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Constitutional Law - Free Speech and Sex on the Internet: Court Clips COPA's Wings, but Filtering May Still Fly - Ashcroft v. American Civil Liberties Union

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CASE NOTES

CONSTITUTIONAL LAW—Free Speech and Sex on the Internet: Court Clips COPA's Wings, but Filtering May Still Fly. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004).

INTRODUCTION

"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."[1] But today, separating a child from a sexy picture can be more complicated. What is the Internet equivalent of a brown paper wrapper on a risqué magazine or a hidden shelf for adult videos in the back of a movie rental store?

In 1998, Congress passed the Child Online Protection Act ("COPA" or "the Act") to protect children from exposure to sexually explicit materials on the Internet.[2] The Act imposes criminal and civil penalties on commercial Internet providers who knowingly post materials on the World Wide Web that are available to minors and harmful to minors under age seventeen.[3] Criminal penalties include fines up to $50,000 and six months in prison.[4] Civil penalties are fines up to $50,000 per violation per day, plus another $50,000 for intentional violations.[5] Content providers are allowed an affirmative defense if they, in good faith, restrict access to their Web sites with some kind of age verification system.[6]

The American Civil Liberties Union ("ACLU"), along with a number of bookstores, Internet providers, and free speech advocates, immediately filed suit against COPA, claiming that it violated the First Amendment "by suppressing a large amount of speech on the World Wide Web that adults are entitled to communicate and receive."[7] The groups asked for an injunction to prevent the enforcement of the Act.[8]

The Government argued that it had a "compelling" interest in "the protection of the physical and psychological well-being of minors by shield-

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1. *Statement Before the U.S. Senate Comm. on Commerce, Science, and Transportation* (February 10, 1998) (statement of Andrew L. Sernovitz, President, Association for Interactive Media), http://commerce.senate.gov/hearings/210ser.htm (last visited Nov. 19, 2005).
2. Child Online Protection Act, 47 U.S.C. § 231 (2005).
3. 47 U.S.C. § 231(a), (e)(7).
4. 47 U.S.C. § 231(a)(1).
5. 47 U.S.C. § 231(a)(2)-(3).
6. 47 U.S.C. § 231(c).
7. Brief for Respondents at i-ii, 1, Ashcroft v. ACLU, 542 U.S. 656 (2004) (No. 03-218) [hereinafter *Brief for Respondents*].
8. *Id.* at 1.

ing them from materials that are harmful to them."[9] It said minors had wide access to pornographic material on the Internet, either through deliberate searching or by accidentally stumbling upon it.[10] Through COPA, Congress sought "a national solution to the problem of minors accessing harmful material on the World Wide Web" that parental control protections and industry self-regulation could not provide.[11]

The ACLU countered with the charge that COPA's severe penalties were a "bludgeon" that would suppress an enormous amount of constitutionally protected speech for adults.[12] The group said age verification systems would deter up to seventy-five percent of Web users due to privacy concerns, and they would impose significant economic burdens on content providers.[13] Moreover, the measure would not protect children from harmful materials on foreign Web sites, non-commercial sites, and information available through protocols other than http (HyperText Transfer Protocol, the primary method used to convey information on the World Wide Web).[14] More effective, yet less restrictive means existed for protecting children, such as "the use of filtering software, the promotion of Internet education and high-quality Internet material for children, and the vigorous enforcement of existing laws."[15]

After almost six years of litigation, COPA, in 2004, emerged from its second trip to the Supreme Court in *Ashcroft v. American Civil Liberties Union* ("*Ashcroft II*"), essentially bound and gagged.[16] In a 5-4 decision, the Supreme Court affirmed the Court of Appeals, upholding the preliminary injunction against COPA because the Government had failed to rebut the plaintiffs' contention that there are plausible less restrictive alternatives to

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9. Brief for the Petitioner at 6, Ashcroft v. ACLU, 542 U.S. 656 (2004) (No. 03-218) [hereinafter *Brief for Petitioner*].

10. *Id.* at 7. A 2000 nationwide study by the Crimes Against Children Research Center of youths ten to seventeen who use the Internet regularly found that twenty-five percent of youth reported having at least one unwanted exposure to sexual pictures during the previous year. YOUTH, PORNOGRAPHY, AND THE INTERNET, 132-33, (Dick Thornburgh & Herbert S. Lin eds., 2002), *available at* http://www.nap.edu/openbook/0309082749/html (last visited Nov. 19, 2005). A 2001 study of children ages ten to seventeen by the Kaiser Family Foundation and NPR found that thirty-one percent reported seeing a "pornographic" Web site, even if by accident. *Id.* at 133.

11. *Brief for Petitioner*, *supra* note 9, at 7.

12. *Brief for Respondents*, *supra* note 7, at 18-19.

13. *Id.* at 20.

14. *Id.* at 48. A recent congressionally-sponsored study inferred that a large number of children are gaining access to pornography through Internet file-sharing programs, which are frequently used to search for music. YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 10, at 132. The conclusion was based on the fact that a search for "Britney Spears" videos on one network resulted in hits on video titles, more than seventy percent of which were pornographic. *Id.* Searches for Christina Aguilera and Madonna produced similar results. *Id.*

15. *Brief for Respondents*, *supra* note 7, at 48-49.

16. Ashcroft v. ACLU, 542 U.S. 656 (2004) [hereinafter *Ashcroft II*].

the Act.[17] The Court remanded the case back to the district court for trial on the issues with a strong directive remark: "Filters are less restrictive than COPA."[18] Based on the Court's opinion, it is "highly unlikely that the statute will be upheld on remand."[19]

While *Ashcroft II* may seem like a slim win based on the close vote and the procedural rather than substantive nature of the decision, it is actually a bell-ringing victory for the First Amendment.[20] Buried within the opinion is the fact that eight of the nine justices agreed that any decisions regarding content restrictions on the Internet should be held to strict scrutiny.[21] This is a solid affirmation of *Reno v. ACLU*, which held the Internet to be "the most participatory form of mass speech yet developed," entitled to "the highest protection from governmental intrusion."[22]

On the other hand, the Court's strong implication that filters are a preferable alternative to source-based restrictions on the Internet should be a fire alarm for First Amendment advocates.[23] Filters have been found to be ineffective because they overblock substantial amounts of constitutionally protected materials while underblocking harmful materials.[24]

This case note will trace the development of First Amendment case law with respect to the restriction of sexually explicit materials in print, in the broadcast media, and on the Internet, and what special restrictions are in place for children. It will demonstrate that speech on the Internet has achieved the highest protection, which *Ashcroft II* upholds. It will also examine the vulnerability of that protected status. The case note then will follow *Ashcroft II* to its logical conclusion by examining the proposed, less-restrictive alternative of filtering. It will reveal the inherent deficiencies of filters as well as the legal barrier that prevents their improvement. It will argue that *Ashcroft II*'s fallback on the software as a technological fix for the problem of sexually explicit material on the Internet amounts to blind hope. The case note will propose that the courts directly address the restrictions filters currently impose on free speech and take steps to eliminate those inadequacies.

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17. *Id.* at 658-61.
18. *Id.* at 667.
19. Anuj C. Desai, *Filters and Federalism: Public Library Internet Access, Local Control, and the Federal Spending Power*, 7 U. PA. J. CONST. L. 3, 10 (2004).
20. *See supra* notes 17-19 and accompanying text.
21. *See infra* notes 144-52, 167, 171-73 and accompanying text.
22. Reno v. ACLU, 521 U.S. 844, 863 (1997).
23. *See infra* notes 148-53 and accompanying text.
24. *See infra* notes 117-18, 212-40 and accompanying text.

BACKGROUND

The First Amendment of the U.S. Constitution states, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."[25] Although the amendment is written in absolute language, the Supreme Court has seen fit to permit restrictions of this fundamental right in certain circumstances.[26] For example, the Constitution may not protect libelous or "fighting" words in many instances.[27] A series of Supreme Court cases has also addressed the ability of the government to regulate sexually-oriented speech in a manner consistent with the First Amendment, as discussed below.

Obscenity

In 1957 in *Roth v. United States*, the Supreme Court held that "obscenity is not within the area of constitutionally protected speech or press."[28] Justice Brennan writing for the Court said:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guaranties . . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.[29]

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25. U.S. CONST. amend. I.
26. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
27. *Id.* at 572. The Court stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72.

28. Roth v. United States, 354 U.S. 476, 485 (1957) (upholding a conviction for mailing obscene materials). The terms "obscenity" and "pornography" are often confused, but "pornography" has no legal meaning under the First Amendment. YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 10, at 87. Historically, the term "pornography" has been used in four different ways: (1) "Pornography" traditionally was used interchangeably with "obscenity;" (2) feminist scholars began using the term about twenty years ago to refer to sexually explicit material harmful to women; (3) "child pornography" refers to sexually explicit material involving minors; (4) "pornography" is often used as a synonym for any sexually explicit material. *Id.* at 86-87.

29. *Roth*, 354 U.S. at 484.

The Court had difficulty, however, in defining obscenity beyond Justice Potter Stewart's famous comment in *Jacobellis v. Ohio*, "I know it when I see it."[30]

Finally, sixteen years after *Roth*, in *Miller v. California*, the Supreme Court formulated a more concrete definition of obscenity.[31] The Court devised a three-prong test for distinguishing obscene material unprotected by the First Amendment from protected expression:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[32]

Courts still use the Miller test today in determining what is obscene.[33]

Regarding obscene materials, the Court has ruled that the government can prohibit the sale, distribution, and exhibition of obscene materials even to willing recipients.[34] It cannot, however, prohibit or punish the private possession of obscene materials.[35] In *Stanley v. Georgia*, Justice Thurgood Marshall wrote, "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control

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30. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (reversing an Ohio Supreme Court decision that a film was obscene).

31. Miller v. California, 413 U.S. 15, 20 (1973) (involving the mailing of unsolicited sexually explicit material).

32. *Id.* at 24 (citation omitted).

33. YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 10, at 88.

34. Paris Adult Theater I v. Slaton, 413 U.S. 49, 69 (1973) ("[C]ommerce in obscene material is unprotected by any constitutional doctrine of privacy. . . . States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called 'adult' theaters from which minors are excluded.").

35. Stanley v. Georgia, 394 U.S. 557 (1969). In *Stanley*, police found some obscene films while searching a suspect's home for evidence of bookmaking. *Id.* at 558. An exception to this rule is child pornography. *See* Osborne v. Ohio, 495 U.S. 103, 111 (1990) (holding that a state "may constitutionally proscribe the possession and viewing of child pornography"). The Ohio Supreme Court defined child pornography as "material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged." *Id.* at 113.

men's minds."[36] Justice Marshall's statement has been recognized as the "right to receive speech."[37]

When materials do not meet the test for obscenity, such as profane or indecent language, the Supreme Court has taken a strong stance in favor of protecting them. In *Cohen v. California*, the Court upheld Cohen's right to wear a jacket into a courthouse that said "Fuck the Draft."[38] Justice Harlan, delivering the opinion, wrote that "[w]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."[39]

When it comes to the Freedom of Speech, the courts have considered minors a special case. In 1968 in *Ginsberg v. New York*, the Supreme Court determined that the state could regulate the sale or distribution of sexually oriented materials to minors when it could not constitutionally regulate the sale of the same materials to adults.[40] Justice Brennan stated, "The well-being of its children is of course a subject within the State's constitutional power to regulate . . . ."[41] The Court explained that while parental authority is "basic in the structure of our society," those who have this primary responsibility "are entitled to the support of laws designed to aid discharge of that responsibility."[42] In addition, the Court acknowledged that "parental control or guidance cannot always be provided . . . [which justifies] reasonable regulation of the sale of material to [children]."[43]

In differentiating material that may be protected for adults even though it is harmful to minors, the Court has sought to ensure that enactment of restrictive laws does not reduce the adult population to reading or viewing only what was fit for children.[44] In *Butler v. Michigan*, the State argued that

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36. *Stanley*, 394 U.S. at 565.

37. Darin Siefkes, Note and Comment, *Explaining United States v. American Library Association: Strictly Speaking, a Flawed Decision*, 57 BAYLOR L. REV. 327, 332 (Winter 2005).

38. Cohen v. California, 403 U.S. 15, 16 (1971).

39. *Id.* at 26.

40. Ginsberg v. New York, 390 U.S. 629, 631 (1968) (involving a stationery store owner's sale of "girlie" magazines to a 16 year-old boy).

41. *Id.* at 639.

42. *Id.*

43. *Id.* at 640.

44. *See* Butler v. Michigan, 352 U.S. 380 (1957) (holding unconstitutional a Michigan statute prohibiting the sale to the general public of any book containing language tending to corrupt the morals of youth). The *Butler* reasoning was reaffirmed in cases involving other media besides print. *See* United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 222 n.2 (2003) (Stevens, J., dissenting) (the Internet); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 814 (2000) (cable television); Reno v. ACLU, 521 U.S. 844, 875 n.40 (1997) (the Internet); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 759

by "quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare," but "[s]urely, this is to burn the house to roast the pig."[45] Further, the Court found that the statute "reduce[d] the adult population of Michigan to reading only what is fit for children" and thus "not reasonably restricted to the evil with which it is said to deal."[46]

The Broadcast Media

The Court has limited the broad protection provided to the print media when the sexually explicit materials are broadcast on radio or television. In *FCC v. Pacifica Foundation*, the Court upheld the ability of the Federal Communications Commission to regulate the time of day when indecent language could be aired over the radio.[47] The Court said, "Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[48] The Court noted that warnings preceding broadcasts about the nature of broadcasts were insufficient because people might tune in during the middle of a program.[49] Further, it said that "broadcasting is uniquely accessible to children, even those too young to read."[50]

On the other hand, the Court has not been willing to extend *Pacifica* beyond the free, over-the-air broadcast media. In *Sable Communications of California, Inc. v. FCC*, which challenged 1988 amendments to the Communications Act of 1934 aimed at the "dial-a-porn" industry, the Court struck down the prohibition on indecent telephone messages.[51] The Court distinguished private commercial telephone communications from the public radio broadcast of *Pacifica* in that "the dial-it medium requires the listener to take affirmative steps to receive the communication. There is no 'captive audience' problem here; callers will generally not be unwilling listeners."[52] Also, the Court said there may be less restrictive ways of keeping indecent dial-a-porn messages out of the reach of minors (such as requiring credit

(1996) (cable television); Sable Commc'ns of California, Inc. v. FCC, 492 U.S. 115, 126-127 (1989) (telephone); FCC v. Pacifica Found., 438 U.S. 726, 750 n.28 (1978) (radio).

45. *Butler*, 352 U.S. at 383.

46. *Id.* at 383-84.

47. FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding the FCC's decision to relegate the broadcast of a monologue on "Filthy Words," which was deemed inappropriate for children, to a time of day when children were unlikely to be listening).

48. *Id.* at 748.

49. *Id.*

50. *Id.* at 749.

51. Sable Commc'ns of California, Inc. v. FCC, 492 U.S. 115, 117-18 (1989).

52. *Id.* at 127-28.

cards, access codes, or scrambling) than totally banning the indecent communications.[53]

In two cases involving cable television, the Supreme Court also declined to impose restrictions on sexually explicit speech.[54] Cable TV was distinguished from other broadcasting media in that cable systems can block unwanted channels on a household-by-household basis.[55] In 1996, in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, the Court allowed cable operators to ban sexually explicit materials on leased channels, though it did not permit restrictions on public access channels, that is, public, educational, or governmental channels.[56] Again the Court cited less restrictive alternatives for protecting children, such as lock boxes or parents requesting the blocking of the material.[57] Four years later in *United States v. Playboy Entertainment Group, Inc.*, the Supreme Court declared unconstitutional a provision of the Cable Act that required cable television operators to fully scramble or block sexually oriented programming or limit transmission to between 10 p.m. and 6 a.m., when children were unlikely to be viewing them.[58]

Thus, by 2000, the Supreme Court had addressed freedom of expression with respect to sexually explicit materials in print as well as in radio, telephone, and television, including cable television.[59] The sale, distribution and exhibition of obscenity, as defined in *Miller*, are prohibited in all media.[60] Otherwise, the Court narrowed First Amendment protection only in public radio and television broadcasts and in recognition of a special interest in protecting minors from harmful materials.[61]

The Internet

In addressing the newest large-scale media, the Internet, the Supreme Court has so far refrained from directly restricting non-obscene, sexually explicit speech.[62] However, a deluge of disturbing (and controversial) statistics about the amount of such speech on the Internet and the dangers of

53. *Id.* at 128, 130.
54. United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).
55. *Playboy Entm't*, 529 U.S. at 815.
56. *Denver Area*, 518 U.S. at 733-34.
57. *Id.* at 759-60.
58. *Playboy Entm't*, 529 U.S. at 806.
59. *See supra* notes 28-58 and accompanying text.
60. Miller v. California, 413 U.S. 15, 24 (1973); Paris Adult Theater I v. Slaton, 413 U.S. 49, 69 (1973).
61. FCC v. Pacifica Found., 438 U.S. 726 (1978); Ginsberg v. New York, 390 U.S. 629 (1968).
62. Reno v. ACLU, 521 U.S. 844 (1997); *Ashcroft II*, 542 U.S. 656 (2004).

children's exposure to it have succeeded in focusing Congress's attention on the "dark side to the bright flicker of the computer screen."[63]

In July 1995, *Time* magazine made a splash in Congress with its cover story entitled "Cyberporn."[64] The article unveiled a new Carnegie Mellon study on the extensive amount of pornographic images readily available on the Internet, including the conclusion that 83.5% of the pictures on Usenet newsgroups were pornographic.[65] That study, along with the *Time* article, was soon discredited.[66] However, the information provided fuel for the hellfire as several senators proposed anti-porn legislation.[67] One bill sponsor, Senator James Exon of Nebraska, printed "some of the rawer images" from the Internet and kept them in a notorious "blue book" at his desk on the Senate floor for any unbelieving Congressmen to view.[68] "[T]he information superhighway should not become a red light district," the Senator proclaimed.[69]

Other tenuous statistics regarding pornography's impact on children have appeared on Web sites and subsequently have been quoted in the *Harvard Law Review*, indicating that the average child first views pornography at age eleven, and eighty percent of fifteen to seventeen year-olds have experienced multiple hard-core online pornography exposures.[70] Regarding pornography's impact on children, the Harvard article reported that "[t]he

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63. 141 CONG. REC. S1953 (daily ed. February 1, 1995) (statement of Sen. Exon).

64. Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38.

65. *Id.* *See* Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849, 1914 (1995).

66. *Id.* *See* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 55 (Nov. 1996). The Rimm Study apparently was not subject to peer review, it was said to be methodologically flawed, the ethics of Rimm's research procedures were questioned, and he was accused of plagiarism. *Id.* at 55 & n.17-20. Suspicion was also cast on Rimm's credibility when he was found to be the author of *The Pornographer's Handbook: How to Exploit Women, Dupe Men, & Make Lots of Money*. *Id.* at 56 & n.21. The *Time* article was largely retracted in a later article which reported the serious questions raised about the validity of the Rimm Study. Philip Elmer-DeWitt, *Fire Storm on the Computer Nets*, TIME, July 24, 1995, at 57.

67. Cannon, *supra* note 66, at 54 & n.13 (reporting that Senator Grassley, in proposing his anti-pornography legislation, waved a copy of the *Time* article in front of the Senate, and that other senators quoted the Rimm Study as well).

68. Elmer-Dewitt, *supra* note 64, at 42.

69. 141 CONG. REC. S1953 (daily ed. February 1, 1995) (statement of Sen. Exon).

70. *Leading Case: D. Freedom of Speech and Expression*, 118 HARV. L. REV. 353, 354 (citing unsourced statistics at Internet Filter Review, Internet Pornography Statistics, at http://www.Internetfilterreview.com/Internet-pornography-statistics.html). Identical statistics were also found at a family values-oriented Web site, which provides the vague reference that "[t]hese statistics have been derived from a number of different reputable sources including Google, WordTracker, PBS, MSNBC, NRC, and Alexa research." Family Safe Media at http://www.familysafemedia.com/pornography_statistics.html (last visited Nov. 19, 2005).

weight of research points to a likelihood of significant effects on the moral and sexual development of youth."[71] This statement is contradicted by a study conducted at the request of Congress by the National Academy of Sciences, which found "there is no scientific consensus on the nature or extent of the impact of exposure to sexually explicit material on children."[72] Even more dire predictions have come from the Christian community. An article in the online *American Family Association Journal* stated that "serial killer Ted Bundy started on his road to perversion and murder by innocently looking at 'nudie' magazines as a boy. It only took one time for him to become hooked."[73]

Estimates of the amount of sexually explicit material available on the Internet continue to vary extravagantly. A House Commerce Committee Report in 1998 quoted an estimate from Reuters Financial Service that almost fifty percent of the content on the Web was unsuitable for children and another estimate from Upside Publishing Company that seventy percent of traffic on the Web is adult-oriented.[74] On the other hand, a study commissioned by Congress in 2002 from the National Academy of Sciences showed that adult-oriented sites accounted for only about 1.5 % of the World Wide Web.[75] Whatever the true numbers, the Supreme Court, in a long list of rulings that includes *Ashcroft II*, has held that the Government has a compelling interest in protecting minors from harmful material, including sexually explicit material.[76]

In an attempt to fence out harmful materials on the Internet, Congress has driven three stakes in the ground: the Communications Decency Act ("CDA") of 1996, COPA in 1998, and the Children's Internet Protection Act ("CIPA") in 2001.[77] CDA and COPA placed restrictions on the content providers as a way to curtail the harmful material; CIPA focused on the con-

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71. *Leading Case: D. Freedom of Speech and Expression, supra* note 70, at 361-62.

72. YOUTH, PORNOGRAPHY AND THE INTERNET, *supra* note 10, at 176.

73. Al Menconi, *Junk Food for Your Soul*, 24 AMERICAN FAMILY ASSOCIATION JOURNAL (June 2000), *available at* http://www.afajournal.org/archives/24060000438.asp (last visited Nov. 19, 2005).

74. H.R. REP. NO. 105-775, at 8 (1998).

75. YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 10, at 72.

76. *Ashcroft II*, 542 U.S. 656 (2004); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 809, 811 (2000); Reno v. ACLU, 521 U.S. 844, 869 (1997); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 743 (1996); Sable Commc'ns of California, Inc. v. FCC, 492 U.S. 115, 126 (1989); FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978).

77. Communications Decency Act of 1996. *See* Pub. L. No. 104-104, §§ 501-561 (1996). The Children's Internet Protection Act was incorporated into two statutes: Library Services and Technology Act, 20 USC § 9134(f) (2005), and under provisions governing E-rate discounts in 47 U.S.C. § 254(h)(6) (2005).

tent users—public libraries.[78] All three pieces of legislation have raised significant First Amendment concerns.[79]

Congress's first attempt to regulate sexually explicit speech on the Internet was the CDA, an amendment to the Telecommunications Act of 1996.[80] CDA expanded the regulation of offensive communication under 47 U.S.C. § 223 from "telephones" to "telecommunication devices," thus including computerized communication.[81] It proposed that telecommunications devices should be subject to the same restrictions on indecent material that *Pacifica* imposed on the broadcast media.[82] It criminalized the knowing transmission or displaying of any materials that were "obscene," "indecent," or "patently offensive" to anyone under eighteen years of age.[83] The act also allowed affirmative defenses, including "good faith, reasonable, effective and appropriate actions" to restrict access by minors and requiring certain designated forms of age proof such as a verified credit card or adult identification number or code.[84]

The Supreme Court found in *Reno v. ACLU* that the Internet was "[u]nlike communications received by radio or television" in that "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."[85] The Court also found that the Internet was not as "invasive" as radio or television: "Communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'"[86] Thus, content restrictions on radio and television were not applicable to cyberspace.[87] The Court concluded that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[88]

Under strict scrutiny, the Court found that CDA lacked the precision that the First Amendment required in regulating a content-based restriction on speech:

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78. *See infra* notes 83-84, 91-92, 96-98 and accompanying text.
79. Desai, *supra* note 19, at 3.
80. Communications Decency Act of 1996, Pub. L. No. 104-104 (1996).
81. Johanna M. Roodenburg, *"Son of CDA": The Constitutionality of the Child Online Protection Act of 1998*, 6 COMM. L. & POL'Y 227, 231 (Winter 2001).
82. Reno v. ACLU, 521 U.S. 844, 864, 867 (1997).
83. *Id.* at 859 (citing 47 U.S.C. § 223(a)(1) (Supp. 1997) and 47 U.S.C. § 223(d)(1) (Supp. 1997)).
84. *Id.* at 860 (quoting 47 U.S.C. § 223(e)(5) (Supp. 1997)).
85. *Id.* at 854 (quoting finding 89 by the district court in ACLU v. Reno, 929 F. Supp. 824, 845 (ED Pa. 1996)).
86. *Id.* at 869 (quoting finding 88, ACLU v. Reno, 929 F. Supp. at 844)).
87. Reno v. ACLU, 521 U.S. 844, 868 (1997).
88. *Id.* at 870.

> The breadth of the CDA's coverage is wholly unprecedented. . . . [T]he scope of the CDA is not limited to commercial speech or commercial entities. Its open-ended prohibitions embrace all nonprofit entities and individuals . . . . The general, undefined terms "indecent" and "patently offensive" cover large amounts of nonpornographic material with serious educational or other value. Moreover, the "community standards" criterion as applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message.[89]

Regarding the affirmative defenses, the Court found that the age verification measures were prohibitively costly for non-commercial Web sites, would discourage access, and were unworkable, especially with respect to e-mail, mail exploders, newsgroups or chat rooms.[90]

Congress proposed COPA, sometimes referred to as the "son of CDA," in the aftermath of the *Reno* decision and specifically designed it to correct the constitutional problems the Supreme Court had identified in CDA.[91] COPA narrows the scope of CDA in several ways. Whereas CDA applied to all Internet communications, COPA is restricted to commercial sites published on the Web.[92] CDA prohibited "indecent" and "patently offensive" communications, while COPA restricts just the narrower category of "harmful to minors."[93] CDA was directed at persons "under 18 years of age."[94] Minors are defined in COPA as persons under seventeen years of age, and "harmful to minors" is defined in language almost identical to the *Miller* test for obscenity, with the addition of phrases referring to minors.[95]

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89. *Id.* at 877-78.

90. *Id.* at 856-57 (citing ACLU v. Reno, 929 F. Supp. 824, 845-47 (E.D. Pa. 1996)).

91. ACLU v. Reno, No. 98-5591, 1998 U.S. Dist. LEXIS 18546, at *3 (E.D. Pa. Nov. 23, 1998).

92. *Compare* Communications Decency Act of 1996, Pub. L. No. 104-104 § 502(a)(1)(A)-(B)(1996), *with* 47 U.S.C. § 231(a)(1) (2005). In COPA, "commercial" means that a person "devotes time, attention, or labor . . . as a regular course of such person's trade or business, with the objective of earning a profit . . . ." 47 U.S.C. § 231(e)(2)(B). Also under COPA, a person must "knowingly" cause or solicit the harmful material to be posted on the Web to be considered in business. 47 U.S.C. § 231(e)(2)(B).

93. *Compare* Communications Decency Act of 1996, Pub. L. No. 104-104 § 502(a)(1)(A)-(B), (d)(1)(B) (1996), *with* 47 U.S.C. § 231(a)(1) (2005).

94. Communications Decency Act of 1996, Pub. L. No. 104-104 § 502(a)(1)(B), (d)(1)(A) (1996).

95. 47 U.S.C. § 231(e)(7) (2005). COPA defines "harmful to minors" as

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—(A) the average person, applying contemporary community standards, would find,

In response to reports of the use of public library computers to access sexually explicit materials, Congress passed the Children's Internet Protection Act ("CIPA") in 2001.[96] The act provides that a library may not receive federal assistance through the E-rate program or Library Services and Technology Act unless it adopts an Internet safety policy for minors that includes the installation of a "technology protection measure" on all Internet access computers to protect against access to materials that are obscene or child pornography, or to "visual depictions" that are "harmful to minors."[97] CIPA permits libraries to disable the filters for bona fide research or other lawful purposes.[98]

In a challenge by the American Library Association, the U.S. District Court for the Eastern District of Pennsylvania held that the filtering requirement of CIPA was a content-based restriction on access to a public forum, and it was thus subject to strict scrutiny.[99] The district court concluded that the provision did not withstand strict scrutiny because the use of filters was not narrowly tailored to achieve the Government's compelling interest in protecting children from harmful materials.[100] While noting that Congress has wide latitude when attaching conditions to its spending measures, the district court said those conditions may not "induce" the recipients of federal funds "to engage in activities that would themselves be unconstitutional."[101]

> taking the material as a whole and *with respect to minors*, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive *with respect to minors*, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value *for minors*.

47 U.S.C. § 231(e)(6) (2005) (emphasis added).

96. United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 200-01 (2003).

97. *Id.* at 201. *See also* 20 U.S.C. § 9134(f)(1)(A)(i) (2005); 47 U.S.C. § 254(h)(6)(B)(i) (2005).

98. *Am. Library Ass'n*, 539 U.S. at 201. *See also* 20 U.S.C. § 9134(f)(3) (2005); 47 U.S.C § 254(h)(6)(D) (2005).

99. Am. Library Ass'n. v. United States, 201 F. Supp. 2d 401, 470 (E.D. Pa. 2002). In a traditional public forum, such as public streets and parks which have long been devoted to assembly and debate, any content-based restriction of speech is held to strict scrutiny. Siefkes, *supra* note 37, at 334.

100. United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 203 (2003) (citing Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 471, 479 (E.D. Pa. 2002)).

101. *Id.* at 203 (quoting South Dakota v. Dole, 483 U.S. 203, 206, 210 (1987)). In *South Dakota v. Dole*, the Supreme Court described the "independent constitutional bar" limitation on Congress's spending power, that is, the spending power may not be used to induce government entities to engage in activities that in themselves are unconstitutional. *Dole*, 483 U.S. at 210. The American Library Association argued that the unconstitutional condition imposed by CIPA was that libraries (government entities) would be required to surrender their

The Supreme Court reversed the district court's decision in 2003, holding that CIPA should not be subject to strict scrutiny because Internet access in public libraries is neither a "traditional" nor a "designated" public forum.[102] Further, it likened filtering Internet access to a library's traditional role in making collection decisions, which were not subject to heightened scrutiny.[103] Regarding the argument that CIPA placed an unconstitutional condition on the receipt of federal funds, the Supreme Court responded that "Government entities [public libraries] do not have First Amendment Rights."[104] Further, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."[105]

While CIPA was upheld in a 6-3 decision, the debate was a contentious one as demonstrated by the five opinions written in the case.[106] Chief Justice Rehnquist wrote for the four-Justice plurality, which included himself, Justices O'Connor, Scalia, and Thomas.[107] Justices Kennedy and Breyer wrote separate concurring opinions; Justices Stevens and Souter wrote separate dissents, with Justice Ginsburg joining Justice Souter.[108] Issues such as strict scrutiny, the public forum doctrine, the concept of filtering as a collection decision, the right to receive speech, and Congress's spending power received considerable debate.[109]

Filtering the Internet

What the Supreme Court decisions regarding CDA, COPA, and CIPA have in common is a rose-colored reliance on a technological solution—filtering and blocking software—to protect children from dangerous content on the Internet. In *Reno*, the Court adopted the district court's view that "despite its limitations, currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may

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First Amendment right to provide public access to constitutionally protected speech. *Am. Library Ass'n*, 539 U.S. at 210.

102. *Am. Library Ass'n*, 539 U.S. at 205. Because the Internet resource did not exist until recently, the Court declined to designate it as a "traditional" public forum. *Id.* at 205-06. Also, the public library was not a "designated" public forum because it has not been affirmatively and intentionally designated as such. *Id.* at 206.

103. *Id.* at 208. The Court noted that public libraries traditionally have excluded pornography from their collections, and thus a parallel limitation on the Internet was reasonable. *Id.* at 212.

104. *Id.* at 210.

105. *Id.* at 211 (quoting Rust v. Sullivan, 500 U.S. 173, 194 (1991) (approving the appropriation of funds for family planning services, but prohibiting the use of the funds for programs that included abortion counseling)).

106. *Am. Library Ass'n*, 539 U.S. 194.

107. *Id.* at 197.

108. *Id.* at 214 (Kennedy, J., concurring), 215 (Breyer, J., concurring), 220 (Stevens, J., dissenting), 231 (Souter, J., dissenting).

109. *Id.* at 214-243.

believe is inappropriate for their children will soon be widely available."[110] In *Ashcroft II*, the majority strongly implied that filtering software is a preferred alternative to the Act.[111] In *American Library Association*, the Court required the use of filters in libraries as a condition of receiving federal funds.[112]

Internet blocking software is most commonly designed to restrict access to materials published on the World Wide Web by monitoring user requests and interceding between the user and the connection to the Internet.[113] The blocking programs classify Web sites into categories created and defined by their producers, such as "Adults Only," "Drugs," "Religion," and "Violence," and the customer then configures the program to prevent access to specific categories.[114] The process includes three basic steps: (1) In order to classify Web sites into the pre-determined categories, the software companies first compile huge lists of Web addresses by following links from online directories such as Yahoo, by doing key word searches on ordinary search engines, and by reviewing reports of newly-registered domain names; (2) the companies then use automated systems utilizing keyword analysis to examine each site and to recommend it for inclusion in a particular category; and (3) a human receiver, at least in some companies and to some extent, makes the final decision about whether and how to categorize a site.[115] However, the size of the Internet and its rapid rate of change are problematic for software designers seeking to classify a large number of diverse sites into a finite and fixed set of categories.[116]

Filtering software has been criticized for both overblocking and underblocking.[117] That is, the software programs prevent access to a substantial number of sites that do not contain content that fits within the blocked

110. Reno v. ACLU, 521 U.S. 844, 877 (1997) (quoting Reno v. ACLU, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

111. *Ashcroft II*, 542 U.S. 656, 666-67 (2004).

112. United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 199 (2003).

113. Expert Report of Benjamin Edelman at 14, Multnomah County Public Library v. United States, 201 F. Supp. 2d 401 (2002) (later joined with Am. Library Ass'n v. United States, 201 F. Supp. 2d 401) *at* http://cyber.law.harvard.edu/people/edelman/pubs/aclu-101501.pdf (last visited Nov. 19, 2005). Edelman's report has been described as "one of the best lay description of the technology." Desai, *supra* note 19, at n.46.

114. Expert Report of Benjamin Edelman, *supra* note 113, at 15. Generally, the programs include one or more categories for sexually explicit materials, such as "Extreme/Obscene/Violence," "Mature," "Nudity," and "Sex." *Id.* In Edelman's study, none of the programs he reviewed used categories specifically tied to CIPA's definitions of obscene, child pornography or harmful to minors. *Id.*

115. *Id.* at 16-18. None of the programs tested categorized and blocked images; rather, they relied exclusively on keyword analysis to classify sites. *Id.* at 18.

116. *Id.* at 17. According to one recent estimate, approximately two billion pages exist on the Web, with 1.5 million pages added each day. Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 436 (E.D. Pa. 2002).

117. Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 450 (E.D. Pa. 2002); *Ashcroft II*, 542 U.S. 656, 668-69 (2004).

category, and they fail to block all content meeting category definitions.[118] Due to this inaccuracy, mandatory filtering in public libraries has been successfully challenged in district court.[119]

In 1998, in *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, an association of public library patrons in Virginia sued the local library board for adopting a "Policy on Internet Sexual Harassment" that required the six branches of the Loudoun County Library system to install site-blocking software on all library computers to block child pornography and obscene material as well as material deemed "harmful to juveniles."[120] The U.S. District Court for the Eastern District of Virginia characterized the installation of filters as a "removal decision," likening the situation to "a collection of encyclopedias from which defendants have laboriously redacted portions deemed unfit for library patrons."[121] Noting that it was undisputed that the software blocked at least some sites not containing any material prohibited by the policy, the court stated, "It has long been a matter of settled law that restricting what adults may read to a level appropriate for minors is a violation of the free speech guaranteed by the First Amendment . . . ."[122]

Research to determine the effectiveness of blocking software has itself been blocked. Benjamin Edelman, a technology analyst at Harvard Law School's Berkman Center for Internet & Society, proposed a research project to reverse engineer a leading filtering software product manufactured by N2H2, Inc. to analyze how it worked and what block lists it generated.[123] Since the research necessarily involved violation of the software licensing agreement and possibly the Digital Millennium Copyright Act ("DMCA"), Edelman filed suit in district court to obtain a declaratory judgment claiming

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118. Expert Report of Benjamin Edelman, *supra* note 113, at 23, 27. In reviewing research regarding filtering software accuracy, the district court concluded that the rate of overblocking is at least six to fifteen percent, and underblocking is significant due to the fast rate of growth in Web pages and the fact that a substantial majority of Web pages are not indexable by Web search engines. Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 442, 448 (E.D. Pa. 2002). Since filtering software companies collect Web sites by means of the search engines, those sites not indexed by those engines cannot be categorized by the filtering programs. *Id.* at 448.

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

120. Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library, 2 F. Supp. 2d 783, 787 (E.D. Va. 1998). The plaintiffs argued that the software blocked their access to protected speech such as the Quaker Home Page, the Zero Population Growth website, and the site for the American Association of University Women-Maryland. *Id.*

121. *Id.* at 794. In *Am. Library Ass'n*, the Supreme Court took the opposite view, characterizing filtering as a collection development decision as opposed to a removal decision. United States v. Am. Library Ass'n, 539 U.S. 194, 208 (2003).

122. *Mainstream Loudoun*, 24 F. Supp. 2d at 567.

123. Stephanie C. Ardito, *New Filtering and Censorship Challenges*, INFORMATION TODAY, Nov. 2002, at 19. N2H2, Inc. is reportedly a leader in the education market, controls a significant portion of the library market, and advertises its software as CIPA compliant. *Id.*

First Amendment and fair use rights to allow his research to proceed without fear of repercussions from N2H2.[124] His complaint was based, in part, on "the public's right to know what World Wide Web sites . . . are blocked by Internet content blocking programs that are increasingly mandated by governments."[125]

The N2H2 software license restricted users from copying the software and reverse engineering it.[126] It also referred to the block list as proprietary and a clause prohibited the use or disclosure of that confidential information.[127] In addition, the DMCA prohibits the circumvention of a technological measure (such as encryption) that controls access to a copyrighted work.[128] Access to N2H2's block list is controlled by an encryption, which Edelman would have to circumvent.[129] Although the Library of Congress created an exception to this provision specifically for libraries or individuals to reverse engineer filtering software, the DMCA also specifically prohibits the manufacture of a technological tool by which to achieve the circumvention.[130] Without the ability to manufacture the circumvention tool, reverse engineering could not be accomplished.[131]

In *Edelman v. N2H2, Inc.*, the district court left the issue unresolved by granting N2H2's motion to dismiss and declining to give an advisory opinion to Edelman.[132] The court held that Edelman did not have standing to bring the suit because he had not yet suffered an injury.[133] According to the

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124. *Id.* at 19-20. The DMCA was signed into law October 28, 1998. U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 1 (December 1998), http://www.copyright.gov/legislation/dmca.pdf (last visited Nov. 19, 2005). The act implemented two 1996 World Intellectual Property Organization treaties and addressed copyright issues in the electronic environment. *Id.*

125. Complaint for Declaratory and Injunctive Relief at 1, Benjamin Edelman v. N2H2, Inc. (D. Mass. 2003) *at* http://www.aclu.org/Files/OpenFile.cfm?id=13619 (last visited Nov. 19, 2005).

126. *Id.* at 20.

127. *Id.*

128. Digital Millennium Copyright Act, 17 U.S.C. § 1201(a)(1)(A) (2005).

129. Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 22.

130. Exemption to Prohibition Against Circumvention, 37 C.F.R. § 201.40 (2005). This federal regulation names "compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites . . ." as a class of copyrighted works that may be exempt from the prohibition against circumvention. 37 C.F.R. § 201.40(b)(1). However, according to DMCA, "[n]o person shall manufacture . . . any technology . . . that—(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title . . ." 17 U.S.C. § 1201(a)(2).

131. Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 23.

132. Edelman v. N2H2, Inc., 263 F. Supp. 2d 137 (D. Mass. 2003).

133. *Id.* at 139.

Court, "the prospect of a lawsuit is supported only by Edelman's conjecture as to N2H2's intentions."[134]

PRINCIPAL CASE

The issue in *Ashcroft II* was whether the Supreme Court should uphold a preliminary injunction against enforcement of COPA because the statute likely violated the First Amendment.[135] The U.S. District Court for the Eastern District of Pennsylvania originally granted an injunction against COPA on the grounds that it placed a burden on some protected speech, and that respondents were likely to prevail in their argument that there were less restrictive alternatives available for preventing minors from accessing harmful materials on the Internet.[136]

The Third Circuit upheld the injunction, but on the grounds that the "community standards" language was likely to be found unconstitutionally overbroad.[137] COPA defined "harmful to minors" in language very similar to the *Miller* test which assessed obscenity by "applying contemporary community standards."[138] The Third Circuit reasoned that applying community standards in an international medium would limit providers to the standards of the most conservative community:

> Because material posted on the Web is accessible by all Internet users worldwide, and because current technology does not permit a Web publisher to restrict access to its site based on the geographic locale of each particular Internet user, COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability.[139]

The Supreme Court, in its first hearing of the case ("*Ashcroft I*"), reversed the Third Circuit's decision, holding that the community standards language standing alone did not make COPA substantially overbroad, but remanded it back to the Third Circuit to rule on other issues, including the least restrictive means issue.[140] The Third Circuit affirmed the district court again, this time satisfied that "COPA does not employ the 'least restrictive

134. *Id.*
135. *Ashcroft II*, 542 U.S. 656, 660 (2004).
136. ACLU v. Reno, 31 F. Supp. 2d 473, 495, 497 (E.D. Pa. 1999).
137. ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000).
138. 47 U.S.C. § 231(e)(6) (2005).
139. ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000).
140. Ashcroft v. ACLU, 535 U.S. 564, 585 (2002) [hereinafter *Ashcroft I*]; *Ashcroft II*, 542 U.S. 656, 665 (2004).

means' to effect the Government's compelling interest in protecting minors."[141]

The Supreme Court heard the case a second time in *Ashcroft II*.[142] In the majority opinion, Justice Kennedy stated, "Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people."[143] To guard against this threat, the Court applied strict scrutiny in its analysis of COPA.[144] When a content-based speech restriction is challenged, "the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives."[145] The burden is on the Government to prove that the proposed alternatives are more restrictive and less effective than the challenged statute.[146]

The Court upheld the preliminary injunction in a 5-4 decision.[147] Focusing on the primary alternative considered by the district court, blocking and filtering software, the Court concluded that "[f]ilters are less restrictive than COPA. They impose selective restrictions on speech on the receiving end, not universal restrictions at the source."[148] Under a filtering regime, adults could access constitutionally protected speech without having to identify themselves or provide credit card information.[149] Even adults who are employing filters could simply turn off the filters to access the same material.[150] Most importantly, promoting filters does not have the chilling effect of criminalizing any category of speech.[151]

Regarding the effectiveness of filters compared with COPA, the Court explained that "[f]ilters also may well be more effective than COPA" because COPA does not prevent minors from accessing harmful material from foreign sources (which may account for about forty percent of Internet pornography), verification systems are subject to evasion and circumvention, and COPA does not address all forms of Internet communication such as e-mail and chat.[152] The opinion further noted that Congress's Commission on

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141. ACLU v. Ashcroft, 322 F.3d 240, 261 (3d Cir. 2003).
142. *Ashcroft II*, 542 U.S. 656 (2004).
143. *Id.* at 660.
144. *Id.* at 665-66. Under strict scrutiny a law must be necessary to achieve a compelling government purpose. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 645, 648 (2d ed. 2002). To prove the law is necessary, the government must show it is the least restrictive alternative to achieving the goal. *Id.*
145. *Ashcroft II*, 542 U.S. at 666.
146. *Id.*
147. *Id.* at 658.
148. *Id.* at 667.
149. *Id.*
150. *Ashcroft II*, 542 U.S. at 667.
151. *Id.*
152. *Id.* at 667-68.

Child Online Protection "unambiguously found that filters are more effective than age-verification requirements."[153]

The Court did admit that filtering "is not a perfect solution" as "[i]t may block some materials that are not harmful to minors and fail to catch some that are."[154] But because the Government failed to introduce specific evidence to prove filtering is more restrictive and less effective than COPA, the Supreme Court held that the district court did not abuse its discretion when it entered the preliminary injunction.[155]

The Court also listed several practical reasons for letting the injunction stand. First, the potential harms from reversing the injunction outweighed the harms of erroneously leaving it in place because of the criminal penalties attached to COPA.[156] Second, there is a serious gap in the evidence regarding the effectiveness of filtering software.[157] Third, because the original district court factfindings took place in 1999, the record does not reflect subsequent, and possibly substantial, technological developments.[158]

The Court addressed one final argument made by the Government: Filtering software is not an available alternative because Congress may not require it to be used.[159] The Court discounted that argument because "Congress undoubtedly may act to encourage the use of filters" as it did in CIPA.[160] Also, Congress could take steps to promote the development of filters by the industry and their use by parents.[161] Regarding parents, the Court noted that "COPA presumes that parents lack the ability, not the will,

153. *Id.* at 668. On an effectiveness scale of zero to ten, the Commission rated age verification based on credit cards at 5.5 and those based on adult IDs at 5.9. Commission on Child Online Protection (COPA), Report to Congress at 25, 27 (Oct. 20, 2000), available at http://www.copacommission.org/report/ (last visited Nov. 19, 2005) [hereinafter, *Copa Commission Report*]. Effectiveness for server-side filtering was 7.4 and client-side filtering was 6.5. *Id.* at 19, 21.

154. *Ashcroft II*, 542 U.S. at 668.

155. *Id.* at 669.

156. *Id.* at 670.

157. *Id.* at 671.

158. *Id.* The Court also pointed out some additional laws that have been passed since COPA, which also attempt to protect minors on the Internet and might be considered less restrictive alternatives to COPA. *Id.* at 672. These include 18 U.S.C. § 2252B, which prohibits misleading Internet domain names, and 47 U.S.C. § 941, which creates a "Dot Kids" domain where content is restricted to that fit for minors under age thirteen. *Id.* at 663.

159. *Ashcroft II*, 542 U.S. at 669. For example, Congress may not require parents to purchase filtering software; filtering software is voluntary. *Brief for Petitioner, supra* note 9, at 17. A Harvard commentator charged that "[t]he least-restrictive-alternative analysis is intended to require a search for a regulatory alternative . . . . The mere existence of filtering software is not a regulatory alternative . . . . [T]he Court seemed to be telling Congress that, because filters already exist, Congress cannot regulate indecent communication on the Internet." *Leading Case: D. Freedom of Speech and Expression, supra* note 70, at 361.

160. *Ashcroft II*, 542 U.S. at 669.

161. *Id.*

to monitor what their children see. By enacting programs to promote use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties."[162]

The Concurrence

In a concurring opinion, Justice Stevens, joined by Justice Ginsburg, supported the Court of Appeals' holding that COPA's use of "contemporary community standards" in identifying materials "harmful to minors" was "a serious, and likely fatal" flaw.[163] Justice Stevens stated, "I continue to believe that the Government may not penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children's consumption, and consider that principle a sufficient basis for deciding this case."[164]

Justice Stevens also underscored the restrictive nature of COPA with fines as high as $50,000 per day of the violation, adult-verification mechanisms that are only affirmative defenses and cannot guarantee freedom from prosecution, and the blurred boundaries of speech considered "harmful to minors."[165] He reasoned that "COPA's creation of a new category of criminally punishable speech that is 'harmful to minors' only compounds the problem."[166]

Regarding alternatives, Justice Stevens supported encouraging filtering software as a way of serving Congress's interest in protecting minors "as well or better than" attempting to regulate Web content at its source and "at a far less significant cost to First Amendment values."[167] While strongly endorsing Congress's goal in COPA, Justice Stevens said, "I must confess to a growing sense of unease when the interest in protecting children from prurient materials is invoked as a justification for using criminal regulation of speech as a substitute for, or a simple backup to, adult oversight of children's viewing habits."[168]

The Dissents

In an individual dissent, Justice Scalia concluded that COPA was constitutional, and that it was an error to subject the statute to strict scrutiny.[169] Justice Scalia believed that the businesses to which COPA applies

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162. *Id.* at 670.
163. *Id.* at 673 (Stevens, J., concurring).
164. *Id.* at 674 (Stevens, J., concurring).
165. *Ashcroft II*, 542 U.S. at 674 (Stevens, J., concurring).
166. *Id.* at 675 (Stevens, J., concurring).
167. *Id.* at 674 (Stevens, J., concurring).
168. *Id.* at 675 (Stevens, J., concurring).
169. *Id.* at 676 (Scalia, J., dissenting).

could, consistent with the First Amendment, be banned entirely, and thus COPA's lesser restrictions should raise no constitutional concern.[170]

A second dissent by Justice Breyer, joined by Justice O'Connor and Chief Justice Rehnquist, also found COPA constitutional, even under strict scrutiny.[171] Justice Breyer, construing the act very narrowly, noted that COPA "imposes a burden on protected speech that is no more than modest" in that it expands the language of *Miller's* definition of obscenity "only slightly" to be applicable to minors.[172] By narrowly construing the statute and removing nearly all protected material from its scope, Justice Breyer would reconcile COPA with the demands of the First Amendment.[173]

Furthermore, Justice Breyer contended that COPA does not censor the material it covers, but rather it restricts minors' access to it by verifying age.[174] The screening requirement would impose some burden on the providers, although use of verification procedures is "standard practice" in commercial operations.[175] Adults wishing to view the material may be deterred by potential embarrassment.[176] However, "in the context of congressional efforts to protect children, restrictions of this kind [monetary, embarrassment] do not automatically violate the Constitution."[177]

Addressing the filtering alternative, Justice Breyer argued that the existence of the software is not an "alternative," but merely part of the status quo, and "doing nothing" does not address the problem Congress sought to address.[178] In addition, filtering software is inadequate in that it underblocks pornographic material, it overblocks a great deal of valuable material, it costs families money, and it depends upon parents' willingness to decide how their children will use the Web.[179] Thus, "Congress could reasonably conclude that a system that relies entirely upon the use of such software is not an effective system."[180]

In summary, Justice Breyer argued that COPA, "properly interpreted," risks only minor burdens on some protected material—burdens that adults may overcome at a modest cost—while significantly helping Congress achieve a compelling goal.[181] Justice Breyer said, "There is no serious,

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170. *Ashcroft II*, 542 U.S. at 676 (Scalia, J., dissenting).
171. *Id.* at 666-67 (Breyer, J., dissenting).
172. *Id.* at 678-79 (Breyer, J., dissenting).
173. *Id.* at 690-91 (Breyer, J., dissenting).
174. *Id.* at 682 (Breyer, J., dissenting).
175. *Ashcroft II*, 542 U.S. at 682 (Breyer, J., dissenting).
176. *Id.* at 683 (Breyer, J., dissenting).
177. *Id.* (Breyer, J., dissenting).
178. *Id.* at 684 (Breyer, J., dissenting).
179. *Id.* at 684-86 (Breyer, J., dissenting).
180. *Ashcroft II*, 542 U.S. at 686 (Breyer, J., dissenting).
181. *Id.* at 689 (Breyer, J., dissenting).

practically available 'less restrictive' way similarly to further this compelling interest. Hence the Act is constitutional."[182]

ANALYSIS

In 1997, the Supreme Court set forth an idealistic vision of the Internet in *Reno v. ACLU*.[183] The Internet is "the most participatory form of mass speech yet developed," its content "as diverse as human thought."[184] It is entitled to "the highest protection from governmental intrusion."[185] After *Ashcroft II* in 2004, is this digital, democratic soapbox as sturdy and strong as cheering First Amendment advocates have assumed? Will speech on the Internet continue to be afforded the highest protection? *Ashcroft II* provides reason to be hopeful and reason to be suspicious. The greatest hope lies in the Court's nearly unanimous agreement in applying strict scrutiny to COPA; the biggest concern arises from the strong direction the Court gives Congress regarding the use of filtering software.

Subsequent to *Reno*, the Court applied strict scrutiny analysis in *Playboy Entertainment Group*, a case dealing with a content-based restriction in the television broadcast media.[186] In that case the Court was explicit about its use of strict scrutiny:

> Since § 505 [of the Telecommunications Act of 1996] is a content-based speech restriction, it can stand only if it satisfies strict scrutiny. If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.[187]

Four years later, in the 5-4 *Ashcroft II* decision, eight of the nine justices agreed that it was appropriate to apply strict scrutiny in analyzing the merits of COPA.[188] According to the majority, the district court should ap-

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182. *Id.* (Breyer, J., dissenting).

183. Reno v. ACLU, 521 U.S. 844 (1997).

184. *Id.* at 863, 870 (quoting ACLU v. Reno, 929 F. Supp. 824, 842, 883 (E.D. Pa. 1996)). Judge Dalzell, one of the three-judge district court panel members to hear *ACLU v. Reno*, listed some of the special attributes of the Internet that precipitated his remarks: The Internet presents very low barriers to entry; the barriers are identical for both speakers and listeners; thus, "astoundingly diverse content" is available; and the Internet provides significant access to all who wish to speak in the medium, creating a relative parity among speakers. *Id.* at 863 n.30 (quoting ACLU v. Reno, 929 F. Supp. at 877).

185. *Id.* at 863 (quoting ACLU v. Reno, 929 F. Supp. at 883).

186. United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000).

187. *Id.* at 813 (citations omitted).

188. *Ashcroft II*, 542 U.S. 656 (2004). Justice Scalia was the single justice who did not agree, and he explained that "[b]oth the Court and Justice Breyer err . . . in subjecting COPA to strict scrutiny. Nothing in the First Amendment entitles the type of material covered by

ply the test for strict scrutiny and "ask whether the challenged regulation is the least restrictive means among available, effective alternatives."[189] Three dissenting justices, Justices Breyer, O'Connor and Chief Justice Rehnquist, agreed with the majority that COPA should be subjected to "the most exacting scrutiny," and the Government should be required to show that any restriction of non-obscene speech was "narrowly drawn" to further a "compelling interest."[190]

This strong stance in favor of strict scrutiny is far from insignificant. The Court has been hesitant to apply strict scrutiny to content-based restrictions in other media besides print.[191] In 1996, in *Denver Area Education Telecommunications Consortium*, the Court applied the standard strict scrutiny test in its analysis, determining whether less restrictive alternatives were available for protecting children from sexually explicit materials on cable television.[192] However, the plurality carefully avoided the terminology "strict scrutiny," for which they were strongly criticized by Justice Kennedy.[193] Even in *Reno* in 1997, the Court never actually used the words "strict scrutiny."[194] *Playboy Entertainment Group* in 2000 was the Court's first explicit use of "strict scrutiny" in analyzing the regulation of sexually explicit, non-obscene speech by the government.[195]

COPA to that exacting standard of review." *Id.* at 676 (Scalia, J., dissenting). Justices Stevens and Ginsburg, who joined in a concurring opinion, based their opposition to COPA on the community standards language in the Act. *Id.* at 673 (Stevens, J., concurring). However, the concurrence "register[ed] my agreement with the Court's less-restrictive-means analysis," the strict scrutiny test. *Id.* at 674 (Stevens, J., concurring).

189. *Id.* at 666.

190. *Id.* at 677 (Breyer, J., dissenting). The dissenting Justices differed from the majority in that they believed COPA would satisfy the stringent test. *Id.* at 689.

191. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) (upholding restrictions on leased cable television channels while prohibiting them on public access channels); Sable Commc'ns of California v. FCC, 492 U.S. 115 (1989) (preserving highly protected status for cable television by considering less restrictive means, but never invoking strict scrutiny); FCC v. Pacifica Found., 438 U.S. 726 (1978) (giving less First Amendment protection to broadcast media).

192. *Denver Area*, 518 U.S. at 733.

193. *Id.* at 786 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Kennedy stated, "The plurality cannot bring itself to apply strict scrutiny, yet realizes it cannot decide these cases without uttering some sort of standard; so it has settled for synonyms." *Id.* (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). "Close judicial scrutiny" is substituted for "strict scrutiny," "extremely important problem" for "compelling interest," "appropriately tailored," "sufficiently tailored," and "carefully and appropriately addressed" for "narrowly tailored." *Id.* (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

194. The terminology in *Reno* was "highest protection from governmental intrusion." Reno v. ACLU, 521 U.S. 844, 863 (1997).

195. CHEMERINSKY, *supra* note 144, at 1004. Previously, the Court had emphasized the low value of indecent speech, but had declined to articulate a specific level of scrutiny for reviewing such cases. *Id.*

Just when the highest First Amendment protection seemed secure for the Internet, the Supreme Court in 2003 reversed the district court in *American Library Association* and held CIPA only to the rational basis test.[196] Further, the ACLU issued a report in 2002 warning that the stage was being set for reducing the protection of speech on the Internet to be more in line with public broadcast television.[197] The impetus for the alarm was a White House summit with industry leaders, apparently including Netscape, Microsoft, IBM and four of the major search engines, who were laying plans for a rating system for Internet materials.[198] The meeting "was clearly the first step . . . away from the principle that protection of the electronic word is analogous to protection of the printed word."[199]

A further reason for concern about the continuing adherence of the Court to the standard of strict scrutiny in Internet cases is buried within the *Ashcroft II* decision. The Court remanded the case to the district court for further factfinding since the original facts were five years old.[200] The Court noted that "[i]t is reasonable to assume that other technological developments important to the First Amendment analysis have also occurred during that time."[201] A Texas commentator took note of Justice Scalia's remarks during oral arguments in *Reno v. ACLU*, when he questioned whether statutes found unconstitutional today would still be unconstitutional next week or next year given the rapid rate of technological change.[202] The commentator concluded that "if relevant facts underlying the Internet have changed . . . then Reno [sic] may no longer present a valid constitutional analysis irrespective of any new laws that might be challenged."[203] The author advocated that courts "must be willing to reconsider precedents when facts change."[204]

However, because the Supreme Court applied strict scrutiny in *Ashcroft II*, it seems certain that the district court on remand will do likewise when evaluating the merits of the COPA case.[205] It seems equally likely,

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196. United States v. Am. Library Ass'n, 539 U.S. 194, 208 (2003). *See supra* notes 102-03 and accompanying text.

197. Ann Beeson, Chris Hansen & Barry Steinhardt, *Fahrenheit 451.2: Is Cyberspace Burning?* at 1 (Mar. 17, 2002) at http://www.aclu.org/news/NewsPrint.cfm?ID=9997&c=252 (last visited Nov. 19, 2005).

198. *Id.* at 2. The ACLU objected to the long-term ramifications of such a rating system because smaller sites, which did not have the resources to rate themselves, would potentially be blocked by Internet software. *Id.* at 2-3.

199. *Id.* at 3.

200. *Ashcroft II*, 542 U.S. 656, 671 (2004).

201. *Id.*

202. *Stepping Into the Same River Twice: Rapid Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 270 (Dec. 1999) (quoting Transcript of Oral Argument at 45, Reno v. ACLU, 521 U.S. 844 (1997) (No. 96-511)).

203. *Id.* at 370.

204. *Id.*

205. *See supra* notes 144-47 and accompanying text.

considering the strength of the *Ashcroft II* opinion regarding the filtering alternative, that the lower court will find COPA does not meet strict scrutiny.[206] If so, COPA would be found unconstitutional and the freedom of the Internet would remain secure—for now.

While the fate of COPA seems to be sealed, the obvious question is, what will be Congress's next step in attempting to curtail sexually explicit speech on the Internet? *Ashcroft II* did not foreclose the possibility of further legislation, with the Court stating, "[I]t is important to note that this opinion does not hold that Congress is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials."[207] *Ashcroft II* also did not point Congress in the direction of the COPA Commission's recommendation for a passive approach including increased education, consumer empowerment, enforcement and funding.[208] Instead, the Court focused on one alternative—filtering.[209] It is the same path taken in CIPA, where Congress employed strong incentives for public libraries to install across-the-board Internet filtering.[210] This path leads straight into a corner.

Nobody—not Congress, nor the courts, nor civil liberties groups like the ACLU—really advocates the broad use of filters, in spite of the stands they have taken on various pieces of legislation.[211] All have expressed serious concerns about the effectiveness of filters and their impact on free speech.

In Congress

In the House Commerce Committee's report to the full House recommending COPA, the Committee "remain[ed] concerned that all blocking software requires the exercise of subjective human judgment by the vendor or purchaser to decide what speech is acceptable and what is unacceptable."[212] The report noted that the list of restricted words was not always visible to users and could result in hidden censorship of matters beyond adult content, such as politics or religion.[213] It explained that "[b]ecause of the discretionary means to screen information, there is a chance that protected, harmless, or innocent speech would be accidentally or inappropriately blocked. Software that blocks a minor's access to 'breast,' for exam-

206. *See supra* notes 148-53 and accompanying text.
207. *Ashcroft II*, 542 U.S. 656, 672 (2004).
208. *Copa Commission Report, supra* note 153, at 39. The Commission also produced a detailed list of twelve recommendations. *Id.* at 40-46.
209. *Ashcroft II*, 542 U.S. at 666.
210. United States v. Am. Library Ass'n, Inc., 539 U.S. 194 (2003).
211. *See infra* notes 212-40 and accompanying text.
212. H.R. REP. NO. 105-775, at 14 (1998).
213. *Id.*

ple, may also screen that minor from accessing information about 'breast cancer.'"[214]

A National Academy of Sciences study commissioned by Congress reached a similar conclusion: "All filters—those of today and for the foreseeable future—suffer (and will suffer) from some degree of overblocking . . . and some degree of underblocking."[215] While the Academy thought the extent of overblocking and underblocking would vary by product and possibly improve over time, inaccuracy was inherent due to the "variability in the perspectives that humans bring to the task of judging content."[216]

In the Courts

In addition to charges of substantial over- and underblocking, the district court in *American Library Association* leveled three other strong criticisms against filtering software: "Most importantly, no category definition used by filtering software companies is identical to CIPA's definitions of visual depictions that are obscene, child pornography, or harmful to minors. And category definitions and categorization decisions are made without reference to local community standards."[217] Second, the methods the companies use to compile and categorize Web sites, as well as the block lists themselves, are proprietary information, and thus not available to users.[218] Third, search engines that software companies use to compile and analyze sites are only capable of searching text and cannot analyze images, which "is of critical importance because CIPA, by its own terms, covers only 'visual depictions.'"[219] Further, the Court noted that "[i]mage recognition technology is immature, ineffective, and unlikely to improve substantially in the near future."[220]

The district court in *Mainstream Loudoun* was also concerned about the lack of congruence between the software company's definitions and library policies as well as the secrecy of the information.[221] Specifically, decisions regarding which materials to block were made "by a California corporation based on secret criteria not disclosed even to defendants," and those criteria "may or may not bear any relation" to the library policy or to legal definitions of obscenity or child pornography.[222] The court also said, "[A] defendant cannot avoid its constitutional obligation by contracting out its

214. *Id.*
215. YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 10, at 303.
216. *Id.*
217. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 429 (E.D. Pa. 2002).
218. *Id.* at 430.
219. *Id.* at 431.
220. *Id.*
221. Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library, 2 F. Supp. 2d 783, 796 (E.D. Va. 1998).
222. *Id.*

decisionmaking to a private entity."[223] The court permanently enjoined the Loudoun County Library Board from enforcing the Internet policy.[224]

While the district court decision against filtering in *American Library Association* was overturned by the Supreme Court, that Court's majority did not contradict the negative findings regarding filtering software.[225] The Court merely found them irrelevant because "[a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled."[226] However, Justice Stevens issued a scathing dissent centered around the "fundamental defects" in the filtering software, saying, "CIPA operates as a blunt nationwide restraint on adult access to 'an enormous amount of valuable information' that individual librarians cannot possibly review. Most of that information is constitutionally protected speech. In my view, this restraint is unconstitutional."[227] Justices Souter and Ginsburg also dissented because "indiscriminate behavior of current filtering mechanisms" denied adults access to "a substantial amount of nonobscene material harmful to children but lawful for adult examination, and a substantial quantity of text and pictures harmful to no one."[228] The two Justices believed that libraries could not constitutionally impose such restrictions at library terminals reserved for public use as "[t]his would simply be censorship."[229]

One year later, in *Ashcroft II* regarding COPA, the dissenters in *American Library Association* who so severely criticized filters, were in the majority whose opinion cast a positive light on filters.[230] While admitting that filters were "not a perfect solution," they held that filters were less restrictive than COPA and probably more effective in sheltering minors from sexually explicit materials.[231] Ironically, Justices Breyer and O'Connor and Chief Justice Rehnquist, who supported the majority in *American Library Association* approving the requirement of filters in public libraries as a prerequisite to receiving federal funding, now wrote a harsh dissent criticizing filters.[232] Justice Breyer wrote, "Filtering software, as presently available, does not solve the 'child protection' problem. . . . First, its filtering is faulty, allowing some pornographic material to pass through without hindrance."[233] Further, "software blocking lacks precision, with the result that those who

223. Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library, 24 F. Supp. 2d 552, 569 (E.D. Va. 1998).
224. *Id.* at 570.
225. United States v. Am. Library Ass'n, 539 U.S. 194, 209 (2003).
226. *Id.*
227. *Id.* at 220-21 (Stevens, J., dissenting) (citation omitted).
228. *Id.* at 233-34 (Souter, J., dissenting).
229. *Id.* at 235 (Souter, J., dissenting).
230. *Ashcroft II*, 542 U.S. 656, 658 (2004).
231. *Id.* at 667-68.
232. *Id.* at 676-91 (Breyer, J., dissenting).
233. *Id.* at 684-85 (Breyer, J., dissenting).

wish to use it to screen out pornography find that it blocks a great deal of material that is valuable."[234] To substantiate these claims, Justice Breyer quoted at length Justice Stevens' dissent in *American Library Association*.[235] He stated that "Congress could reasonably conclude that a system that relies entirely upon the use of such software is not an effective system."[236]

The ACLU

Though the ACLU argued in *Ashcroft II* that filters were a less restrictive alternative than COPA, it has criticized any mandatory imposition of filters by the government. In a recent article, an ACLU spokesperson said, "[A]ll blocking software censors valuable speech and gives librarians, educators and parents a false sense of security when providing minors with Internet access."[237] Further, "[m]ost blocking software prevents access to sites based on criteria provided by the vendor."[238] ACLU concluded that "somebody out there is making judgments about what is offensive and controversial, judgments that may not coincide with [the user's judgment]. The First Amendment exists precisely to protect the most offensive and controversial speech from government suppression."[239] While the ACLU notes that blocking software can be a somewhat useful tool for parents who voluntarily block access to some inappropriate material online, "in the hands of government, blocking software is nothing more than censorship in a box." [240]

Is there a way out of the filtering corner? If so, it must address the ineffectiveness of the filters as well as the impacts of filters on constitutionally-protected speech. Neither can be assessed without "go[ing] under the hood" of filtering software and examining block lists in their entirety.[241] However, users, including public libraries who must install filters to receive federal funding, cannot access software manufacturers' block lists because under licensing agreements they are protected proprietary information.[242]

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234. *Id.* at 685 (Breyer, J., dissenting).

235. *Id.* at 685-86 (Breyer, J., dissenting). Justice Breyer wrote that "Justice Stevens described 'fundamental defects in the filtering software . . . .'" *Id.* at 685 (Breyer, J., dissenting). "As Justice Stevens pointed out, 'the software's reliance on words to identify undesirable sites necessarily results in the blocking of thousands of pages that contain content that is completely innocuous for both adults and minors . . . .'" *Id.* at 685-86 (Breyer, J., dissenting).

236. *Id.* at 686 (Breyer, J., dissenting).

237. Harry Hochheiser, *Censorship in a Box: Why Blocking Software is Wrong for Public Libraries* at 1 (Sept. 16, 2002), *at* http://www.aclu.org/Privacy/Privacy.cfm?ID=13624&c=252 (last visited Nov. 19, 2005).

238. *Id.* at 4.

239. *Id.* at 5.

240. *Id.* at 2.

241. Brian R. Fitzgerald, Note, *David G. Trager Public Policy Symposium: Our New Federalism? National Authority and Local Autonomy in the War on Terror: Edelman v. N2H2 At the Crossroads of Copyright and Filtering Technology*, 69 BROOK. L. REV. 1471, 1491 (Summer 2004).

242. Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 10.

Further, the DMCA, which purportedly allows for reverse engineering of filters by libraries, is seemingly negated by a rule promulgated by the Library of Congress that prohibits such research.[243] Thus, research to date has largely amounted to testing compiled lists of Web sites to see whether they are blocked.[244] Four studies were commissioned prior to the *American Library Association* litigation, but the district court determined that all of the studies suffered from methodological flaws.[245]

When the district court dismissed *Edelman v. N2H2, Inc.*, it missed a golden opportunity to support valuable research on filters that could lead to their improvement.[246] The court also lost a chance to address the legal roadblocks on legitimate research imposed by proprietary licenses and the conflicting elements of DMCA.[247]

It should be recognized, however, that software manufacturing companies have a legitimate interest in protecting the secrecy of their block lists due to massive piracy on digital networks.[248] The ability to easily make nearly perfect and inexpensive copies of software allows other companies and individuals to easily steal unprotected trade secrets.[249] This proprietary interest, however, should be balanced with the public interest in creating more effective filters and, most importantly, preserving free speech on the Internet.[250] Filter users are currently at the mercy of—not the government, not their own consciences—but software companies in deciding what information they may receive.[251]

The Supreme Court's advocacy for filters in *Ashcroft II* may not be a violation of the First Amendment, but it certainly carries First Amendment implications.[252] However, the Court moved closer to the constitutional line in affirming CIPA and requiring filters in public libraries as a prerequisite for federal funding because CIPA constitutes a "near forced compliance" if the library is dependent on the funding.[253] At that point, "the rules of filtering software essentially become an extension of the law."[254]

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243. Exemption to Prohibition Against Circumvention, 37 C.F.R. § 201.40(a)(1) (2005).
244. Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 12-13.
245. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 437-46 (E.D. Pa. 2002).
246. Fitzgerald, *supra* note 241, at 1506.
247. *Id.*
248. *Id.* at 1476.
249. *Id.*
250. Complaint for Declaratory and Injunctive Relief, *supra* note 125, at 1.
251. Fitzgerald, *supra* note 241, at 1499.
252. Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library, 24 F. Supp. 2d 552, 569 (E.D. Va. 1998).
253. Fitzgerald, *supra* note 241, at 1500.
254. *Id.* at 1499.

An innovative compromise could accommodate the interests of software proprietors without weakening the current First Amendment protection of the Internet while still safeguarding children. Congress could authorize the American Library Association to evaluate Internet filtering programs under the promise of strict confidentiality.[255] Based on its findings, ratings could be made of the programs that could be useful to schools, libraries, and individuals.[256] The American Library Association has a long-standing professional ethic regarding First Amendment issues that is articulated in the "Library Bill of Rights."[257] In addition, libraries have been placed in an awkward position by CIPA, possibly being forced to compromise their free speech values due to a funding crisis.[258] After the Supreme Court ruling regarding CIPA, the American Library Association called for "full disclosure of what sites filtering companies are blocking, who is deciding what is filtered and what criteria are being used."[259] The librarians pointed out that "[f]indings of fact clearly show that filtering companies are not following legal definitions of 'harmful to minors' and 'obscenity'" and these "practices must change."[260]

CONCLUSION

In light of the Supreme Court's decision in *Ashcroft II*, it is highly likely that COPA will ultimately be found unconstitutional for the same rea-

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255. *Id.* at 1511.

256. *Id.*

257. The "Library Bill of Rights" states in part:

> II. Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval. III. Libraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment. IV. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas.

AM. LIBRARY ASS'N, LIBRARY BILL OF RIGHTS (adopted June 18, 1948; amended Feb. 2, 1961; Jan. 23, 1980; inclusion of "age" reaffirmed Jan. 23, 1996), http://www.ala.org/ala/ourassociation/governingdocs/policymanual/intellectual.htm (last visited Nov. 19, 2005).

258. During 2003, the year of the CIPA decision, libraries across the country were receiving drastic budget cuts. *See* George M. Eberhart, *Recession, 2003: More Cutbacks and Closures*, AMERICAN LIBRARIES ONLINE, July 29, 2003, http://www.ala.org/ala/alonline/selectedarticles/recession2003libraries.htm (last visited Nov. 26, 2005); Gordon Flagg, *Recession, 2003: Libraries Confront Budget Crisis with Cutbacks and Closures*, AMERICAN LIBRARIES ONLINE, Jan. 15, 2003, http://www.ala.org/alonline/recession.htm (last visited Nov. 26, 2005).

259. Press Release, American Library Association, ALA Denounces Supreme Court Ruling on Children's Internet Protection Act, (June 23, 2003), http://www.ala.org/Template.cfm?Section=news&template=/ContentManagement/ContentDisplay.cfm&ContentID=36161 (last visited Nov. 19, 2005).

260. *Id.*

sons its predecessor CDA was stricken down. It is unconstitutionally overbroad and violates the First Amendment's protection of free speech. The Court has practically dictated a finding that filtering software is a less restrictive, more effective alternative to COPA in achieving the government's compelling interest in protecting children from sexually explicit materials on the Internet. Even though the judgment was an unresounding 5-4, the best news is that eight of the nine Justices held Congress's feet to the strict scrutiny fire. The Internet, previously awarded "the highest protection from governmental intrusion" because it is "the most participatory form of mass speech yet developed" retains its closely protected status. It will continue to enjoy the same level of freedom as the print media.

The victory for the First Amendment feels tenuous, however, because the shield that the Court has brandished is a weak one: filtering software. Although the Justices advocated for filters in *Reno*, which challenged CDA, provided strong incentives for libraries to use filters in CIPA, and argued for their superiority over COPA, they have proven their individual lack of faith in the effectiveness of filtering software and the constitutionality of requiring its use. Rather than take steps to remove barriers to adequate research necessary to improve filtering and assure it does not become a widespread censorship tool, they have spoken out of both sides of their mouths—sometimes defending filtering, sometimes criticizing—and left the censorship to the software companies and the pornography to the children.

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