NOTES

THE CHILDREN'S INTERNET PROTECTION ACT OF 1999: IS INTERNET FILTERING SOFTWARE THE ANSWER?

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TABLE OF CONTENTS

I. Introduction

With the help of federal funding, Internet access has become increasingly common in public schools and libraries around the

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country.[1] At the same time, explicit sexual and violent content has become rampant on the Internet.[2] As a result, the problem of child access to pornographic materials on the Internet is of national concern.[3] In response to this concern, the Children's Internet Protection Act of 1999 ("CIPA")[4] was introduced in the United States Senate in January of 1999.[5] If passed, CIPA would mandate that any public schools or libraries receiving federal funding for the installation of Internet access would be required to implement some filtering mechanism on their computers to block children from accessing harmful Internet content.[6]

This Note will identify and examine the underlying issues involved in CIPA.[7] Although CIPA was designed to protect children from accessing both sexually explicit and violent material, this Note will deal primarily with the regulation of sexually explicit content under CIPA. Part IIA will briefly discuss the First Amendment and pornography generally.[8] The background and current regulation of the Internet will be discussed in Part IIB.[9] Part IIC will explain the manner in which Internet filtering software

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1 *See Hearings on Protecting Children from Obscenity on the Internet Before the House Committee on Commerce*, 105th Cong. 1, 22 (Sept. 11, 1998) (statement of Representative Ernest Istook, Oklahoma); *see also infra* Part IIB.

2 *See generally Hearings on the Nature and Threat of Sexual Predators on the Internet Before the House Committee on the Judiciary*, 105th Cong. 1 (Nov. 7, 1997) (statement of Cathy Cleaver, Director of Legal Policy, Family Research Council Member of Board of Directors, Enough is Enough); *see also infra* Part IIA and Part IIIA.

3 *See Legal Issues Abstract: Is Filtering Software the Answer?* (visited July 15, 1999) <http://cse.stanford.edu/class/cs201/Projects/online-pornography/Abstract/abstract.html>; *see also McCain - Hollings Introduce Internet School Filtering Act, February 9, 1998* (visited Mar. 1, 1999) <http://www.senate.gov/~mccain/filter.htm>. "As Internet use in our schools and libraries continues to grow, children's potential exposure to harmful online content will only increase." *Id.* "Each week we receive telephone calls and letters from parents and other concerned citizens horrified by what children are encountering online." Statement of Cathy Cleaver, *supra* note 2, at 1.

4 *See* Children's Internet Protection Act of 1999, S. 97, 106th Congress (1999); *see also* United States Congress, *Bill Summary & Status for the 106th Congress for S. 97* (visited Mar. 1, 1999) <http://thomas.loc.gov/>.

5 *See id.*

6 *See id.*

7 *See infra*.

8 *See infra* Part IIA.

9 *See infra* Part IIB.

works.[10] Part IIIA will then examine the necessity, or lack thereof, for legislation dealing with this issue.[11] A brief history of the legislative initiatives leading up to CIPA will be given in Part IIIB.[12] Finally, Part IV will comprehensively analyze CIPA.[13] This analysis will include a discussion of the provisions of CIPA, the arguments for and against passage of CIPA, and several alternatives to filtering software.[14]

II. Background

A. The First Amendment and the Regulation of Pornography

The First Amendment to the United States Constitution protects citizens from governmental intrusion into "free speech."[15] It has long been established, however, that the First Amendment does not protect "all forms of expression."[16] In fact, speech that is

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10 *See infra* Part IIC.

11 *See infra* Part IIIA.

12 *See infra* Part IIIB.

13 *See infra* Part IV.

14 *See infra* Part IV.

15 *See* U.S. CONST. amend. I. The First Amendment states, in pertinent part, that: "Congress shall make no law . . . abridging the freedom of speech." *Id.* "The primary purpose of the First Amendment is to protect the public's right to participate in the free exchange of ideas." James V. Dobeus, *Rating Internet Content and the Specter of Government Regulation*, 16 J. MARSHALL J. COMPUTER & INFO. L. 625, 635-636 (1998). Therefore, speech should not be censored by government directly, or through "excessive and intrusive regulation." *See id.*

16 *See* Dobeus, *supra* note 15, at 635. The Supreme Court has recognized that certain types of expression do not warrant First Amendment protection at all and that other speech may, in some circumstances, be regulated despite the First Amendment protection afforded to it. *See id.* For example, the government may regulate the "time, place, and manner" of protected speech if the government has a compelling interest and the regulation is content-neutral. *See* U.S. v. O'Brien, 391 U.S. 367, 370 (1968). In addition, where there is a "clear and present danger" that the protected speech sought to be regulated will incite immediate lawless action, that speech may be regulated. *See* Schenck v. United States, 249 U.S. 47, 52 (1919); *see also* Bradenburg v. Ohio, 395 U.S. 444, 451 (1969) (Douglas, J., concurring). If a government regulation of speech seeks to regulate "fighting words" in a non-public forum, that regulation also may withstand the First Amendment. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

deemed "obscene" receives no protection under the First Amendment.[17] In addition, there is a well-established precedent that

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[17] *See* Glenn E. Simon, *Cyberporn and Censorship: Constitutional Barriers to Preventing Access to Internet Pornography by Minors*, 88 J. CRIM. L. & CRIMINOLOGY 1015, 1018 (1998). "Obscene material" has been defined by the Supreme Court as those works which, according to an average community standard, "appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973).

The courts have, thus far, been unwilling to dictate a national standard of "obscenity." *See* David J. Loundy, *E-Law 4: Computer Information Systems Law and System Operator Liability*, 21 SEATTLE U. L. REV. 1075, 1123 –24 (1998). Therefore, carriers or publishers of obscenity must be mindful of the differences in the definitions between the various states. *See id.* In addition, all "child pornography" has been deemed "obscene" and is illegal under federal statutory law. *See id.* (citing 18 U.S.C. § 2252).

Speech which is merely "indecent", but not "obscene" is afforded full protection under the First Amendment, and thus, any statute regulating such speech must pass the "strict scrutiny" test; it must promote a compelling government interest and must be "narrowly-tailored" to achieve that purpose. *See Action for Children's Television v. Federal Communications Commission*, 58 F.3d 654, 657 (D.C. Cir. 1995). There are two essential tests that a statute must pass in this context. First, the statute cannot be overbroad in its application. *See* Dobeus, *supra* note 15, at 637 (citing Broadrick v. Oklahoma, 413 U.S 601, 612 (1979) and Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting)). Second, the statute cannot be "unduly vague." *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). A statute will be deemed "overbroad" if it "not only proscribes speech that may be constitutionally forbidden, but also sweeps within its coverage speech that is constitutionally protected." Dobeus, *supra* note 15, at 637. In addition, a statute is overbroad if it has a "chilling effect" on protected speech. *See id.* at 637. In order for a statute to avoid being struck down on vagueness, it must be tailored so that it gives the person of "ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *See Grayned*, 413 U.S. at 108.

"Indecent" speech has been defined as that which "describes, in terms patently offensive as measured by community standards . . . sexual or excretory activities and organs . . . ." *See* Loundy, *supra* at 1126 (citing FCC v. Pacifica, 438 U.S. 726, 732 (1978). The distinction between "obscene" and "indecent" speech was drawn because "indecent" speech is presumed to have "some social value" even if the speech "lacks literary, political, or scientific value." *See* Dobeus, *supra* note 15, at 635-36 (citing *FCC*, 438 U.S. at 746-48 (finding that "words that are commonplace in one setting are shocking in another")). "Obscene" speech, on the other hand, lacks any social value. *See generally* Miller v. California, 413 U.S. 15, 23 (1973).

"Pornography" is not a legal term. *See Hearings on Legislative Proposals to Protect Children from Inappropriate Materials on the Internet Before the House Subcomm. on Telecomm., Trade and Consumer Protection*, 105th Cong. 1, 47 (Sept. 11, 1998) (statement of Jeffrey J. Douglas, Executive Director, Free Speech Coalition). For the purposes of this Note, "pornography" will be used to describe generally sexually explicit content. Unless otherwise stated, it should be assumed that the terms "pornography" and "indecent," "harmful," or "inappropriate" content or materials are

the government "may lawfully impose different regulations on minors than it does on adults."[18] Therefore, for the purposes of protecting children from "harmful" material, the government may regulate otherwise protected (i.e., non-obscene) speech.[19] This is based on the generally accepted proposition that such laws will assist parents and teachers in performing their roles as guardians of

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interchangeable.

[18] *See* Simon, *supra* note 17, at 1016, *see also* Ginsberg v. New York, 390 U.S. 629, 643 (1968); Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 170 (1944). Although minors are certainly afforded a "significant measure of First Amendment protection," *see* Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975), it has become virtually indisputable that "children are governed by different rules" when it comes to the principles of free expression. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 496-97 (1970). The rights of minors under the First Amendment are not "co-extensive with those of adults." *See* Tinker v. Des Moines School Dist., 393 U.S. 503, 515 (1969) (Stewart, J., concurring). According to Justice Stewart in *Ginsberg*, "a child is not possessed of that full capacity for individual choice which is a presupposition of the First Amendment guarantees." Emerson, supra at 497.

Therefore, "[h]e is not permitted that measure of independence, or able to exercise that maturity of judgment, which a system of free expression rests upon." *Id.* Some critics of limiting First Amendment protection for children argue, however, that by limiting what children are exposed to, society runs a much greater risk of creating a future generation of children who are unable to think for themselves. *See* Comment, *Exclusion of Children from Violent Movies*, 67 COLUM. L. REV. 1149, 1158 (1967). If a child only hears and sees what the "majority" wants her to, she will know nothing else as an adult. *See id.* "It may be that children are so immature and unsophisticated that they can easily be led into confusion and error. But some risk of confusion and error is preferable to the risk of a deadening conformity of thought." *Id.*

[19] *See* Simon, *supra* note 17, at 1016. Although "indecent" speech is constitutionally protected, "the state may regulate the content of indecent speech where that speech could affect children." *See* Dobeus, *supra* note 15, at 636 (citing *Ginsberg*, 390 U.S. at 639-640). This is because it is a well-established principle that society has a "'compelling interest' in protecting minors from sexually explicit material . . . ." *See NLC Memorandum of Law on Immunity for Filter Use* (visited Mar. 1, 1999) <http://www.filteringfacts.org/nlc2.htm>. Where child access is concerned, the court will generally weigh the government's interest in protecting children from harmful speech "relative to the ease with which [they] can access that speech." *See* Simon, *supra* note 17, at 1016.

Indecent materials are considered "harmful" to children because of their explicit sexual nature as well as the recurring themes of violence, degradation, and abuse that are deemed to be part of much of this material. *See* H.R. REP. NO. 105-775, at 7 (1998). "Parents, educators, and civic groups agree that exposure to pornography shapes a child's perspective on sexual activity in a manner that may be inconsistent with the goal of healthy sexual development." *Id.* "The unique kind of threat of exposure to pornography is, once it's seen (by a child) the damage is done." Frank James, *Internet Pornography Poses Classroom Problem*, BUFF. NEWS, Feb. 21, 1999, at A10 (quoting David Crane from Senator John McCain's office).

children's welfare.[20] In addition, the Supreme Court has recognized an independent state interest in protecting the well being of its youth.[21] However, statutes that regulate child access to protected speech will be struck down if they restrict adults to only viewing material that is suitable for children.[22]

Two trends have developed in the regulation of "pornographic" or "indecent" materials for the purpose of protecting children from exposure to such materials.[23] First, most states use zoning laws to regulate where "adult-oriented" establishments may exist.[24] Second,

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20 *See Ginsberg*, 390 U.S. at 639.

> [P]arents and others, teachers for example, who have the primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility . . . Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the [materials] for their children.

Id.

21 *See id.* "Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults." *Id.* at 636 (citing Bookcase Inc. v. Broderick, 18 N.Y.2d 71, 75 (Ct. App. 1966)).

22 *See* Simon, *supra* note 17, at 1016 (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73 (1983).

23 *See* Reno v. ACLU, 117 S.Ct. 2329, 2352 (1997) (O'Connor, J., dissenting in part, concurring in part). By regulating "the twin characteristics of geography and identity," a state can restrict a minor's access to inappropriate material. *See id.*

24 *See id.* "The creation of adult zones is by no means a novel concept. States have long denied access to certain establishments frequented by adults." *Id.* at 2353 n.1 (citing ALASKA STAT. ANN. § 11.66.300 (1996) (no minors in "adult entertainment" places); ARIZ. REV. STAT. ANN. § 13-3556 (1989) (no minors in places where people expose themselves); ARK. CODE ANN. §§ 5-27-223, 5-27-224 (1993) (no minors in poolrooms and bars); COLO. REV. STAT. § 18-7-502(2) (1986) (no minors in places displaying movies or shows that are "harmful to children"); DEL. CODE ANN., Tit. 11, § 1365(i)((2) (1995) (same); D.C. CODE ANN. § 22-2001(b)(1)(B) (1996) (same); FLA. STAT. § 847.013(2) (1994) (same); GA. CODE ANN. § 16-12-103(b) (1996) (same); HAW. REV. STAT. § 712-1215(1)(b) (1994) (no minors in movie houses or shows that are "pornographic for minors"); IDAHO CODE § 18-1515(2) (1987) (no minors in places displaying movies or shows that are "harmful to minors"); LA. REV. STAT. ANN. § 14:91.11(B) (West 1986) (no minors in places displaying movies that depict sex acts and appeal to minors' prurient interest); MD. ANN. CODE, Art. 27, § 416E (1996) (no minors in establishments where certain enumerated acts are performed or portrayed); MICH. COMP. LAWS § 750.141 (1991) (no minors without an adult in places where alcohol is sold); MINN. STAT. § 617.294 (1987 and Supp.1997) (no minors in places displaying movies or shows that are "harmful to minors"); MISS. CODE ANN. § 97-5-11 (1994) (no minors in poolrooms, billiard halls, or where alcohol is sold); Mo. Rev. Stat. § 573.507 (1995) (no minors in adult cabarets); NEB. REV. STAT. § 28-809 (1995) (no minors in places displaying movies or shows that are "harmful to minors"); NEV. REV.

most states require age identification to purchase "adult" materials or enter "adult" establishments.[25] In addition, local communities have always controlled what children are exposed to in public schools and libraries by limiting child access to "objectionable materials."[26]

STAT. § 201.265(3) (1997) (no minors in places displaying movies or shows that are "harmful to minors"); N.H. REV. STAT. ANN. § 571-B:2(II) (1986) (no minors in places displaying movies or shows that are "harmful to minors"); N.M. STAT. ANN. § 30-37-3 (1989) (no minors in places displaying movies or shows that are "harmful to minors"); N.Y. PENAL LAW § 235.21(2) (McKinney 1989) (no minors in places displaying movies or shows that are "harmful to minors"); N.D. CENT. CODE § 12.1-27.1-03 (1985 and Supp. 1995) (no minors in places displaying movies or shows that are "harmful to minors"); 18 PA. CONS. STAT. § 5903(a) (Supp.1997) (no minors in places displaying movies or shows that are "harmful to minors"); S.D. COMP. LAWS ANN. § 22-24-30 (1988) (no minors in places displaying movies or shows that are "harmful to minors"); TENN. CODE ANN. § 39-17-911(b) (1991) (no minors in places displaying movies or shows that are "harmful to minors"); VT. STAT. ANN., Tit. 13, § 2802(b) (1974) (no minors in places displaying movies or shows that are "harmful to minors"); VA. CODE ANN. § 18.2-391 (1996) (no minors in places displaying movies or shows that are "harmful to minors")).

25 *See id.* at 2353 (stating that where a minor enters an adult establishment or attempts to purchase adult materials, he will not be able to "conceal completely his identity (or consequently, his age)") (citing ALA. CODE § 13A-12-200.5 (1994); ARIZ. REV. STAT. ANN. § 13-3506 (1989); ARK. CODE ANN. 5-68-502 (1993); CAL. PENAL CODE ANN. § 313.1 (West Supp.1997); COLO. REV. STAT. § 18-7-502(1) (1986); CONN. GEN. STAT. § 53a-196 (1994); DEL. CODE ANN., Tit. 11, § 1365(i)(1) (1995); D.C. CODE ANN., Tit. 11, § 22-2001(b)(1)(A) (1996); FLA. STAT. § 847.012 (1994); GA. CODE ANN. § 16-12-103(a) (1996); HAW. REV. STAT. § 712-1215(1) (1994); IDAHO CODE § 18-1515(1) (1987); ILL. COMP. STAT., ch. 720, § 5/11-21 (1993); IND. CODE § 34-49-3-3(1) (Supp.1996); IOWA CODE § 728.2 (1993); KAN. STAT. ANN. § 21-4301c(a)(2) (1988); LA. REV. STAT. ANN. § 14:91.11(B) (West 1986); MD. ANN. CODE, Art. 27, § 416B (1996); MASS. GEN. LAWS, ch. 272, § 28 (1992); MINN. STAT. § 617.293 (1987 and Supp.1997); MISS. CODE ANN. § 97-5-11 (1994); MO. REV. STAT. § 573.040 (1995); MONT. CODE ANN. § 45-8-206 (1995); NEB. REV. STAT. § 28-808 (1995); NEV. REV. STAT. §§ 201.265(1), (2) (1997); N.H. REV. STAT. ANN. § 571-B:2(I) (1986); N.M. STAT. ANN. § 30-37-2 (1989); N.Y. PENAL LAW § 235.21(1) (McKinney 1989); N.C. GEN. STAT. § 14-190.15(a) (1993); N.D. CENT. CODE § 12.1-27.1-03 (1985 and Supp. 1995); OHIO REV. CODE ANN. § 2907.31(A)(1) (Supp. 1997); OKLA. STAT., Tit. 21, § 1040.76(2) (Supp.1997); 18 PA. CONS. STAT. § 5903(c) (Supp.1997); R.I. GEN. LAWS § 11-31-10(a) (1996); S.C. CODE ANN. § 1615-385(A) (Supp.1996); S.D. COMP. LAWS ANN. § 22-24-28 (1988); TENN. CODE ANN. § 39-17-911(a) (1991); TEX. PENAL CODE ANN. § 43.24(b) (1994); UTAH CODE ANN. § 76-10-1206(2) (1995); VT. STAT. ANN., Tit. 13 § 2802(a) (1974); VA. CODE ANN. § 18.2-391 (1996); WASH. REV. CODE § 9.68.060 (1988 and Supp.1997); WIS. STAT. § 948.11(2) (Supp.1995)).

26 *See* Telephone Interview with Staff Member, Senator John McCain's office (Feb. 1999).

> Ten years ago an English teacher could confiscate a Playboy magazine from a 14-year old boy in class and we thought it was the appropriate thing to do. The Internet has made such actions a lot

The tremendous growth of the pornography industry over the past several decades has made it increasingly difficult for the government to regulate children's access to "harmful" material.[27] This problem has been further aggravated by the advent of the Internet.[28] Almost 70% of the current traffic on the Internet is "adult-oriented material."[29] As of January 1998, there were an estimated 100,000 pornographic Web sites,[30] with approximately 200 new pornographic sites created each day.[31] In fact, the Washington Post recently termed the Internet "the largest pornography store in history."[32]

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more difficult, but the principle remains the same. The only thing that has changed is that the tools are more sophisticated.

Hearings on Internet Indecency Before the Senate Comm. on Commerce, Science, and Transportation, 105th Cong. 1, 41 (Feb. 10, 1998) (statement of Andrew L. Sernovitz, President, Association for Interactive Media).

27 *See* Istook, *supra* note 1, at 22. "The porn industry is huge, estimated to gross $8 billion per year (U.S. News & World Report), compared with $6.6 billion for movie admissions, and $6.7 billion spent on spectator sports (U.S. Chamber of Commerce)." *Id.*

28 *See generally* Yaman Akdeniz, *The Regulation of Pornography and Child Pornography on the Internet* (visited Mar. 1, 1999) <http://elj.warwick.ac.uk/jilt/internet/97_1akdz/akdeniz.htm#2>.

29 *See* H.R. REP. NO. 105-775, at 10 (1998).

30 *See* Istook, *supra* note 1, at 22. However, this number varies greatly by the source. *See id.* According to Wired Magazine, for instance, the number of online "adult" Web sites is closer to 28,000. *See id.* Whereas Congressman Istook claims that 100,000 is actually a low estimate. *See id.* According to USA Today, "[b]est-guess estimates are that pornography, hate and bomb-making sites make up less than 10% of the more than 30 million Web pages on the Internet." *See* Joe Panepinto, *Sitters and Nannies, for Kids and Parents: How Filtering Programs Stack Up*, USA TODAY, Feb. 24, 1999, at D6.

31 *See* Istook, *supra* note 1, at 22. These sites include commercially developed "adult" Web sites as well as hundreds of amateur sites and "erotic homepages". *See* Douglas, *supra* note 17, at 1. Another reason pornography is so prevalent on the Internet is that it is available in so many different forms. *See* Akdeniz, *supra* note 28. A user can download pictures, short animated movies, sound files, or stories and can witness live sex acts or have sex discussions in chat rooms. *See id.*

32 *See* Cleaver, *supra* note 2, at 3.

B. *The Internet and Pornography*

It is estimated that almost 200 million users have access to the "Internet."[33] This is largely due to: (1) the ease of Internet navigation,[34] and (2) the proliferation of easy-access capabilities.[35]

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33 *See* Dobeus, *supra* note 15, at 631 n.21 (citing ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996)). The "Internet" is a "decentralized means of global communication that links people, schools, corporations, libraries, governments, and organizations." *Id.* at 630. It is "not [ ] a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks." ACLU v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996). This system, originally called "ARPANET," was developed in the late 1960s and served to link "computers owned by the military, defense contractors, and university laboratories engaged in military research." ED KROL, THE WHOLE INTERNET USER'S GUIDE AND CATALOG 13 (1994). In the 1980s, ARPANET gave way to NSFnet, "a network of super computers around the country." *See id.* Eventually, in the early 1990s, several commercial groups began to develop the system and it "grew to include universities, corporations, and individuals worldwide" and became known as "the Internet." *See id.*

The Internet has grown enormously over the past several years. *See* Simon, *supra* note 17, at 1024. It is "a world-wide phenomenon available in over 90 countries, connecting some 5 million different computer systems, and accessed by an estimated 10-30 million people." *Hearings on S. 892 and Indecency on the Internet Before the Senate Judiciary Committee*, 104th Cong. 1, 72 (July 24, 1995) (written testimony of William W. Burrington, Assistant General Counsel and Director of Government Affairs, America Online, Inc.). In addition, "[t]he Internet is growing and expanding faster than we ever thought possible." 144 CONG. REC. S8611 (1998). The number of computers linked to the Internet grew from 300 to over 9.4 million from 1981 to 1996. *See Reno*, 929 F. Supp. at 831. This number does not include the great number of individuals accessing the Internet through personal computers in their homes. *See id.* As of 1996, it was estimated that about 60% of the computers linked to the Internet are located within the United States. *See id.*

34 Although there are many ways to communicate via the Internet, the "World Wide Web" ("Web"), created in 1991, is the most well known as well as the most pertinent to this discussion. *See* Dobeus, *supra* note 15, at 631. The Web is used to transmit and to access "text, sound, pictures, and video images" on documents which are stored on various computers throughout the Internet. *See Reno*, 929 F. Supp. at 836. Each document on the Web has its own address, called a "uniform resource locator" ("URL"). *See* Dobeus, *supra* note 15, at 631. Most of the documents also contain "links" to other documents which allow a user to view other, related documents, regardless of where on the Internet they are stored. *See Reno*, 929 F. Supp. at 836. In addition, it is common for many organizations, universities, libraries, and businesses to have Web "home pages," which are set up to give a user information about that organization as well as links to related Web sites. *See id.* Many individuals also create their own "home pages" with a URL address so that other Internet users can locate their sites. *See* Dobeus, *supra* note 15, at 631.

Users search the Web by use of an Internet "web browser" or "search engine". *See Reno*, 929 F. Supp. at 837. These browsers search for "keywords" or for sites that

With the advent of a multitude of commercially available Internet "search engines," individuals can now use the Internet for a vast array of services from research to retail shopping.[36] Although access to the Internet was originally limited to large organizations and individuals with the financial resources to purchase "powerful" personal computers,[37] access is now widely available in schools, public libraries, businesses, and even "storefront 'computer coffee shops.'"[38] Furthermore, personal computers and access to Internet service providers have become increasingly affordable to the average consumer.[39]

Internet access has also become commonplace in schools and public libraries,[40] largely due to various state and federal programs designed to fund Internet connections.[41] As a result, millions of

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contain certain categories of information. *See id.* Since the first commercially available search engine was created in 1993, several others have become available, including Yahoo, Altavista, Magellan, Lycos, and Webcrawler. *See id.*

There are several other means of communication via the Internet, including but not limited to: (1) one-to-one messaging (such as e-mail), which allows a user to send a message to one or more people; (2) one-to-many messaging, which allows a user to subscribe to a certain mailing list and receive all messages forwarded to the subscribers of that list; and (3) real time communication, which allows a user to converse in a "real time" conversation with other users. *See* Simon, *supra* note 17, at 1025.

35 *See* H.R. REP. NO. 105-775, at 7 (1998). Individuals gain access to the Internet through subscriptions to various commercial online services, internet service providers (ISPs), telephone companies, cable television companies, and even some local newspapers, which provide access for a monthly fee. *See id.*

36 *See Hearings on Internet Indecency Before the Senate Committee on Commerce, Science, and Transportation*, 105th Cong. 1, 16 (Feb. 10, 1998) (statement of Seth Warshavsky, CEO, Internet Entertainment Group, Inc.). The Internet "is literally reshaping every aspect of our lives, minute by minute." *Id.* The Internet "has become a daily tool for many Americans." 144 CONG. REC. S8611 (1998).

37 *See* H.R. REP. NO. 105-775, at 7 (1998).

38 *See* Simon, *supra* note 17, at 1024.

39 *See* Simon, *supra* note 17, at 1024-25.

40 *See* Istook, *supra* note 1, at 22. Fifty percent of all public schools currently have access to the Internet. *See* Peter G. Drever, III., *The Best of Both Worlds: Financing Software Filters for the Classroom and Avoiding First Amendment Liability*, 16 J. MARSHALL J. COMPUTER & INFO. L. 659, 660-61 (1998). In addition, President Clinton has challenged the computer industry, business community, and local governments to ensure that "every classroom in America" is connected to the Internet by the year 2000. *See id.* According to the American Library Association, in 1998, 60.4% of the public libraries in the United States offer Internet access. *See* Emily Whitfield & Ann Beeson, *Censorship in a Box: Blocking Software is Wrong for Libraries*, 16 NO. 7 CABLE TV & NEW MEDIA L. & FIN. 1 (Sept. 1998).

41 *See* Istook, *supra* note 1, at 22. The federal government and local and state

American schoolchildren now have easy access to the Internet,[42] and the Internet is quickly becoming an invaluable tool in learning and communication.[43] Ironically, the characteristics that make the

governments nationwide spent $4.2 billion on the computer hardware and software needed for Internet access in schools and libraries in 1997 alone. *See id.* In addition, the federal government is investing over $750 million yearly in various federal programs aimed at installing the necessary tools for Internet access in schools. *See id.* These programs include Title I, Special Education, Goals 2000, and various education technology and vocational programs. *See id.* Another federal government program known as "the e-rate program" provides subsidies to public libraries and schools so that they can receive discounted Internet access. *See* 144 CONG. REC. S8161, S8162 (1998). This funding program was created as part of the Telecommunications Act of 1996, and was responsible for providing approximately $675 million in subsidies during its first year of implementation. *See id.* Schools and libraries located in rural and low-income areas receive the highest discounts under this program. *See id.*

The funding for the e-rate program comes out of the "universal service fund." *See id.* The "universal service fund" provides the funding for the broader federal "Universal Service Discounts" program, which was instituted to provide individual residences with nationwide access to basic telephone service. *See generally* Jon Baumgarten & Denise Gough, *Washington Watch*, 3 NO. 6 CYBERSPACE LAW. 16 (1998). The program does not give direct assistance to the individuals, but instead mandates that the providers offer discounted rates for customers and then the providers are reimbursed for the amount of the discounts. *See* 47 U.S.C.A. § 254 (b) (1999). The program was extended to include schools and libraries for the purpose of assisting them in offering Internet access in the Telecommunications Act of 1996. *See* 144 CONG. REC. S8161, S8162; *see also* 47 U.S.C.A. §§ 254 (a) through 254(h).

42 *See* Istook, *supra* note 1, at 22.

43 *See* Whitfield, *supra* note 40, at 1. Because schools have limited books and budgets, the Internet can be an excellent resource for students. *See* Drever, *supra* note 40, at 661. "[S]tudents can access worlds of information which are mere keystrokes away via the Internet." *Id.* As an educational tool, students can use the Internet to "learn about virtually any topic, visit a museum, [or] take a college course ...." Lawrence J. Magid, *Child Safety on The Information Highway* (visited Mar. 1, 1999) <http://www.safekids.com/child_safety.htm>.

"If the substantial barriers to change discussed later in this testimony are overcome, within two decades, American schooling will shift to new models of teaching and learning better suited to developing 21st century workers and citizens for a knowledge-based society." *Joint Hearing on Educational Tech. in the 21st Century Before the House Comm. on Science and Comm. on Econ. and Educ. Opportunities*, 104th Cong. 1, 56 (Oct. 12, 1995) (statement of Professor Chris Dede, Graduate School of Education, George Mason University). "Since the process of thinking is based on representations such as language and imagery, the process of learning is strongly shaped by the types of instructional messages we can exchange with students. Emerging representational containers, such as multimedia, enable a broader, more powerful repertoire of pedagogical strategies." *Id.* In addition, experts in the field claim that by the year 2015, four new mediums of communication made possible by the Internet will shape the teaching methods in American elementary and high schools. *See id.* These include: (1) "knowledge webs," which "will complement teachers, texts, libraries, and archives as sources of information"; (2) virtual classroom

Internet such an important educational resource are the same ones that cause such great concern over child use of the Internet.[44] Because there is "no limit as to what can be found on the information highway,"[45] children can access massive amounts of information about virtually any topic, regardless of the "appropriateness" of the information.[46] And, because most children "demonstrate a computer proficiency that far surpasses that of their parents," they generally have little problem finding whatever information they want on the Internet.[47]

The Internet has thus far remained a primarily unregulated entity due to its unique characteristics.[48] The Internet is not controlled or administered by any one individual or organization, yet operates successfully only because those who send and receive electronic communications do so with compatible technologies.[49] Because there is "no single point at which the Internet is administered," it is not technically feasible for any single entity to control the immense amount of information being transmitted via the Internet.[50] Therefore, government regulation of the content of the Internet is extremely difficult, if not impossible.[51]

Due to the unique nature of the Internet, traditional methods for regulating pornography are not viable for the Internet.[52] First, there is no effective means by which an individual user's age can be verified.[53] Although some commercial Web sites charge for access

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interaction, which will complement the normal face-to-face classroom relationships; (3) synthetic environments, which will "extend learning-by-doing in real world settings"; and (4) sensory immersion, which will help students grasp reality through use of illusion. *See id.*

44 *See* Drever, *supra* note 40, at 660.

45 Drever, *supra* note 40, at 660.

46 *See* Drever, *supra* note 40, at 660.

47 *See* Cleaver, *supra* note 2, at 1.

48 *See* Telephone Interview with Staff Member, Senator John McCain's office (Feb. 1999).

49 *See* Simon, *supra* note 17, at 1024. "No single organization controls any membership in the Web, nor is there any centralized point from which individual sites or services can be blocked from the Web." Reno v. ACLU, 117 S. Ct. 2329, 2336 (1997).

50 *See* Simon, *supra* note 17, at 1024.

51 *See* Telephone Interview with Staff Member, Senator John McCain's office (Feb. 1999).

52 *See* Simon, *supra* note 17, at 1043.

53 *See* Simon, *supra* note 17, at 1027. "[T]he Internet does not (yet) provide any

to their sites, most offer extensive free "previews" of the material, allowing children to see graphic sexual and violent images without having to produce a credit card.[54] Therefore, via the Internet, children can freely access materials which both federal and state laws would prevent them from obtaining at retail stores.[55] Even though many pornographic sites have disclaimers warning users that the material posted contains graphic nudity and sexually explicit images, these disclaimers "are about as effective as constructing a retaining wall out of tissue paper."[56] Additionally, because the Internet lacks a central place at which Internet communications may be monitored, there is no effective way to hold people accountable for the material they post.[57]

Numerous international issues also arise when attempting to regulate child access to Internet pornography.[58] It is estimated that over forty percent of the content on the Internet originates from foreign Web sites and it is unknown what portion of that figure is pornography.[59] Therefore, domestic mandates alone will not prevent pornographic material on the Internet from finding a child audience.[60] Furthermore, effective international regulation of the Internet is problematic because nations differ on what Internet

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mechanism for establishing the age of users who may gain access to indecent material...." Loundy, *supra* note 17, at 1127. "A ten year old can navigate the Web with the same ease as an adult. If a person has access to a computer and a modem, they can get on-line and retrieve any information they can find, regardless of their age." Drever, *supra* note 40, at 665-66.

54 *See* Istook, *supra* note 1, at 22. "Without requiring the use of a credit card to access information, which for some is prohibitively expensive, a person who posts material on the Internet can never be sure that no minor will access that information." Simon, *supra* note 17, at 1043.

55 *See* Simon, *supra* note 17, at 1027.

56 Istook, *supra* note 1, at 22. A child seeking pornography on the Internet is not likely to be deterred by a mere disclaimer stating that the material is only appropriate for adults. *See* Telephone Interview with Staff Member, Senator John McCain's office (Feb. 1999).

57 *See* Simon, *supra* note 17, at 1043. In fact, some commentators argue that it would not be fair to hold individuals or organizations accountable for what they post on the Internet because "[o]nce a person places information on a Web page or bulletin board, that person has little control over, or knowledge of, who gains access to it." *See id.*

58 *See* Steven M. Hanley, *International Internet Regulation: A Multinational Approach*, 16 J. MARSHALL J. COMPUTER & INFO. L. 997, 997-99 (1998).

59 *See* H.R. REP. NO. 105-775, at 19 (1998).

60 *See id.*

content should be regulated and because conventional principles of jurisdiction are difficult to apply on the Internet.[61]

Although no international law presently exists governing the Internet, past international efforts to enact global communications legislation have been successful.[62] However, because many nations disagree on basic policy, cooperative international regulation of the Internet has not yet been embraced.[63] For example, countries that support free expression will approach regulation differently then countries that are more interested in protecting "societal values".[64]

C. Internet Filtering Software

Many commentators have compared the Internet to a "giant information funnel."[65] Arguably, the easiest place to intercept objectionable content on the Internet would be at the funnel's narrow end (i.e. at the user's computer)[66] because Internet data communications travel in random pathways from network to network before reaching the user's computer.[67] Various types of Internet filtering software have been designed to accomplish this task.[68] Filtering software can be installed directly on an individual user's computer.[69] However, it is becoming more common for *entire networks* to filter out objectionable content, thereby keeping objectionable material from reaching any of the network's users.[70] Moreover, many users of the Internet connect filtering software

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61 *See* Hanley, *supra* note 58, at 999. Different countries have different standards for offending content. *See id.* at 1003-1006. For example, while the United States is attempting to regulate "content which is harmful to children," the Singapore government is attempting to regulate "disturbing information." *See id.* at 1006; *see also* Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) (discussing issues regarding jurisdiction and the Internet).

62 *See* Hanley, *supra* note 58, at 1009. For example, international law is in place that regulates telephone and satellite networks. *See id.*

63 *See* Hanley, *supra* note 58, at 1011.

64 *See* Hanley, *supra* note 58, at 1011.

65 Sernovitz, *supra* note 26, at 42.

66 *See* Sernovitz, *supra* note 26.

67 *See* Sernovitz, *supra* note 26.

68 *See Hearings on Internet Indecency Before the Senate Comm. on Commerce, Science and Transportation*, 105th Cong. 1, 4-5 (Feb. 10, 1998) (statement of Senator of Conrad Burns).

69 *See* H.R. Report No. 105-775, at 18 (1998).

70 *See id.*

directly to their Internet search engine.[71]

There are currently four types of filtering software available.[72] First, some types of filtering software block Web sites based on their URL address.[73] Other filtering software blocks content based on certain words used in conjunction with an objectionable site.[74] Third, some software filters by blocking all sites except those which

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71 *See* Whitfield, *supra* note 40, at 3.

72 *See Filtering Facts: How Filtering Works* (visited Mar. 1, 1999) <http://filteringfact.org/howfilt.htm>. Collectively, these four types of filtering are often referred to as either inclusive or exclusive. *See* Drever, *supra* note 40, at 677-78. Inclusive filters are those filters which initially block all Internet content, but then allow material which the user has specified as desirable. *See id.* at 677. It is argued that this type of filtering is appropriate for the classroom because teachers can narrowly tailor the available information to closely parallel their lesson plans. *See id.* By analogy, when a teacher selects a singular textbook for a classroom, that teacher is not expected to allow students access to other existing books. *See id.* Students must use the textbook that the teacher selects. *See id.* In other words, the Internet medium does not decide what information is available to the students; the teacher decides. *See id.* at 677-78. In comparison, exclusive filters are those which initially allow all information but then block out specified undesirable information. *See* Dobeus, *supra* note 40, at 678. This type of filtering may also be appropriate for the classroom setting. *See id.* For example, inclusive filtering may be appropriate for a biology class, while exclusive filtering may be appropriate for a speech or creative writing class. *See id.*

73 *See id.* This is the preferred method of filtering. *See id.* This type of filtering comes equipped with a list of pre-selected objectionable sites. *See id.* These types of programs also place the objectionable sites in such categories as "Sex Acts," "Full Nudity," "Drug Use," and "Profanity." *See id.* This method of filtering has been described as methodically accurate, because the sites are usually hand-picked by an editor. *See id.*

74 *See id.* This type of filtering software blocks access to sites which contain a list of pre-selected objectionable words. *See id.* Most early filters relied on this method of filtering, which contributed to the "bad reputation" of filters. *See id.* Often, this type of filter would filter out sites that contained objectionable words in *any* context. *See id.* For example, education sites that discussed issues such as breast cancer would be filtered out, because the site would contain the word breast. *See id.* Also, a site belonging to the city of Middlesex, England would be filtered, because the word, "Middlesex" contains an arrangement of consecutive letters that spells out "sex." *See* Istook, *supra* note 1, at 24. In addition, keyword filters are not capable of blocking images. *See* David Loundy, *E-Law: Screening for Legal Pitfalls*, 3 NO. 2 CYBERSPACE LAW. 25 (1998).

Another problem with this type of filtering mechanism is that the list of keywords is often over inclusive and thus, many perfectly harmless sites get blocked. *See id.* at 1-2. For example, one Internet filter blocks out sites which use the word "couple." *See id.* Consequently, this filter blocks out access to sites such as the White House Web site, because this site uses the word couple to describe Mr. and Mrs. Clinton. *See id.* Due to its deficiencies, these types of filters are no longer used in libraries. *See Filtering Facts: How Filtering Works* (visited Mar. 1, 1999) <http://filteringfact.org/howfilt.htm>.

it has been told are not objectionable.[75] Finally, some block entire categories of material such as newsgroups or chat rooms.[76] New advances in technology are constantly improving on filtering software, and new types of filtering products are currently in the process of creation.[77] Internet filtering software is widely available at low cost and can keep pace with both domestic and foreign Web sites.[78]

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75 *See id.* These filters come equipped with a pre-selected list of sites which are considered to be non-objectionable. *See id.* These lists are commonly referred to as "allow lists" or "white lists." *See id.* This particular method of blocking is close to 100% accurate, however it does not facilitate access to scores of useful, non-objectional sites. *See id.* This is because the editors have not yet completed the tedious task of discovering all non-objectionable sites. *See id.* It is argued that this is the most promising type of filtering software for the future, however it is recommended for use only in situations in which it is absolutely necessary to ensure 100% blockage. *See id.* It has been suggested that this type of filtering be used with younger children. *See id.*

76 *See* Filtering Facts: How Filtering Works (visited March 1, 1999) <http://filteringfact.org/howfilt.htm>. These filters are programmed to block out entire sections of the Internet. *See id.* For example, they can deny all access to newsgroups, chat rooms, e-mail, and/or games. *See id.* Libraries often utilize this type of filtering as a matter of resource allocation as opposed to a matter of filtering objectionable content. *See id.* Many libraries feel that games and talking to electronic "pen pals" are not a proper allocation of library resources. *See id.*

77 *See* H.R. REP. NO. 105-775 at 19 (1998). For example, there is new filtering software in development that doesn't require a pre-selected list of sites. *See id.* Such software first analyzes the content of material received by the user's computer and then blocks out objectionable content. *See id.*

78 *See* Burns, *supra* note 68, at 4-5. Filtering software may be purchased for anywhere between $14.95 and $199.50. *See* H.R. REP. NO. 105-775, at 19 (1998). Filtering software to be implemented for multiple users, such as in the library or schools, could cost anywhere between $1,050 and $4,250. *See id.* at 19-20. Further costs are incurred if the user of the filtering software purchases updates to the software. *See id.* at 20.

As of July 28, 1998, there were over forty-nine different brands of filtering software available. *See Microweb* (visited Jan. 29, 1999) <http://microweb.com.pepsite/software/filters.html>. The filters can only be used for certain operating systems such as Windows 95 or Mac OS. *See id.* However, many can be used for multiple operating systems. *See id.* Each filter possesses various features ranging from blocking Internet content or extended usage of the Internet, to reporting log sheets of the what, where and when of a child's time on the Internet. *See id.* As of July 28, 1998, the available filters included "AUP Action Tools," "Bess, The Internet Retriever," "Chi-Brow 2.0," "Click and Browse Jr. '98," "CyberPatrol 3.3," "CyberSitter '97 v.8," "CyberSentinel 1.5," "CyberSnoop 3.0," "Dick Tracy," "Ed View," "Email for Kids," "Family Cam," "Family Connect," "GaurdiaNet v 3.0," "Gulliver's Guardian, Internet Suite," "Hexabit Junior 2.0," "I-Gear," "Internet Filter Suite 1.0," "Internet Watchdog," "¡Way Patrol," "Kid Desk Internet Safe," "Kid Web," "KiddoNet," "Mama Bear," "Microsoft Plus For Kids," "Net Nanny 3.1," "Net-Rated," "Net Shepherd 2.0," "Planet Web Browser," "Prudence," "Safe Search,"

Most filtering software is highly customizable.[79] Filters commonly classify objectionable materials into categories such as "profanity," "sexual content," or "violence."[80] These classifications are created to allow the user to filter the particular material that he or she finds objectionable for children.[81] It is important to note that users must acquire updates for most filtering software because previously undiscovered objectionable sites are constantly being found by the authors of the software.[82] This is due to both the large number of "hidden" sites as well as the fact that new sites are constantly being created.[83] Most filtering software companies make these updates readily available.[84]

"Safe-Net Suite," "Safe Surf," "SentryCam," "Smart Alex ICU," "Smart Filter," "SOS Internet Filter," "Surf Monkey," "SurfWatch 3.0," "Surfin' Annette," "Time's Up," "Triple Exposure," "Web Prints," "Web Chaperone 1.1," "WebLoc," "WebSense," "WinGaurdian," "WinWhatWhere," "WizGuard," and "X-Stop v. 3.01." *See id.*

79 *See* Sernovitz, *supra* note 26, at 42. School administrators and parents can modify the list of keywords and Web site addresses which the filter will either block or allow. *See id.* Thus, local school boards can cater the filter to block sites that are objectionable to the community, while individual teachers can unblock sites that help them teach a particular lesson. *See id.* at 42-43. For example, N2HS, a large provider of filtering software to schools, is highly customizable. *See Hearings on Legislative Proposals to Protect Children from Inappropriate Materials on the Internet Before the House Subcommittee on Telecommunications, Trade, and Consumer Protection*, 105th Cong. 1, 64 (Sept. 11, 1998) (testimony of Peter Nickerson, Chief Executive Officer, N2H2). The user can pick out categories of information to be blocked. *See id.* In addition, the user can invoke exceptions for educational sites, as in adding or subtracting his or her own sites to the blocking list. *See id.* Furthermore, different filtering schemes can be implemented for different times of the day, and at the option of the user, updates to the block list can occur automatically on a daily basis. *See id.*

80 *See Hearing on Protecting Children from Obscenity on the Internet Before the House Comm. on Commerce*, 105th Cong. 1, 2 (Sept. 11, 1998). Other categories may include hate, sexually explicit, violent, or religious speech, criminal activity, and sports and entertainment. *See* Whitfield, *supra* note 41, at 2.

81 *See* Loundy, *supra* note 17, at 2.

82 *See* Loundy, *supra* note 17, at 1-2.

83 *See* Loundy, *supra* note 17, at 1-2. It is estimated that over 200 new pornographic Web sites come into existence every day. *See id.* at 2.

84 *See* Loundy, *supra* note 17, at 2.

III. Legislative History

A. The Necessity For Legislation

As noted *supra*, there is currently no limit to what individuals may put on the Internet.[85] Although proper parental supervision is the best protection for children against "harmful" or "dangerous" material on the Internet, parents cannot oversee their children at all times, particularly while the children are at school or the library.[86] As a result, child access to indecent material on the Internet has increasingly become a problem over the past several years[87] and adolescents between the ages of twelve and seventeen have recently been cited as one of the largest consumers of "adult-oriented" material on the Internet.[88] There is nationwide concern about this problem among parents and educators.[89]

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85 *See* S. REP. NO. 105-226, at 2 (1998). "Anyone in the world – companies, governments, organizations, and individuals – can publish material on the Internet. An ISP links you to these sites, but it can't control what is on them. It's up to individuals to make sure that they behave in a way that's safe and appropriate." Lawrence J. Magrid, *Child Safety on The Information Highway* (visited Mar. 1, 1999) <http://www.safekids.com/child_safety.htm>.

86 *See* S. REP. NO. 105-226, at 3 (1998); *see also* 144 CONG. REC. S516, S518.

87 *See Letters to the Editor*, WASH. POST, Feb. 18, 1999, at V02. Hundreds of incidents have been cited nationwide whereby pornography was downloaded in libraries. *See id.* In a recent California case on the issue of Internet filtering in public libraries, the plaintiff, Kathleen R., alleged that her 12-year-old son used the local public library's computer to download pornographic images from the Internet on ten different occasions. *See ACLU Backs Effort To Dismiss Library Filtering Suit*, 1. NO. 12 ANDREWS TELECOMM. INDUS. LITIG. REP. 10 (Aug. 1998).

88 *See* Istook, *supra* note 1, at 22.

89 *See* Cleaver, *supra* note 2, at 1

> Each week we receive telephone calls and letters from parents and other concerned citizens horrified by what children are encountering online. There is a growing sense of frustration that this wonderful new technology, with all of its promise for education, commerce, and communication – especially for the next generation – is being misappropriated by those who would exploit the Internet's capabilities.

Id. In a letter written to Senator Daniel Coats (R-IN), a group of teachers expressed concern over the problem of child access in their school to inappropriate materials on the Internet. *See Hearings on Internet Indecency Before the House Subcomm. on Telecomm., Trade, and Consumer Protection*, 105th Cong. 1, 7 (Sept. 11, 1998) (statement of Senator Dan Coats, Indiana). The letter reads, in part:

This problem is compounded by the fact that "if a child wants to find pornography online, it is far from difficult."[90] In fact, "the advent of search engines has made it even easier for inexperienced users to find information and Web sites that interest them."[91] Even where an adolescent is not actively seeking out this material, he or she may very easily come across it "by accident."[92] For example, House Representative Ernest Istook (R-OK 5th Dist.), recently testified before Congress that an intern in his office mistakenly typed in "www.whitehouse.com" instead of "www.whitehouse.gov" in an attempt to download the text of a Presidential speech.[93] In his words, "[h]er screen suddenly showed a sexually-provocative image, standing with a bullwhip, with little White House Web site flags waving, and text inviting the user to 'interview' the 'intern of the week.'"[94] As the Congressman explained, "it was a porn site which

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> We are all working hard to make it possible for the students . . . to have Internet exposure. Yet, Senator, how are we supposed to know that if you type in Fiesta on the Internet, you may get a bare chested woman posing in a suggestive manner? We have seen pictures on the Internet in our school library of a man and woman participating in oral sex. We have also seen tattooed penises and testicles. If a child wants to look up a type of doll that she has, she can type in water baby. One of her choices is a site with pictures of adult women, naked except for a wet diaper, or a woman pictured from behind, urinating in her underpants.

Id.

90 Telephone Interview with Staff Member, Senator John McCain's office (Feb. 1999).

91 Drever, *supra* note 40, at 2 n.6. In addition, pornographic material is "created, named, and posted in the same manner as non-sexual material. [Therefore, a] search engine accidentally may retrieve sexually explicit material through an imprecise search." Simon, *supra* note 17, at 1027.

92 144 CONG. REC. S8611 (1998). A national survey conducted in 1997 revealed that 22% of the surveyed schoolchildren had unintentionally downloaded pornography on the Internet while in school and 25% had done so while at a public library. *See id.* "[C]hildren and adolescents are especially curious, and therefore vulnerable . . . even if they don't go looking for obscenity on the Internet, it comes looking for them." Istook, *supra* note 1, at 23. However, in ACLU v. Reno, the Court specifically stated that accidental encounters with indecent content on the Internet "rarely occur" and that Internet users must actively seek out this content. *See ACLU v. Reno*, 929 F. Supp. 824, 844-45 (E.D. Pa. 1996).

93 *See* Istook, *supra* note 1, at 23.

94 Istook, *supra* note 1, at 23. Several parents, teachers, and librarians have cited similar stories. 144 CONG. REC. S8611, S8612 (1998). For example, one parent testified before the Senate that her fifteen year old daughter had accidentally typed the address "www.infoseel.com" instead of "www.infoseek.com" and was "traumatized" and "nauseated" at the images that instantly downloaded on to her computer screen.

deliberately had created a URL address mimicking the legitimate White House Web site, knowing that it would be accessed by many people, who it hoped to lure in further."[95] The incident that Congressman Istook relayed is not an isolated incident. In fact, "one of the biggest concerns about pornography on the Internet is the way that it is often hidden behind seemingly innocent sites."[96]

Because Internet searches take only a few seconds, they can "easily be executed by a student in a classroom while a teacher is helping another student or is in a different part of the room. The student can easily exit the site in a matter of seconds if an authority figure approaches."[97] Thus, the "tap on the shoulder" method[98] that

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See id. The first "show[ed] anal intercourse with the text 'Free Live Fucking, Now With Sound,'" and the second was "a gynecological close-up with the text, 'hot hole, enter free.'" *See id.*

95 Istook, *supra* note 1, at 23.

96 Joanna Hunter, *Shocks Lurk Behind 'Innocent' Sites*, THE TIMES OF LONDON, Feb. 10, 1999, at 12. Often, creators of "adult" Web sites "thrive" by using URL addresses that are very similar to other popular sites. *See* Frank James, *Internet Pornography Poses Classroom Problem*, BUFF. NEWS, Feb. 21, 1999, at A10. One woman, relaying her experience to a newspaper reporter, stated:

> My daughter asked me to investigate a number of sites related to her favorite cartoon character. I clicked on one labeled with the cartoon character's name, it displayed semi-hard pornography. I closed the link. The site then re-opened itself and each time I tried to exit it took charge of my PC and continued to download its material on to my computer. Eventually, I had to reboot the computer in order to stop it.

Joanna Hunter, *Shocks Lurk Behind 'Innocent' Sites*, THE TIMES OF LONDON, Feb. 10, 1999, at 12.

Many Web sites also intentionally attach misleading, often benign keywords to their sites, leading anyone, including children to "stumble on to their sites." *See id.* "Simple word searches such as cheerleading[,] school, animal (sic) enable children to access Web sites that are very sexually explicit." *See Hearings on Internet Indecency Before the Senate Commerce Comm.*, 105th Cong. 1, 16 (Feb. 10, 1998) (statement of anonymous police detective). Even the word "teen-ager" "has been transformed into a dirty [word]" by the Internet. *See* James, *supra* note 96, at A10 (citing Jim O'Halloran, marketing director at N2H2, a Seattle filtering technology company). Another advocate of implementing legislation to deal with this issue testified before Congress that "a career-minded child can innocently select a link to a page called 'Working Men' and be confronted with men 'working together' without any clothes." *See* testimony of Cathy Ceaver, *supra* note 2, at 3.

97 Drever, *supra* note 40, at 2 n.6.

98 The "tap on the shoulder" method refers to the practice of many libraries and schools of placing Internet computer stations in an area where the screens can be viewed by librarians and school teachers at all times so that when a child is engaged in accessing indecent materials, the teacher or librarian can immediately tell the child to

many teachers and librarians currently employ to keep children from accessing inappropriate materials on the Internet is, arguably, "almost completely ineffective."[99]

B. *Federal Initiatives Prior to CIPA*

The first broad federal legislation to deal with the issue of protecting children from harmful materials on the Internet was the Communications Decency Act of 1996 ("CDA").[100] The CDA

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stop. *See* David Burt, *'Tap on Shoulder'" Policies Widespread in Public Libraries* (visited Mar. 1, 1999) <http:www.filteringfacts.org/tapon.htm>. Studies conducted in Ohio and Oregon found that 73% of the public libraries in Ohio and 63% of the Oregon public libraries use "tap on the shoulder" methods as their primary means for controlling child access to Internet content. *See id; see also infra* Part IVC.

99 *See* Telephone Interview with Staff Member, Senator John McCain's office (Feb. 1999). There are hundreds of nationwide complaints from parents about their children being exposed to indecent materials on the Internet at public libraries which employ these "tap on the shoulder" policies. *See Reports of Pornography in Libraries* (visited Mar. 1, 1999) <http://www.filteringfacts.org/kidlib.htm>. "Filtering Facts," an organization founded by David Burt, has been continuously compiling a report of nationwide parental complaints of this nature. *See id.* To date, the list includes complaints from: Battle Ground Public Library in Washington state; Brevard County Public Library in Florida; Brielle Public Library in New Jersey; Boston Public Library in Massachusetts; Cascade Public Library in Washington; Cedar Rapids Public Library in Iowa; Coldwater Branch District Library in Michigan; DeKalb County Public Library in Georgia; Volusia County Public Library in Florida; Farmington Public Library in Michigan; Goldendale Public Library in Washington; Gwinnett County Public Library in Georgia; Hillsborough Public Library in Florida; Iowa City Public Library in Iowa; Jacksonville Public Library in Florida; Johnson County Public Library in Kansas; Los Angeles Public Library in California; Melbourne Public Library in Florida; Mira Mesa Public Library in California; Monroe County Public Library in Michigan; Multnomah County Public Library in Oregon; National City Public Library in California; New Rochelle Public Library in New York; New Smyrna Beach Public Library in Florida; Oak Harbor Public Library in Washington; Phoenix Public Library in Arizona; Ridgefield Public Library in Washington; Roanoke Public Library in Virginia; St. Charles City-County Public Library in Missouri; St. Paul Public Library in Minnesota; San Diego Public Library in California; Santa Clara County Public Library in California; Seattle Public Library in Washington; Seminole County Public Library in Florida; Staten Island Public Library in New York; Tumwater Public Library in Washington; Temecula Public Library in California; Vancouver Public Library in Washington; Vigo County Public Library in Indiana; Vista Public Library in California; Washougal Public Library in Washington; White Salmon Public Library in Washington; and Woodland Public Library in Washington. *See id.*

100 *See generally* 47 U.S.C. §§ 223(a) through 223(h). Signed into law on Feb. 8, 1996, the CDA was enacted as Title V of the Telecommunications Act of 1996 (hereinafter "Telecom Act"), and codified as part of the Communications Act of 1934. *See id.*

The Telecom Act, PUB. L. NO. 104-104, § 502, 110 Stat. 56, was a massive

criminalized the knowing transmission of obscene or indecent messages to any recipient under 18 years of age,[101] as well as the sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age.[102]

On the same day that the CDA was signed into law, a group of plaintiffs led by the ACLU[103] brought suit in federal district court

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legislative initiative enacted to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition..." S. REP. NO. 104-23, at 1-2 (1996). The Telecom Act was meant to address several telecommunications issues, including: (1) new telephone companies' entry in to long distance service; (2) telephone company entry into cable; (3) local telephone service competition; (4) the entry of electric utility companies into the telecommunications market; (5) the rights of broadcasters to provide services; and (6) universal telephone service. *See id.* Title V of the Telecom Act dealt with the transmission of "obscene" and "indecent" materials by means of various telecommunications technologies. *See id.* at 9. More specifically, Title V "modernizes the protections in the 1934 Act against obscene, lewd, indecent, and harassing use" of various telecommunications facilities. *See id.*

The CDA was not, however, Congress's first attempt to address child access to pornography on the Internet. In 1995, the "Protection of Children from Computer Pornography Act of 1995" ("1995 Bill") was considered in the Senate. *See generally* Protection of Children from Computer Pornography Act of 1995, S. 892, 104th Cong. (1995). Sponsored by Senator Charles Grassley (R-IA) and cosponsored by Senators Robert Dole (R-KS), Daniel Coats (R-IN), Mitch McConnell (R-KY), Richard Shelby (R-AL), Donald Nickles (R-OK), and Orrin Hatch (R-UT), the 1995 Bill created broad criminal liability for a large variety of commercial and non-commercial entities, such as on-line service providers, full service network providers, schools, libraries, and businesses when those entities transmitted or displayed indecent materials to minors. *See id.* Although similar to the CDA, the 1995 Bill was much broader in scope than the CDA. *See id.* It never progressed beyond the Senate Judiciary Committee and thus was never fully considered by either house of Congress and never passed. Congress also considered several other alternatives to filtering. *See infra* Part IVC for a discussion of these alternatives and others.

101 *See* 47 U.S.C. § 223(a).

102 *See id.* § 223(d). The CDA was enacted in response to Congress's findings that "[t]he information superhighway *should* be safe for families and children," and there had been "an increasing number of published reports of inappropriate uses of telecommunications technologies to transmit pornography [and] engage children in inappropriate adult contact...." S. REP. NO. 104-23, at 59 (1995). Congress also provided two affirmative defenses in the CDA for: (1) those who take "good faith, . . . effective . . . actions" to restrict minor's access to the prohibited communications, *see* 47 U.S.C. § 223(e)(5)(A), and (2) those who restrict access to minors by requiring designated forms of proof of age, such as an adult identification number or a verified credit card. *See id.* § 223(e)(5)(B).

103 The other plaintiffs in the suit included the following organizations and individuals: Human Rights Watch; Electronic Privacy Information Center; Electronic Frontier Foundation; Journalism Education Association; Computer Professionals for

challenging the constitutionality of the legislation.[104] The CDA was ultimately struck down by the United States Supreme Court on First Amendment "overbreadth" grounds[105] in the landmark case of *Reno v. ACLU*.[106] The Court concluded that the CDA's provisions precluded too much adult access to constitutionally protected speech.[107] This decision is significant because it places a substantial

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Social Responsibility; National Writers Union, Clarinet Communications Corp.; Institute for Global Communications; Stop Prisoner Rape; AIDS Education Global Information System; Bibliobytes; Queer Resources Directory; Critical Path AIDS Project, Inc.; Wildcat Press, Inc.; Declan McCullough d.b.a. Justice on Campus; Brock Meeks d.b.a. Cyberwire Dispatch; John Troyer d.b.a. The Safer Sex Page; Jonathan Wallace d.b.a. The Ethical Spectacle; and Planned Parenthood Federation of America, Inc. *See* ACLU v. Reno, 929 F. Supp. 824, 827 n.2 (E.D. Pa. 1996), *aff'd* 117 S. Ct. 2329 (1997).

104 *See* ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd* 117 S. Ct. 2329 (1997). The suit was brought in the federal district court for the Eastern District of Pennsylvania. The focus of the plaintiffs' constitutional challenge was based on both First Amendment free speech grounds and Fifth Amendment due process grounds. *See Reno*, 929 F. Supp. at 849. The plaintiffs also requested a preliminary injunction against enforcement of the CDA. *See id.* at 825. The named defendants were the United States Attorney General Janet Reno and the United States Department of Justice. *See id* at 826.

A three-judge panel, made up of Chief Circuit Court Judge Sloviter, and District Court Judges Buckwalter and Dalzell, granted the preliminary injunction and eventually found provisions of the CDA unconstitutional, based on First Amendment grounds. *See id.* Specifically, the Court found that the provisions of the CDA that applied to "indecent" material were facially unconstitutional under the First Amendment. *See id.* The decision was eventually appealed to the United States Supreme Court. *See Reno*, 117 S. Ct. at 2329.

105 *See* William Bennett Turner, *Federal and State Attempts to Regulate the Internet After Reno v. ACLU*, 520 PLI/PAT 595, 597 (Second Annual Internet Law Institute 1998).

106 *See* Reno v. ACLU, 117 S. Ct. 2329 (1997).

107 *See* Kathleen M. Sullivan, *First Amendment Intermediaries in Cyberspace*, 45 U.C.L.A. L. REV. 1653, 1674 (1998). The regulation applied to "indecent" and "patently offensive" speech as well as to "obscenity." *See* Turner, *supra* note 105, at 597. Although "obscenity" is afforded no First Amendment protection, speech that is deemed "indecent" is protected under the First Amendment free speech dictates. *See Reno*, 117 S. Ct. at 2351. Therefore, since the provisions of the CDA sought to regulate "indecent" speech as well as "obscene" speech, it was presumptively invalid and would have to pass strict scrutiny in order to be upheld. *See id.* The Court found that it did not. *See id.*

The Court's decision focused on the government's contention that the "harmful to minors" standard that was adopted in the CDA was identical to the standard upheld by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968). *See id.* The Supreme Court in *Reno* distinguished the statute at issue in *Ginsberg* from the CDA on four bases. *See* Coats, *supra* note 89, at 3. First, the Court found that the statute in *Ginsberg* did not prohibit parents from purchasing the "harmful" materials for their

hurdle on any future Congressional efforts to legislate this matter; any future legislation on this issue will not pass constitutional muster unless it is narrowly-drawn enough to meet the standard set forth in *Reno*.[108]

After the Supreme Court struck down the CDA as unconstitutional, Congress looked for new ways to deal with the problem of child access to Internet pornography, yet remain within the confines of the Supreme Court's interpretation of the Constitution in *Reno*.[109] On November 12, 1998, Congress passed the "Child On-Line Protection Act" ("COPA").[110] COPA imposed

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children if they wanted to. *See id.* In contrast, the CDA did not include protections for parents who wanted to purchase or access the materials for their children. *See id.* Second, the CDA was not limited to "commercial transactions" only; the statute at issue in *Ginsberg* was. *See id.* Third, the standard upheld in *Ginsberg* included a requirement that the material be "without social importance to minors", and "lack serious literary, artistic, political, or scientific value." *See id.* The "indecent speech" standard articulated in the CDA did not include either of these requirements. *See id.* Fourth, the *Ginsberg* statute defined a "minor" as a person under 17 years of age. *See id.* The provisions of the CDA applied to "persons under the age of 18." *See id.*

108 *See* Telephone Interview with Staff Member, Senator John McCain's office (1999). *"Reno* has made it a lot tougher to draft legislation that will both effectively address this problem and simultaneously get past the courts." *Id.*

109 *See generally* H.R. REP. NO. 105-775 (1998); *see also generally* S. REP. NO. 105-226 (1998).

110 *See* United States Congress, *Bill Summary & Status for the 106th Congress for H.R. 4328.* (visited Mar. 1, 1999) <http://thomas.loc.gov/>. COPA was passed as part of the omnibus Appropriations bill with the "Internet Tax Freedom Act." *See* Robin Peek, *Taming the Internet in Three Acts,* INFORMATION TODAY, Jan. 1, 1999, at A10; *see also* Appropriations Bill FY99, Pub. L. No. 105-277 (1998). COPA was initially introduced in the House by Representative Michael G. Oxley (R-11th Dist. NY) on April 30, 1998. *See* United States Congress, *Bill Summary & Status for the 105th Congress for H.R. 3783.* (visited Mar. 1, 1999) <http://thomas.loc.gov/>. Introduced as H.R.3783, COPA had several other cosponsors, including: Robert Aderholt (R-AL 4th Dist.); Roscoe Bartlett (R-MD 6th Dist.); Joe Barton (R-TX 6th Dist.); Michael Bilirakis (R-FL 9th Dist.); Roy Blunt (R-MO 7th Dist.); Richard Burr (R-NC 5th Dist.); Dan Burton (R-IN 6th Dist.); Steve Buyer (R-IN 5th Dist.); Sonny Callahan (R-AL 1st Dist.); Ken Calvert (R-CA 43rd Dist.); Jon Christensen (R-NE 2nd Dist.); Barbara Cubin (R-WY); Dave Danner (R-FL 15th Dist.); Nathan Deal (R-GA 9th Dist.); John Doolittle (R-CA 4th Dist.); Phil English (R-PA 21st Dist.); Mark Foley (R-FL 16th Dist.); Jon Fox (R-PA 13th Dist.); Bob Franks (R-NJ 7th Dist.); Elizabeth Furse (D-OR 1st Dist.); Greg Ganske (R-IA 4th Dist.); Paul Gillmor (R-OH 5th Dist.); Benjamin Gilman (R-NY 20th Dist.); Bart Gordon (D-TN 6th Dist.); James C. Greenwood (R-PA 8th Dist.); Ralph Hall (D-TX 4th Dist.); David Hobson (R-OH 7th Dist.); Peter Hoekstra (R-MI 2nd Dist.); Asa Hutchinson (R-AR 3rd Dist.); Ernest Istook (R-OK 5th Dist.); Nancy Johnson (R-CT 6th Dist.); John Kasich (R-OH 12th Dist.); Sue Kelly (R-NY 19th Dist.); Jay Kim (R-CA 41st Dist.); Steve Largent (R-OK 1st Dist.); Rick Lazio (R-NY 2nd Dist.); John McHugh (R-NY 24th Dist.); Thomas

both civil and criminal penalties on any person who, by use of the Web, knowingly communicated, for "commercial purposes," material deemed "harmful to minors" unless that person also made a "good faith effort to restrict access by minors."[111] Although Congress had clearly intended to avoid the constitutional defects that were inherent in the CDA,[112] COPA was challenged in federal court on constitutional grounds immediately upon its passage into law.[113] The ACLU again led a large group of interested plaintiffs[114] in a suit challenging the provisions of COPA on First and Fifth Amendment grounds.[115] The U.S. District Court for the Eastern

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Manton (D-NY 14th Dist.); Jack Metcalf (R-WA 2nd Dist.); Sue Myrick (R-NC 9th Dist.); George Nethercutt (R-WA 5th Dist.); Mark Neumann (R-WI 1st Dist.); Charlie Norwood (R-GA 10th Dist.); Michael Pappas (R-NJ 12th Dist.); Bill Paxon (R-NY 27th Dist.); Collin Peterson (D-MN 7th Dist.); Charles W. "Chip" Pickering (R-MS 3rd Dist.); Joseph Pitts (R-PA 16th Dist.); Max Sandlin (D-TX 1st Dist.); Pete Sessions (R-TX 5th Dist.); Lamar Smith (R-TX 21st Dist.); Linda Smith (R-WA 3rd Dist.); Vince Snowbarger (R-KS 3rd Dist.); Gerald Solomon (R-NY 22nd Dist.); Mark Souder (R-IN 4th Dist.); Cliff Stearns (R-FL 6th Dist.); Fred Upton (R-MI 6th Dist.); J.C. Watts, Jr. (R-OK 4th Dist.); Dave Weldon (R-FL 15th Dist.); Jerry Weller (R-IL 11th Dist.); Ed Whitfield (R-KY 1st Dist.); Heather Wilson (R-NM 1st Dist.). *See id.* at 1-2. COPA was referred to the House Committee on Commerce the same day it was introduced and then to the Subcommittee on Telecommunications, Trade, and Consumer Protection on May 8, 1998. *See id.* at 1. COPA passed the House on October 7, 1998, and was received in the Senate the following day. *See id.* at 2. It eventually passed the Senate on October 29, 1998, and was signed into law on November 2, 1998. *See id.*

111 *See* H.R. REP. NO. 105-775, at 7 (1998). Congress included an affirmative defense against prosecution in COPA for those who would restrict child access to "material that is harmful to minors" by "requiring [the] use of a credit card, debit account, adult access code, or adult personal identification number; by accepting a digital certificate that verifies age; or by any other reasonable measures that are feasible under available technology." Reno, 31 F. Supp. 2d at 478.

112 *See* H.R. REP. NO. 105-775, at 7 (1998). COPA was "carefully drafted to respond to the Supreme Court's decision in Reno v. ACLU...." *Id.*

113 *See id.* at 4.

114 The other plaintiffs included "a diverse group of individuals, entities, and organizations suing on behalf of their members, who are speakers, content providers, and ordinary users of the Web." Reno, 31 F. Supp. 2d at 485. These included groups, such as the American Booksellers Foundation for Free Expression, the Electronic Frontier Foundation, the Internet Content Coalition, CNET, OBGYN.net, Riotgrrl, Blackstripe, Philadelphia Gay News, the Electronic Privacy Information Center, Lawrence Ferlinghetti of City Lights Bookstore, and Condomania. *See id* at 480.

115 *See* ACLU v. Reno, 31 F. Supp. 2d at 477. Specifically, the plaintiffs attacked COPA on the following grounds:

> (1) [T]hat it is invalid on its face and as applied to them under the First Amendment for burdening speech that is constitutionally protected for adults; (2) that it is invalid on its face for violating the First Amendment rights of minors; and (3) that it is

District of Pennsylvania granted the plaintiffs' motion for a preliminary injunction against enforcement of COPA and, ultimately, struck it down on First Amendment grounds.[116] The case, now termed "*Reno II*", was appealed and is set to be heard before the Third Circuit Court of Appeals on November 4, 1999.[117] Commentators believe that COPA will probably have the same fate as CDA.[118]

The "Children's Internet Protection Act of 1999" (CIPA)[119] is the latest Congressional effort to ensure some protections for children against harmful content on the Internet.[120] CIPA was introduced in the Unites States Senate by Senator John McCain (R-AZ) on January 19, 1999, and referred to the Commerce Committee the same day.[121] Currently, CIPA is awaiting a final vote[122] but, in the meantime, is expected to generate "a great deal of discussion in both houses."[123]

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unconstitutionally vague under the First and Fifth Amendments. *Id.*

116 In fact, seven hours before COPA was scheduled to take effect, Judge Lowell A. Reed, Jr. of the United States District Court for the Eastern District of Pennsylvania temporarily suspended enforcement of COPA. *See id.* The court found that, similar to the CDA, COPA was presumptively invalid and subject to strict scrutiny, because it was a content-based restriction on non-obscene speech. *See id.* at 495.

117 *See* ACLU Freedom Network: *ACLU v. Reno, Round 2* (visited Oct. 11, 1999) <http://www.aclu.org/features/f101698a.html>.

118 *See id.*

119 Children's Internet Protection Act of 1999, S. 97, 106th Cong. (1999).

120 This bill was originally introduced as S.1619, in the exact same form, in the 105th Congress on February 2, 1998. *See* United States Congress, *Bill Summary & Status for the 106th Congress for S. 97.* (visited Mar. 1, 1999) <http://thomas.loc.gov/>. Although after extensive committee hearings on the issues involved, S. 1619 passed in the Senate, no action was taken on it in the House before the conclusion of the legislative session. *See id.* It was then reintroduced as S. 97 in the 106th Congress. *See id.*

121 *See id.* (visited Oct. 1, 1999) <http://thomas.loc. gov/>. Committee hearings on CIPA were held on May 20, 1999. *See id.* On June 23, 1999, CIPA was "ordered to be reported with an amendment in the nature of a substitute favorably." *Id.* Senator John McCain reported CIPA to the Senate with the amendment on August 5, 1999. *See id.* Because the original date of submission for publication of this Note was July 15, 1999, this Note will focus on the provisions in the text of the original version of the bill. However, the amended version is substantively the same for the purposes of this Note. *See id*; *see also* Telephone interview with Staff Member, Senator John McCain's office (Oct. 13, 1999).

122 *See* Telephone interview with Staff Member, Senator John McCain's office (Oct. 13, 1999).

123 Telephone Interview with Staff Member, Senator John McCain's office (Feb.

IV. Analysis

A. Provisions of CIPA

The Children's Internet Protection Act of 1999 requires public libraries and elementary or secondary schools receiving federal subsidies for Internet access[124] (called the "e-rate subsidy") to use filtering technology to block children's Internet access to material deemed "harmful to minors."[125] Specifically, CIPA requires schools and libraries to submit a "certification" to the federal government stating that they have chosen a filtering software and the software is being utilized or will be utilized as soon as Internet access becomes available.[126] If the school or library fails to meet this requirement, it will be liable to repay "the full amount of all universal service it received."[127]

CIPA would allow local school districts and libraries the power to determine which filtering software to use.[128] If a library has more

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1999).

124 *See supra* note 41 for a description of the federal "e-rate" program under which schools and libraries receive federal discounts for Internet access.

125 *See* Children's Internet Protection Act of 1999, S. 97, 106th Cong. (1999). CIPA will be codified as an amendment to § 254 of the Communications Act of 1934, 47 U.S.C. § 254. *See generally id.*

126 *See* S. 97 at § (a)(1). Schools and libraries will not be eligible to receive the federal "e-rate" funding without first submitting this certification. *See id.* Further, the certification must be made "within 30 days of the passage of CIPA, or, if later, within 10 days of the date on which any computer with access to the Internet is first made available in the school or library for its intended use." *Id.* § (a)(4). If a library or school later ceases use of the filtering mechanism upon which their certification is based, it must notify the FCC within 10 days of the cessation. *See id.* § (a)(5)(A).

127 *See id.* § (a)(6)

128 *See id.* § (a)(7). CIPA states, in pertinent part, that "the determination of what material is to be deemed harmful to minors shall be made by the school, school board, library or other authority responsible for making the required certification." *Id.* CIPA also specifies that:

> [n]o agency or other instrumentality of the United States Government may: (A) establish criteria for making that determination; (B) review the determination made by the certifying school, school board, library or other authority; or (3) consider the criteria employed by the certifying school, school board, library, or other authority in the administration of [the e-rate program].

Id. This provision was included in reaction to Congress's determination that these types of decisions "must remain at the local level with those who best know their

than one computer with Internet access, it would only be required to install the filtering mechanism on one computer.[129] If a library only has one computer, it would not be required to install any filtering device as long as it certifies to the FCC that it "employs a reasonably effective alternative means to keep minors from accessing material on the Internet that is deemed to be harmful to minors."[130]

Proponents of CIPA argue that the bill is necessary to ensure some measure of protection for children against harmful Internet content, especially because the CDA and COPA have been made "virtually meaningless by the federal courts."[131] Several members of Congress, including proponents of the e-rate subsidy program, feel particularly responsible for remedying this problem because the federal e-rate subsidies were what allowed many public schools and libraries to install Internet access in the first place.[132]

Advocates of CIPA claim that there are three main reasons why the bill should withstand constitutional scrutiny, where the CDA and COPA were unable to. First, the requirement that filtering software be installed is not an absolute mandate.[133] Public schools and libraries are only required to comply with CIPA if they want to be able to receive the e-rate funding.[134] Second, CIPA does not

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students." *See* 144 Cong. Rec. S8595, S8611 (1998).

129 *See id.* § (a)(3)(A). This provision is included to avoid the problem of restricting too much adult access to constitutionally protected speech. *See* Telephone Interview with Staff Member, Senator John McCain's office (Feb. 1999).

130 *See id.* § (a)(3)(B). This provision is included to avoid the problem of restricting adult access in the library to "only that which is suitable for children." *See* Telephone Interview with Staff Member, Senator John McCain's office (Feb. 1999). Where a library only has one computer station, the librarian can employ several alternative means to effectively block child access to "harmful" Internet content. *See id.; see also infra* Part IVC for further discussion of some of the alternatives.

131 *See Reports of Pornography in Libraries* (visited Mar. 1, 1999) <http://www.filteringfacts.org/kidlib.htm>.

132 *See* Telephone Interview with Staff Member, Senator John McCain's office (Feb. 1999). "[Congress] owe[s] it to parents and educators across the country to pass this Act. After all, [Congress] put the children in harm's way in the first place." *Id.*

133 *See* Jon Baumgarten, Alec W. Farr & Denise Gough, *Washington Watch*, 3 NO. 1 CYBERSPACE LAW. 25 (Mar. 1998). CIPA "does not force schools and libraries to use screening software, but rather controls the distribution of money based on the willingness of schools and libraries to accede to the requirements." *Id.*

134 *See* S. REP. NO. 105-226, at 5 (1998). The federal government has linked federal funding to "behavioral" requirements on many occasions, see *id.* at 4, and "the courts have upheld similar methods for encouraging state and local government behavior, including withdrawing federal funding for interstate road development if states did not raise the legal drinking age to twenty-one." Baumgarten, *supra* note 133. In addition,

regulate the posting or transmission of content on the Internet but, rather, blocks the content received on the user's end.[135] This enables users to continue to be able to publish protected speech on the Internet.[136] Third, CIPA does not set a national standard for "harmful" speech. Instead, the legislation allows local communities to determine what material is "harmful to minors" and select their own choice of filtering software.[137] Advocates of the bill also point out that filters are adaptable and "capable of being fine-tuned" to accommodate the "evolving needs of individual schools and even individual lesson-plans."[138] Finally, filtering systems are able to be removed if the school or library so decides.[139]

B. Criticisms of CIPA

Some commentators argue that CIPA will not withstand constitutional scrutiny in the federal courts[140] because filtering

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the Supreme Court has specifically recognized that where the government spends public funds in order to promote a particular policy, it may take "legitimate and appropriate steps to ensure that its message is neither garbled nor distorted." Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 833 (1995) (citing Rust v. Sullivan, 500 U.S. 173, 196-200 (1991)).

135 *See* Sernovitz, *supra* note 26, at 43.

136 *See* Sernovitz, *supra* note 26, at 43; *see also* S. REP. NO. 105-226, at 2 (1998). "Filtering or blocking systems restrict what the user may receive over the Internet, rather than what a speaker may put on to the Internet." *Id.*

137 *See* S. REP. NO. 105-226, at 4.

> Perhaps most important, the bill prohibits the federal government from prescribing any particular filtering system, or from imposing a different filtering system than the one selected by the certifying educational authority. It thus places the prerogative for determining which filtering system best reflects the community's standard precisely where it should be: on the community itself.

144 Cong. Rec. S465, S519 (1998)

138 144 Cong. Rec. S465 at S519.

139 *See* Sernovitz, *supra* note 26, at 43. It is a common misconception that filters are permanent once installed. *See id.* Librarians and school administrators, with the aid of a password, can disable filtering software to enable full Internet access. *See id.* For example, a librarian could leave the Internet filter "on" in the children's section of the library and leave it "off" in the adult section. *See id.*

140 *See ACLU Backs Effort To Dismiss Library Filtering Suit*, 1. NO. 12 ANDREWS TELECOMM. INDUS. LITIG. REP. 10 (Aug. 1998). The ACLU has raised this argument since this issue was first discussed. *See generally* Baumgarten, *supra* note 133. The ACLU argues that mandating filtering systems would "require librarians to assume the role of Internet censor – a role forbidden by the First Amendment," and that "[n[either librarians nor the makers of commercial blocking software are constitutionally empowered to make such decisions." *Id.* "The use of filtering software on public

technology is not yet so advanced that it can effectively screen out only that which is constitutionally permissible to block.[141] Other opponents of CIPA assert that schools and libraries must already satisfy a large number of requirements to get the federal e-rate funding[142] and that "[a]dding additional requirements could postpone, if not derail the program."[143] Furthermore, many people believe that this is an issue which should be addressed entirely on a local level.[144]

The most cited criticism of CIPA is that filtering software is not the best solution to the problem of children's access to pornography on the Internet.[145] Critics have advanced three arguments in opposition to filtering software.[146] First, it is argued that conventional software filtering will inevitably fail due to the rapid expansion of the Internet[147] and filtering technology is too difficult to be implemented and understood by the average consumer.[148]

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library computers threatens to turn the Internet into a souped-up, G-rated television network for many Americans whose only Internet access is through the public library." *Id.* In response to this claim, the sponsors of CIPA argue that this would not be a problem because CIPA only requires one library computer to have the filtering software installed so that adult access would not be blocked. *See* Telephone Interview with Staff Member, Senator John McCain's office (Feb. 1999).

141 *See id.; see also infra* Part IVB.

142 *See* Baumgarten, *supra* note 133.

143 Baumgarten, *supra* note 133 (quoting Jon Bernstein of the National Education Association). In addition, some schools and libraries in poorer areas must use the e-rate funding to build the wires and install the cables necessary for Internet access before they can even get the computer systems. *See id.* "If they were required to prove that they were using filtering software, these schools would never be able to receive any funding to get their schools on the Internet." *Id.* (quoting Elizabeth Whitaker, Tucson Unified School District).

144 *See Hearings on Internet Indecency Before the Senate Comm. on Commerce, Science and Transportation*, 105th Cong. 1, 73 (Feb. 10, 1998) (statement of the National Education Association). A federal mandate of filtering "violates the principle and philosophy of local control of curricular matters." *Id* at 73.

145 *See* Warshavsky, *supra* note 36, at 19.

146 *See infra* notes 147-151 and accompanying text.

147 *See* Baumgarten, *supra* note 133.

148 One commentator has argued that filtering software requires a great deal of technical understanding and involvement by parents. *See Hearings for Legislative Proposals to Protect Children from Inappropriate Materials on the Internet Before the Subcomm. on Telecomm., Trade, and Consumer Affairs*, 105th Cong. 1, 59 (1998) (statement of Laith Paul Alsarraf, President and Chief Executive Officer, Cybernet Ventures, Inc.). On the other hand, some argue that filtering software is both easy to use and configure. *See Hearings on Internet Indecency Before the Senate Comm. on Commerce, Science and Transportation*, 105th Cong. 1, 4-5 (Feb. 10, 1998)

Second, critics argue that filtering software is technologically flawed because it simultaneously blocks out too much and too little content.[149] Third, there is critical disagreement on the overall effectiveness of filtering software.[150] Specifically, evidence indicates that filtering software is easily circumvented by the very children that the software is meant to protect.[151]

Congress fears that a mandate to install filtering software will eventually lead to a form of private censorship.[152] Authors of filtering software must necessarily rely upon subjective judgment to determine which content is objectionable and which is not.[153] In addition, software filtering may result in "hidden" censorship because many software filters do not permit access to its list of restricted Web sites or keywords.[154] As a result of the law of trade secrets, creators of software filters may not have an affirmative duty (or a competitive incentive) to reveal to the public what keywords it uses or what sites it blocks out or allows to pass through.[155] This has led many critics to argue that discretionary decisions about what material is objectionable for viewing by children are not decisions that should be made by commercial filtering software companies.[156]

(statement of Senator of Conrad Burns).

149 *See* Warshavsky, *supra* note 36, at 19; *see also supra* notes 73-78 for an explanation of ways in which filtering software blocks too much or too little content.

150 *See Responses to Arguments Against Filtering* (visited Mar. 1, 1999) <http://filteringfact.org/resp.htm>. Although filtering will probably never be 100% effective, the best available filtering software still functions at 90% effectiveness. *See id.*

151 *See id.* Children that are computer literate can "break through" the filtering software to reach the objectionable sites which were blocked. *See id.* Often times, children possess greater skill and understanding of the family's computer than their parents do. *See id.*

Web sites interested in attracting the curiosity of children can also circumvent filtering technology. *See id.* Such Web sites often choose names for their Web sites that are deceptive as to the objectionable content of the site. *See* James, *supra* note 19. As a result, such Web sites appear "innocent" on their face. *See id.* Many objectionable Web sites maintain as standard procedure the process of constantly and methodically changing their URL address. *See* Baumgarten, *supra* note 133. This makes the job of blocking such sites almost futile. *See id.*

152 *See* H.R. REP. NO. 105-775, at 19 (1998).

153 *See id.* at 19-20.

154 *See id.*

155 Telephone interview with Henry Flam, L.L.M. student (Information Technology Law), John Marshall School of Law, (Feb. 20, 1999).

156 *See* David Loundy, *E-Law: Screening for Legal* Pitfalls, 3 NO. 2 CYBERSPACE LAW. 25 (1998).

In addition, Congress has articulated a belief that there are less restrictive ways than filtering to deal with the problem of keeping adult content on the Internet away from children.[157] Congress has previously asserted that a governmental mandate to filter Internet material is not the preferred solution because it has the effect of blocking protected speech.[158] Furthermore, Congress fears that such a mandate would have the effect of discouraging schools from using the Internet because the implementation of filtering software is financially burdensome.[159] In considering alternative legislation to Internet filtering, Congress has stated that "[f]ilters may be very useful tools for parents and educators, but the law should impose duties on the source of the problem, not the victims."[160]

C. *Alternatives to Filtering Software*

There are a variety of alternatives to filtering software to keep Internet pornography away from children.[161] First, some have suggested that the problem of child access to Internet pornography should be handled without the aid of technology.[162] For example, one critic has argued that instead of using filters, schools should draft content-neutral rules and hold educational seminars about how and when children may use the Internet.[163] Any student who wished to use the Internet at schools would be required to complete the seminar.[164] Others have argued that the monitoring of access by teachers should replace technological solutions.[165]

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157 *See* H.R. REP. NO. 105-775, at 19 (1998).

158 *See id.*

159 *See id.*

160 *Id.* at 20.

161 *See generally* Sernovitz, *supra* note 26.

162 *See generally* Whitfield, *supra* note 40, at 3-4. The ACLU has endorsed many of these non-technological alternatives. *See ACLU Backs Effort To Dismiss Library Filtering Suit*, 1. NO. 12 ANDREWS TELECOMM. INDUS. LITIG. REP. 10, at 2 (Aug. 1998).

163 *See id.* at 4. Such rules could include a rule stating that the Internet may only be used for school related work. *See id.* The seminars could emphasize ideas including that students should not engage in Internet disclosure of personally identifiable information. *See id.*

164 *See id.*

165 *See, e.g., Hearings on Internet Indecency Before the Senate Comm. on Commerce, Science, and Transportation*, 105th Cong. 1, 33 (1998) (statement of Elizabeth Whitacker, Coordinator, Instructional Technologies, Tucson Unified School District.

Libraries could also implement non-technological means of preventing children from viewing Internet pornography.[166] For example, they could implement the same rules that schools do for children (i.e. publicize child-safe Internet links), install cubicle-like "privacy screens" around computers with Internet access, and impose time limits on Internet access.[167] Furthermore, many libraries have already implemented a "tap on the shoulder" policy, whereby persons using the Internet must disconnect from objectionable Web sites if a librarian quietly taps them on the shoulder.[168]

A second, non-technological method of distancing children from Internet pornography is for Congress to legislate a complete ban of Internet pornography.[169] However, in addition to undercutting traditional American freedoms,[170] such a ban would be technologically infeasible to implement.[171] This is because the Internet is an *international* communications medium, and it would be difficult to enforce such a ban on Internet sites and users not in the United States.[172]

There are also three "technological" alternatives to traditional software filtering. The first alternative involves the use of age verification techniques.[173] Such a system would require adult Web sites to require proof of age of any party seeking entry to its site by requiring either a credit card number or an electronically signed

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166 *See ACLU Backs Effort To Dismiss Library Filtering Suit*, 1. NO. 12 ANDREWS TELECOMM. INDUS. LITIG. REP. 10 at 4 (Aug. 1998). The ACLU has also shown its full support for most of these suggestions regarding library access. *See id.* at 2.

167 *See id.* at 4.

168 *See id.*; *see also supra* notes 99-100. One commentator has suggested that this alternative is likely to be unconstitutional and highly intrusive. *See id.*; *see also supra* Part IIIA.

169 *See* Sernovitz, *supra* note 26, at 3.

170 *See* Sernovitz, *supra* note 26, at 3.

171 *See* Sernovitz, *supra* note 26, at 3.

172 *See* Sernovitz, *supra* note 26, at 3. It is futile to ban the Internet publication of pornography for many reasons. First, a great deal of Internet content is published in foreign countries and any domestic ban would simply increase the "import" market. *See id.* Second, disconnecting those computers which continue to publish would be difficult because publishers of pornography can switch to a different host computer before publication is discontinued. *See id.* Third, because Internet data travels in random paths, it is impossible to restrict foreign content from entering the United States. *See id.* It also argued that any such ban on publication, would make our political leaders look foolish and technologically ignorant. *See id.*

173 *See* H.R. REP. NO. 105-775, at 16 (1998).

statement affirming that the user is of legal age to view the material.[174] The use of age verification services ("AVSs") are already standard practice in segments of the online adult industry and there are currently online AVSs that sell their services to adult Web sites that do not possess their own verification capabilities. [175] There are, however, many problems with AVSs. First, AVSs are not foolproof.[176] One commentator has stated that the electronic contracts are merely "wall[s] of tissue paper."[177] In addition, the requirement of AVSs places a significant burden on adult Web sites.[178] Once a password is issued, it can be shared with many users.[179] Finally, it must also be appreciated that many children have access to their parent's credit cards.[180]

The second technological alternative to filtering is the systematic implementation of "Internet zoning."[181] Traditionally,

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174 *See* Simon, *supra* note 17, at 1027. Congress has already attempted to legislate this alternative in the text of the Communications Decency Act and in the Child Online Protection Act. *See supra* Part IIIB.

175 *See* H.R. REP. NO. 105-775, at 14. As of October 5, 1998, there were at least 25 AVS organizations in existence. *See id.* An AVS can embed information into an adult Web site so that the AVS is triggered when one attempts to enter an adult Web page. *See* Alsarraf, *supra* note 148, at 52. A credit card number must then be entered in order to either gain instant entry or a password which will allow entry. *See id.* The process of verifying a password usually takes five to ten seconds. *See id.*

176 *See* Alsarraf, *supra* note 148, at 52.

177 *See* Istook, *supra* note 1, at 22.

178 *See Hearings on Legislative Proposals to Protect Children from Inappropriate Materials on the Internet Before the Subcomm. on Telecomm., Trade and Consumer Protection of the House Comm. On Commerce*, 105th Cong. 1, 59 (1998) (statement of Lawrence Lessig, Professor, Harvard Law School). First, it is argued that such systems are "cumbersome to use and relatively expensive to maintain." *See id.* Second, the use of such systems destroy consumer anonymity. *See id.* This may interfere with the business of the adult Web site, because many are uncomfortable giving their name out over the Internet. *See id.*

Finally, the use of a credit card on-line will discourage the use of adult Web sites, because many people are fearful that their credit card is especially susceptible to illegal abuse on the Internet. *See id.* For example, one adult Web site boasts free access in exchange for a credit card number. *See id.* An Internet user may believe that only a $1.00 service charge will be billed to the credit card, however the fine print states that the Web site has the right to charge the card $20 a month for membership if the user does not cancel the agreement within 72 hours. *See id.* Furthermore, it states that the user cannot cancel their subscription at all after the 72 hour period has elapsed. *See id.*

179 *See* Istook, *supra* note 1, at 4. It should be noted that current technology is close to being able to solve this problem. *See id.*

180 *See* Istook, *supra* note 1, at 4.

181 *See* H.R. REP. NO. 105-775, at 17 (1998).

zoning laws have been used in the "physical world" to regulate damaging secondary effects of speech without actually regulating the speech itself.[182] Zoning on the Internet would create a "red-light district in cyberspace," adding a generic top level domain name to the Internet that would be reserved for adult content. [183] For example, all adult Web sites would be entitled "www.site1.adult" or "www.site2.adult".[184] Internet zoning would be combined with Internet filtering software in order to effectively block domain names that end in ".adult."[185]

Commentators argue that the use of Internet zoning would be universally accepted because it segregates adult content, while simultaneously helping to market pornographic Web sites to adults.[186] Furthermore, there are no technical barriers to implementing zoning on the Internet.[187] Although, it would be very difficult to ensure compliance by adult Web sites.[188] Furthermore, because the registration system for domain names is constantly changing, Internet zoning will be impractical until there are international registration standards.[189]

Internet zoning could also be used to segregate child friendly content.[190] Networks such as America Online have already created "kid-friendly Internet services" that *only* allow access to materials

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182 *See* Simon, *supra* note 17, at 1044-45. For example, the detrimental effect of adult content on children can be regulated even though it has an effect on objectionable speech, so long as the objectionable speech itself is not directly regulated. *See id.*

183 *See* H.R. REP. NO. 105-775, at 17-18.

184 *See* Sernovitz, *supra* note 26, at 42.

185 *See* H.R. REP. NO. 105-775 at 17. One commentator has suggested specific legislation on the issue of Internet zoning, entitled the ".adult Act." *See generally* Warshavsky, *supra* note 36, at 19. There would be three provisions in the ".adult Act." *See id.* at 19-20. First, adult Web site must choose a domain name that ends in .adult and must implement other additional safeguards such as requiring age verification. *See id.* at 19. Second, the ".adult Act" would require all new computers to possess V-Chips which would filter out ".adult" Web sites at the direction of parents. *See id.* at 19-20. Third, the ".adult Act" would make it a punishable crime not to comply with the first two provisions and allow an affirmative defense for Web sites, such as Planned Parenthood, that transmit content which possesses "serious literary, artistic, political, scientific or educational value." *See id.* at 20.

186 *See* Sernovitz, *supra* note 26, at 42.

187 *See* H.R. REP. NO. 105-775, at 17.

188 *See* Sernovitz, *supra* note 26, at 42.

189 *See* H.R. REP. NO. 105-775, at 18.

190 *See* Sernovitz, *supra* note 26, at 42.

suitable for children.[191] Because the Internet provider owns all of the content on their network, they would possess ultimate control over what content would be on the children's portion of the network.[192] Although this could be effective, it could also significantly limit the amount of content available to children for educational purposes.[193]

Finally, the most controversial alternative to traditional filtering software is the use of an Internet rating system in conjunction with a technology known as the Platform for Internet Content Selection ("PICS").[194] PICS is not a rating system but, rather, is a sophisticated technology which enables traditional filtering software "to associate a rating label with Internet content."[195] Instead of having commercial companies rating Web sites, PICS technology allows independent organizations to publish their own content based rating for a Web site.[196] Furthermore, users can customize PICS to either allow through or block out all unrated Web sites.[197] The widespread use of PICS in conjunction with filtering software is increasing,[198] prompting Congress to consider legislation that will mandate PICS and Internet rating.[199]

The currently predominant rating system, "RSACi," is authored by the Recreational Software Advisory Council ("RSAC").[200] RSACi enables PICS compliant filtering software or

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191 *See* Sernovitz, *supra* note 26, at 42.

192 *See* Sernovitz, *supra* note 26, at 42.

193 *See* Sernovitz, *supra* note 26, at 42.

194 *See* Dobeus, *supra* note 15, at 627.

195 *See* Dobeus, *supra* note 15, at 627. Like traditional filtering software, PICS technology can be "inserted" at a user's connection to a network or at a network's connection to the Internet. *See* Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 v. Filtering*, 38 JURIMETRICS J. 629, 659 (1998). It can also be used in conjunction with an Internet search engine. *See id.* at 661.

196 *See* Dobeus, *supra* note 15, at 633. For example both the "Christian Right" and the "Atheist Left" can simultaneously rate Web sites and adults can choose which rating system to adopt in their own homes. *See* Lessig, *supra* note 195, at 659.

197 *See* Dobeus, *supra* note 15, at 634.

198 *See* Dobeus, *supra* note 15, at 629.

199 *See* Dobeus, *supra* note 15, at 648 (citing Family Friendly Internet Act of 1997, H.R. 1180, 105th Cong. (1997) and Internet Freedom and Child Protection Act of 1997, H.R. 774, 105th Cong. (1997)). Some members of Congress believed that Internet ratings should be required once PICS technology had been factory installed in most home computers. *See id.* In conjunction with this mandate, legislation was proposed to criminalize the misrating of Web sites. *See id.*

200 *See* Dobeus, *supra* note 15, at 627. It was expected that by 1998, over 120,000 Web sites would be rated by RSACi. *See id.* at 633 n.46. As further evidence of

web browsers to block out *categories* of material at the direction of adults according to the maturity of the child.[201] RSACi was originally created to rate video games and has been criticized because it transposed its vocabulary for rating video games to rating other content, which some claim is "completely inappropriate."[202] RSACi has also been criticized because it cannot distinguish between graphics and text and, more importantly, cannot identify and allow through Web sites that possess "artistic, literary, political, educational or social value."[203]

The ACLU has stepped forward as a strong opponent to any government mandate that requires the use of PICS and Internet ratings.[204] It has stated that the widespread use of PICS will create a "dense smokescreen" that will obscure controversial speech and which will be difficult to penetrate by the average Internet user.[205]

RSACi's potential future success, it should be noted that IBM has announced that it is making a $100,000 grant to RSAC to encourage the use of RSACi. *See* ACLU White Paper: *Fahrenheit 451.2: Is Cyberspace Burning?* (visited Mar. 1, 1999) <http://www.aclu.org/issues/cyber/burning.html>. Furthermore, both Microsoft Explorer and CompuServe have already implemented the RSACi ratings system. *See id.* at 3.

RSACi rating involves a three-step process. *See* Dobeus, *supra* note 15, at 634. First, a Web site fills out a detailed questionnaire stating how much sex, violence, nudity and offensive language is contained within the Web site. *See id.* Second, an RSAC computer grades the questionnaire and generates an appropriate rating. *See id.* Finally, the RSAC computer electronically attaches the rating to the Web site. *See id.*

201 *See* Dobeus, *supra* note 15, at 634. RSACi rates in accordance with four categories. *See* Hanley, *supra* note 58, at 1007, n.56. Objectionable language is rated as follows: "0 = inoffensive slang, no profanity; 1 = Mild expletives or mild terms for bodily functions; 2 = Moderate expletives, nonsexual anatomical references; 3 = Vulgar language, obscene gestures[,] use of epithets; [and] 4 = Extreme crude language, explicit sexual references." *Id.* Nudity is rated as follows: "0 = None; 1 = Revealing attire; 2 = Partial nudity; 3 = Frontal nudity; [and] 4 = Provocative frontal nudity." *Id.* Sex is rated as follows: "0 = No sexual activity portrayed; 1 = Passionate kissing and touching; 2 = Clothed sexual touching; 3 = Nonexplicit sexual activity; [and]4 = Explicit sexual activity." *Id.* Violence is rated as follows: "0 = No aggressive, natural, or accidental violence; 1 = Creatures injured o[r] killed or damage to realistic objects; 2 = Human or creatures injured or killed; 3 = Killing with blood and gore; [and] 4 = Wanton and gratuitous violence." *Id.*

202 *See* Dobeus, *supra* note 15, at 642-43.

203 *See* Dobeus, *supra* note 15, at 645.

204 *See generally* ACLU White Paper: *Fahrenheit 451.2: Is Cyberspace Burning?* (visited Mar. 1, 1999) <http://www.aclu.org/issues/cyber/burning.html>.

205 *See id.* at 3. The ACLU speculates that a mandate requiring PICS and Internet ratings will inevitably lead to the following scenario: First, PICS would become a universal standard; Next, one or two systems of rating will dominate the market as a de facto standard; Third, PICS and the dominant ratings system will be routinely built into

The ACLU has advanced a number of strong arguments against Internet ratings, stating that such a system is destined for constitutional and technological failure.[206]

V. Conclusion

The problem of child access to pornography on the Internet is a relatively new one, as the Internet itself is new. However, the issues raised in this context are far from new. Protecting children from

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Internet software as a default setting; Then, unrated Internet speech would be effectively blocked by the default setting and search engines will not report the *very existence* of unrated or blocked Web sites; Finally, government will make misrating a crime and self-rating mandatory. *See id.* at 3-4

206 *See id.* at 5-9. First, the ACLU argues that ratings will cause controversial speech to be censored. *See id.* at 5. For example, a Web site may feel that their Web site is both educational and sexual in nature, but because misrating might carry a criminal penalty, the Web site will label itself as "adult" as to avoid punishment. *See id.* Such a rating will likely distance the educational information from children. *See generally ACLU White Paper: Fahrenheit 451.2: Is Cyberspace Burning?* (visited Mar. 1, 1999) <http://www.aclu.org/issues/cyber/burning.html>. Second, because self-rating is costly, unwieldy and burdensome many Web sites will refrain from rating. *See id.* at 6. This will keep their content away from children, because the PICS default would be to omit unrated Web sites. *See id.* Third, PICS technology can not effectively rate discussion groups and e-mail. *See id.* at 7. Such communications will be stifled in the face of criminal penalties, because it is difficult to spontaneously rate such "off-the-cuff" communications. *See id.* Fourth, PICS and Internet rating will create what the ACLU calls "fortress America." *See id.* More specifically, those foreigners who haven't heard about the American rating system, will be unable to get their content through to children, because their unrated Web sites will be blocked by the PICS system default. *See id.* at 7-8. Fifth, it is argued that the implementation of PICS will encourage further government censorship. As discussed *supra*, it may also lead to criminal penalties for misrating. *See generally ACLU White Paper: Fahrenheit 451.2: Is Cyberspace Burning?* (visited Mar. 1, 1999) <http://www.aclu.org/issues/cyber/burning.html>. In addition, there is proposed legislation that would give parents a cause of action for negligence if Web sites accidentally misrate their Web site and it is viewed by a child as a result. *See id.* Finally, it is argued that Internet ratings will cause the Internet to be a "medium of homogenized speech." *See id.* at 8-9. This could occur because groups such as Walt Disney and Time Warner will hire lawyers to advise them as how to cater their content in a manner that will reach the widest and largest possible audience. *See id.* In other words, it will become a wise business decision for many firms to cater their speech to the ratings system, instead of first determining content then applying the "proper" rating. *See id.*

"harmful material" is hardly a novel concept in America. In fact, it is probably one of the few policy decisions upon which most Americans agree. We base this on the notion that children do not possess the maturity level necessary to "appropriately" comprehend certain material. It is this assumption that has served as the justification for limiting children's First Amendment free expression rights for years.

However, this is inconsistent with the fact that society places no "maturity" requirements on adults in assessing their constitutional protections. It is certainly arguable that there are many adults who possess a similarly limited capacity to deal "appropriately" with pornographic content. But, rather than evaluate the individual, an arbitrary "cut-off" age has been chosen whereby an individual is presumed to have the requisite level of maturity once he or she reaches the age of eighteen. This arbitrariness underscores the idea that it is essential for lawmakers to be extremely careful when limiting free speech in this context. Otherwise, they will inevitably take the first step down the "slippery slope" of arbitrary censorship. It is my contention that, in its applicability to public libraries, the Children's Internet Protection Act of 1999 takes this first step.

In analyzing CIPA, it is crucial that a distinction be made between its potential effect on schools as opposed to libraries. An elementary or secondary school setting is very different from a public library setting, yet CIPA treats them the same and, therefore, is inherently flawed. In the typical school setting, various regulations are imposed on children which limit what and when certain expression may take place. For instance, students are not able to speak whenever they want to and are subject to the requirements of expression placed upon them by their teachers. More significantly, in choosing the curriculum, teachers and local school boards make the primary decisions about the *content* of classroom discussions and what materials students will be exposed to. In contrast, public libraries are not typically this "regulated." In fact, public libraries typically serve as symbols of the very free expression that the First Amendment seeks to protect. As such, any proposed federal legislation that would regulate the free flow of information in public libraries should be looked upon with heightened suspicion.

In addition, although it is true that parents can not control what their children are exposed to in schools, there is a much greater

potential for parental monitoring in a public library. A parent who is afraid that their child may be exposed to Internet pornography at the public library has the same option they would have if they feared the child would be exposed to Internet pornography at a friend's house; They can discuss their views with the child and trust them, or they can refuse to allow the child to go unaccompanied. This option does not exist with schools, creating a far greater justification for government substituting for parents as censors in the school environment. In sum, while the Children's Internet Protection Act of 1999 may be an appropriate governmental response to the problem of child access to Internet pornography in the school setting, it is arguably a step in the wrong direction in the public library setting.

The Children's Internet Protection Act of 1999 also poses a more practical problem. Although CIPA leaves all determinations as to what filtering devices to employ up to the schools and libraries, it is hard to imagine how that will be properly implemented. For instance, because this "local control" will require librarians and educators to make very detailed decisions about how to "customize" the filtering systems they choose, it will undoubtedly demand a great deal of their already limited time. In addition, there is no guarantee that the people making these types of decisions will have any training to do so. It is questionable whether most attorneys could decipher a particular state's standards for "indecency" as it pertains to minors and its applicability to specific material. The chances seem even slighter that librarians and educators with no legal training would be able to do so. Even if the state standard is clearly articulated and easy to find, the librarian or teacher making the determination about what to filter would have to be able to apply that standard to a particular image or text. This is more than subjective; it's random at best.