* 1 Internet L. & Reg.(P & F) Laws & Policy page FS-229 (Jan. 2001).
  24. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997).
  25. U.S. CONST. art. I, § 8, cl. 3.
  26. 47 U.S.C. § 223 (2000).
  27. Nadine Strossen, *William O. Douglas Lecture: Current Challenges to the First Amendment*, 36 GONZ. L. REV. 279, 291 (2000/2001).
  28. *Reno v. ACLU*, 521 U.S. at 858-59.
  29. Niccoli, *supra* note 12, at 227 (citing *Reno v. ACLU*, 521 U.S. at 859).
  30. *Id.* (citing *Reno v. ACLU*, 521 U.S. at 859-60).
  31. *See Reno v. ACLU*, 521 U.S. at 868-69.
  32. Corn-Revere, *supra* note 2, at FS-A3.
  33. *See Reno v. ACLU*, 521 U.S. at 864.
  34. *Id.*
  35. *Ginsberg v. New York*, 390 U.S. 629 (1968).
  36. *See id.* at 636.
  37. *Reno v. ACLU*, 521 U.S. at 865.
  38. *Ginsberg*, 390 U.S. at 639.
  39. *Reno v. ACLU*, 521 U.S. at 865.
  40. *Id.* (citing *Ginsberg*, 390 U.S. at 647).
  41. *Ginsberg*, 390 U.S. at 646.



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42. *Reno v. ACLU*, 521 U.S. at 865.
  43. *Id.* at 865-66.
  44. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).
  45. *Id.*
  46. *Id.* at 729-30.
  47. *Reno v. ACLU*, 521 U.S. at 867.
  48. *Id.*
  49. *Id.*
  50. *Id.*
  51. *Id.* (citing *FCC v. Pacifica*, 438 U.S. at 748).
  52. *Id.*
  53. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).
  54. *Reno v. ACLU*, 521 U.S. at 867.
  55. *Id.* at 867-68.
  56. *Id.* at 868.
  57. *Id.*
  58. *Id.* at 872.
  59. *Id.* at 869.
  60. *Id.* (quoting the findings of the district court, 929 F.Supp. 824, 844 (E.D. Pa. 1996)).
  61. Justice O'Connor wrote separately concurring in part, dissenting in part, in which Chief Justice Rehnquist joined. *See Reno v. ACLU*, 521 U.S. at 886.
  62. *See id.* at 875. Under the First Amendment's strict scrutiny standard of review, a law that restricts the content of speech will only be upheld if it is reasonably necessary to serve a compelling government interest and is the least restrictive means to achieve that interest. *Carey v. Brown*, 447 U.S. 455, 461 (1980); *see also* Tim Specht, *Untangling the World Wide Web: Restricting Children's Access to Adult Materials While Preserving the Freedoms of Adults*, 21 N. ILL. U. L. REV. 411, 423-24 (2001)(stating why the provisions of the CDA could not be construed as narrowly tailored).

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63. 47 U.S.C. § 231 (2000).
64. *See* Corn-Revere, *supra* note 2, at FS-A7.
65. Child Online Protection Act, Pub. L. No. 105-277, tit. XIV, § 1402(4), 112 Stat. 2681-736 (1998).
66. H.R. REP. NO. 105-775, *supra* note 6, at 12.
67. *Id.* at 12-13 (citing *Miller v. California*, 413 U.S. 15 (1973)).  
As a general matter, the First Amendment does not protect “obscene” speech. However, the government may not presume that a particular communication is obscene, but must demonstrate that the material (1) appeals primarily to the prurient interest when judged as a whole by the average person applying contemporary community standards; (2) contains patently offensive depictions or descriptions of sexual or excretory organs or functions as specifically defined by applicable law; and (3) lacks serious literary, artistic, political or scientific value.
68. H.R. REP. NO. 105-775, *supra* note 6, at 13; *see* 47 U.S.C. § 231(e)(6)(B) (2000).
69. H.R. REP. NO. 105-775, *supra* note 6, at 13; *see* 47 U.S.C. § 231(e)(6)(B).
70. H.R. REP. NO. 105-775, *supra* note 6, at 13.
71. *Id.* at 13-14 (citing *Reno v. ACLU*, 521 U.S. 844, 856 (1997)).
72. H.R. REP. NO. 105-775, *supra* note 6, at 14.
73. *Id.* at 15; *see* 47 U.S.C. § 231(e)(7) (2000).
74. H.R. REP. NO. 105-775, *supra* note 6, at 16.
75. *See id.* at 15.
76. Corn-Revere, *supra* note 2, at FS-A8.
77. Letter from L. Anthony Sutin, Acting Assistant Attorney General, U.S. Department of Justice, to Representative Thomas Bliley, Chairman, House Committee on Commerce (Oct. 5, 1998), *reprinted in* 1 Internet L. & Reg.(P & F) Laws & Policy page FS-98 (2001).
78. *Id.* (quoting *Reno v. ACLU*, 521 U.S. 844, 861, 870, 885 (1997)).
79. *See id.*
80. *Id.*
81. Corn-Revere, *supra* note 2, at FS-A8.

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82. *Id.* (citing *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999)).

83. *ACLU v. Reno*, 31 F. Supp. 2d 473, 493 (E.D. Pa. 1999).

84. Specht, *supra* note 62, at 429.

85. *Id.* at 430.

86. *Id.* (citing *ACLU v. Reno*, 31 F. Supp. 2d at 491).

87. Corn-Revere, *supra* note 2, at FS-A8.

88. *Id.* at FS-A9.

89. *Id.*

90. *Id.*

91. *Id.* COPA did permit several affirmative defenses:

(c) Affirmative Defense

(1) Defense. It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors--

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

(2) Protection for use of defenses. No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this subsection or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

47 U.S.C. § 231(c) (2000).

92. *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000).

93. *Id.* at 167.

94. *Id.*

95. Niccoli, *supra* note 12, at 230.

96. *Id.* (citing *ACLU v. Reno*, 217 F.3d at 174-75).

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97. *ACLU v. Reno*, 217 F.3d at 174.
98. *Id.* at 175.
99. *Id.* at 177 (citing *Miller v. California*, 413 U.S. 15 (1973)).
100. *Id.*
101. *Id.*
102. *Ashcroft v. ACLU*, 122 S. Ct. 1700 (2002).
103. *Id.* at 1703.
104. *Id.*
105. *Id.* at 1709 (quoting *Reno v. ACLU*, 521 U.S. 844, 877-78 (1997)).
106. *See, e.g., Hamling v. United States*, 418 U.S. 87 (1974) (upholding a federal statute prohibiting the mailing of obscene material); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (placing the burden on the “dial-a-porn” operator to comply with the prohibition on obscene messages in various communities).
107. *Ashcroft v. ACLU*, 122 S. Ct. 1700, 1712.
108. *Id.* at 1713.
109. *Id.*
110. *Id.* at 1726-28 (Stevens, J., dissenting).
111. *Id.* at 1714-15 (O’Connor, J., concurring) (Breyer, J., concurring).
112. *Id.* at 1722 (Kennedy, J., concurring) (Justices Souter and Ginsburg joined this opinion).
113. *Id.* at 1717.
114. *Id.* at 1713-14.
115. Joan E. Berten, *Talking Dirty*, *LEGAL TIMES*, July 3, 2002, available at <http://www.law.com>.
116. Plaintiffs in the suit against COPA included OBGYN.Net, Philadelphia Gay News, Androgyny Books, Inc., and Salon Internet, Inc. *See ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000).
117. Niccoli, *supra* note 12, at 232.
118. Corn-Revere, *supra* note 2, at FS-A10.

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119. *Id.*

120. *See* Children's Internet Protection Act of 2001, Pub. L. No. 106-554, § 1701, 1733, 14 Stat. 2763 (2000), available at <http://www.ifea.net/cipa.html> (last visited Dec. 20, 2001).

121. Lisa M. Bowman, *Filters Face Free-Speech Test*, ZDNet News (Apr. 18, 2001), at <http://www.zdnet.com/zdnn/stories/news/0,4586,2709729,00.html>.

122. *Id.*

123. Corn-Revere, *supra* note 2, at FS-A10.

124. *Id.* (citing John Carlo Bertot and Charles R. McClure, Survey of Internet Access Management in Public Libraries (Library Research Center, Univ. of Illinois, June 2000) (“Library Survey 2000”).

125. *Id.* (citing Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd. 8776 (1997)).

126. *Id.*

127. *Id.*

128. *See* Children's Internet Protection Act of 2001, Pub. L. No. 106-554, § 1703, 114 Stat. 2763 (2000), available at <http://www.ifea.net/cipa.html> (last visited Dec. 20, 2001).

129. For an extensive discussion of Internet filtering technology and its effectiveness, *see* Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 427-50 (E.D. Pa. 2002).

130. URL is the abbreviation for “uniform resource locator” and refers to the address of an Internet site. URL, Dictionary.Com, available at <http://dictionary.reference.com/search?q=url>.

131. Commission on Child Online Protection (COPA), *Report to Congress*, Oct. 20, 2000, reprinted in 1 Internet L. & Reg.(P & F) Laws & Policy page FS-229, FS-237 (Jan. 2001), available at <http://www.copacommission.org/report/> [hereinafter *Report to Congress*]

132. *Id.* at FS-238.

133. *Id.* at FS-239.

134. *Id.*

135. *Id.* at FS-230.

136. Bowman, *supra* note 121.

137. *See Report to Congress, supra* note 131, at FS-237-239.

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138. *Id.* at FS-239.

139. Am. Library Ass'n v. United States, No. 01-CV-1303 (E.D. Pa. filed Mar. 20, 2001); Multnomah County Pub. Library v. United States, No. 01-CV-1322 (E.D. Pa. filed Mar. 20, 2001).

140. Children's Internet Protection Act of 2001, Pub. L. No. 106-554, 114 Stat. 2763, tit. XVII, § 1741, available at <http://www.ifea.net/cipa.html> (last visited Nov. 5, 2002).

141. ACLU Feature, *ACLU Files Challenge to Library Internet Censorship in Case Fast-Tracked for Supreme Court Review* (Mar. 20, 2001), at <http://www.aclu.org/SafeandFree/SafeandFreeMain.cfm>. The "digital divide" is a term used to describe the educational and opportunity divide between those with Internet access and those without.

142. *Id.*

143. *Id.*

144. Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Pub. Library, 24 F. Supp. 2d 552 (E.D. Va. 1998).

145. *Id.*

146. *Id.* at 570.

147. *Id.* at 570.

148. Reno v. ACLU, 521 U.S. 844, 875 (1997) (quoting Bolger v. Youngs Drug Prods Corp., 463 U.S. 60, 74-75 (1983)).

149. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002). The opinion was written by Chief Judge Edward R. Becker of the Third Circuit Court of Appeals, and was joined by U.S. District Judges John P. Fullam and Harvery Bartle, III. Shannon P. Duffy, *Children's Internet Protection Act Struck Down*, THE LEGAL INTELLIGENCER, June 3, 2002, available at <http://www.law.com>.

150. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 408.

151. Shannon P. Duffy, *Children's Internet Protection Act Struck Down*, THE LEGAL INTELLIGENCER, June 3, 2002, available at <http://www.law.com>.

152. 47 U.S.C. § 254(h)(6) (2001).

153. 20 U.S.C. § 9134(f) (2001).

154. *Id.*

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155. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 406 (E.D. Pa. 2002).
156. *Id.* at 408.
157. *Id.*
158. *Id.* at 409.
159. *Id.* (citing *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).
160. *Id.* at 409; *see also* U.S. CONST. art. I, § 8, cl. 1.
161. *South Dakota v. Dole*, 483 U.S. 203 (1987).
162. *See Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 450.
163. *Id.* *See also* *Dole*, 483 U.S. at 210.
164. *Am. Library Ass'n*, 201 F. Supp. 2d at 453.
165. *Reno v. ACLU*, 521 U.S. 844 (1997).
166. *Am. Library Ass'n*, 201 F. Supp. 2d at 450.
167. *Id.* at 449.
168. *Id.* at 410.
169. *Id.* The court suggested that libraries “enforce Internet use policies that make [it] clear to patrons that the library’s Internet terminals may not be used to access illegal speech.” Libraries could then impose penalties for violations of these Internet use policies. The court also suggested “restricting minors’ unfiltered access to terminals within view of library staff.”
170. *Id.* at 411.
171. ALA (American Library Association), *CIPA case goes to Supreme Court*, at <http://www.ala.org/cipa> (last visited Nov. 12, 2002).
172. 47 U.S.C. § 254(h)(5) (2002).
173. 47 U.S.C. § 254(h)(5)(D).
174. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).
175. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 261 (1988).
176. In *Hazelwood School District*, the Court permitted the deletion of two additional articles from the school newspaper that were on the same pages as the two objectionable articles. *Id.* at 276.

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177. Niccoli, *supra* note 12, at 234-35.
178. *Id.* at 234.
179. *Id.*
180. *Id.*
181. Specht, *supra* note 62, at 454.
182. *Id.*
183. *Id.*
184. *Id.* at 455.
185. Children's Online Privacy Protection Act of 1998, 15 U.S.C. § 6502 (2000).
186. *Id.*
187. *Report to Congress, supra* note 131, at FS-230.
188. *Id.* at FS-231.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at FS-232.
193. *Id.*
194. *Id.*
195. *Id.*
196. *ACLU v. Reno*, 217 F.3d 162, 181 (3d Cir. 2002).