

**DOES FILTERING STOP THE FLOW OF VALUABLE  
INFORMATION?: A CASE STUDY OF THE CHILDREN'S INTERNET  
PROTECTION ACT (CIPA) IN SOUTH DAKOTA**

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I. INTRODUCTION

In the mid-eighties, United States Surgeon General, C. Everett Koop, “called for opposition to violent and pornographic media due to the influence of these stimuli upon the fantasy life and the real life ‘action’ of millions of vulnerable adults and children.”<sup>1</sup> He argued that this media was a “felony against the human spirit” and “atrocities of despair.”<sup>2</sup> Since that time, filtering has become the great hope of those troubled by all the offensive and unwanted material on the Internet.<sup>3</sup> It offers not only a way to process the unfathomable amounts of information on the Web,<sup>4</sup> but also a way for parents to shield

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1. Judith A. Reisman, *The Toxic Public Library: Violating Children With “Harmful Matter,”* THE INST. FOR MEDIA EDUC. 2 (2003), available at <http://www.drjudithreisman.com/archives/toxic.doc>.

2. *Id.*

3. See generally Judith A. Reisman, *The Toxic Public Library: Violating Children with “Harmful Matter,”* THE INST. FOR MEDIA EDUC. (2003), available at <http://www.drjudithreisman.com/archives/toxic.doc>.

4. In 2001, in addition to the visible web, the deep, or invisible web was estimated to be 400 to 550 times larger than the commonly defined World Wide Web (or visible Web). See Michael K. Bergman, *WHITE PAPER: The Deep Web: Surfacing Hidden Value*, THE J. OF Elec. Publ'g 1 (2001), available at <http://quod.lib.umich.edu/cgi/t/text/text-idx?c=jep;view=text;rgn=main;idno=3336451.0007.104>. The total content of the deep web is 1000 to 2000 times that of the surface web. *Id.* Internet pornography statistics from the web site include: pornographic websites comprise 4.2 million or 12% of all websites, 420 million pornographic web pages, 68 million daily pornographic search engine requests, and 1.5 billion monthly downloads. In

children from offensive material.<sup>5</sup> Indeed, given the flood of information in the media today, and the desire of parents to exclude harmful media material from their children's consumption, free speech may come to mean the freedom to filter.<sup>6</sup> The effect of Internet filtering on free speech concerns formed the focus of the study reported in this article.

## II. CONGRESSIONAL EFFORTS TO PROTECT CHILDREN FROM OFFENSIVE INTERNET MATERIALS

In response to the public's request to protect children from the ever growing body of pornographic material available on the Internet,<sup>7</sup> the United States Congress has made a number of legislative attempts "to shield children from Internet smut."<sup>8</sup> In 1996 the Communications Decency Act passed prohibiting the transmission of Internet material over the Internet to anyone under the age of eighteen.<sup>9</sup> The prohibition was soon declared unconstitutional in *Reno v. ACLU*.<sup>10</sup> Next, the Child Online Protection Act<sup>11</sup> "required adult Web site operators to make it impossible for children to gain access to their material."<sup>12</sup> The court struck this law down in *Ashcroft v. ACLU*.<sup>13</sup>

The Child Pornography and Prevention Act,<sup>14</sup> passed by Congress in 2000, expanded the federal prohibition on child pornography to include computer-generated images of minors engaging in sexually explicit conduct. This act was overturned by *Ashcroft v. Free Speech Coalition*.<sup>15</sup> Finally in 2000, Congress changed from a prohibition mentality to a filtering mentality, and the Children's Internet Protection Act (CIPA)<sup>16</sup> was enacted as part of the Consolidated Appropriations Act. The CIPA strove to protect children from being subjected to Internet pornography at the nation's public libraries. Under CIPA, all public

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addition, 34% of users received unwanted exposure to sexual material. Jerry Ropelato, *Internet Pornography Statistics*, Top Ten Reviews, <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html> (last visited Oct. 18, 2008).

5. *Reno v. ACLU*, 521 U.S. 844, 869 (1997).

6. See, e.g., J. M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulations*, 45 DUKE L. J. 1131, 1143-45 (1996).

7. See Jeordan Legon, *Sex sells, especially to Web surfers: Internet porn a booming billion-dollar industry*, Dec. 11, 2003, available at <http://www.cnn.com/2003/TECH/internet/12/10/porn.business>. Analyst Sean Kaldor of Nielsen/Net Ratings estimates that "34 million visited porn sites in August [2003] – about one in four users in the United States." *Id.* He states that "the average user is looking at 121 pages[.]" *Id.* A study was released in September 2003 and stated "over 1.3 million sites serv[e] up about 260 million pages of erotic content. *Id.*

8. David McGuire, *Supreme Court Upholds Internet Filters*, June 23, 2003, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A22519-2003Jun23&notFound=true>.

9. See Communications Decency Act, 47 U.S.C. § 223(a) & (d) (1994).

10. 521 U.S. at 874-85.

11. Child Online Protection Act, 47 U.S.C. § 231 (Supp. V. 2000).

12. McGuire, *supra* note 8.

13. *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

14. See Child Pornography and Prevention Act, 18 U.S.C. § 2256(8)(A)-(D) (2000).

15. 535 U.S. 234 (2002).

16. Children's Internet Protection Act, 20 U.S.C. § 9134(f) (2000), 47 U.S.C. § 254(h)(6) (2000).

libraries receiving federal assistance for Internet access are required to implement a software filtering system that blocks pornographic material from appearing on any public computer terminal in the library.<sup>17</sup> The CIPA provides federal funding to libraries using E-rate software<sup>18</sup> to filter out the harmful materials, and mandates that libraries certify that their filtering software prevents “depiction of obscenity, child pornography or material that is harmful to minors.”<sup>19</sup> The CIPA also provides that any adult conducting research can request the librarians to disable the filtering software.<sup>20</sup> However, the passage of CIPA led to concerns that the filtering requirement would result in censorship, blocking the flow of valuable and constitutionally protected information to adults.

### III. THE CHALLENGE TO CIPA

Opponents of the act maintain that CIPA is “Congress’ constitutionally insensitive attempt . . . to condition the receipt of federal funds by public libraries on the implementation of censorship in the form of Internet filtering.”<sup>21</sup> They argue that filtering software brings about an “unavoidable suppression . . . of valuable, constitutionally protected expression . . . covering a vast range of essential subjects, from sexuality to politics . . . .”<sup>22</sup> According to critics, CIPA results in the “substantial overblocking . . . of vast amounts of constitutionally protected material.”<sup>23</sup> However, these claims of overblocking were countered by findings of surveys such as a Filtering Facts survey of twenty-four public library administrators that reported library administrators received “only 1.6 complaints

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17. *Id.*

18. Universal Service Administrative Company, *Overview of the Program*, <http://www.usac.org/sl/about/overview-program.aspx> (last visited Oct. 2, 2008) [hereinafter USAC]. “‘E-Rate,’ is administered by the Universal Service Administrative Company (USAC) under the direction of the Federal Communications Commission (FCC), and provides discounts to assist most schools and libraries in the United States to obtain affordable telecommunications and Internet access . . . .” Four categories of service exist: telecommunications services, Internet access, internal connections, and basic maintenance of internal connections. *Id.*

19. National Conference of State Legislatures, *Children and the Internet: Laws Relating to Filtering, Blocking and Usage Policies in School and Libraries*, <http://www.ncsl.org/programs/lis/cip/filterlaws.htm> (last visited Oct. 2, 2008).

20. *Am. Library Ass’n, Inc., v. United States*, 201 F. Supp.2d 401, 411 (E.D. Pa. 2002), *rev’d*, 539 U.S. 194 (2003). The Court further stated:

In an effort to avoid the potentially fatal legal implications of the overblocking problem, the government falls back on the ability of the libraries, under CIPA’s disabling provisions, *see* CIPA § 1712 (codified at 20 U.S.C. § 9134(f)(3)), CIPA § 1721(b) (codified at 47 U.S.C. § 254(h)(6)(D)), to unblock a site that is patently proper yet improperly blocked. The evidence reflects that libraries can and do unblock the filters when a patron so requests.

*Id.* Under CIPA “images are the only format of content that must be blocked in each of the categories” listed as harmful. *See* Paul T. Jaeger & Charles R. McClure, *Potential legal challenges to the application of the Children’s Internet Protection Act (CIPA) in public libraries: Strategies and issues*, FIRST MONDAY, [http://www.firstmonday.org/issues/issue9\\_2/jaeger](http://www.firstmonday.org/issues/issue9_2/jaeger).

21. Brief of Amici Curiae Ass’n of Am. Publishers, Inc., et al. as Amici Curiae Supporting Respondents, *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194 (2003), 2003 WL 345845, at \*1-2 [hereinafter Petitioner’s Brief].

22. *Id.* at \*2.

23. *Id.* at \*17.

per month about inappropriately blocked sites,”<sup>24</sup> and a national survey that showed “a quarter of all school children had inadvertently downloaded pornography while at a public library.”<sup>25</sup> Nevertheless, the opponents of CIPA argued that the law censored the flow of information.<sup>26</sup>

The CIPA was challenged by the American Library Association (ALA) and the American Civil Liberties Union (ACLU) who represented libraries, library patrons, and web site providers in lawsuits that were consolidated.<sup>27</sup> The challenge alleged that CIPA is ‘facially unconstitutional because . . . it induces public libraries to violate their patrons’ First Amendment rights . . . [and] it requires libraries to relinquish their First Amendment rights as a condition on the receipt of federal funds.’<sup>28</sup> However, recognizing that “there is . . . an enormous amount of pornography on the Internet, much of which is easily obtained,”<sup>29</sup> the Court ruled that the law does not violate the First Amendment rights of library patrons.<sup>30</sup> As a result of this ruling, filtering is now actively used in public libraries across the nation.

#### IV. THE IMPACT OF CIPA: A STUDY OF SOUTH DAKOTA PUBLIC LIBRARIES USING INTERNET FILTERS

##### A. DESCRIPTION OF THE STUDY

The filtering requirements of the CIPA present one of the first successful governmental efforts to help parents protect their children from harmful Internet material.<sup>31</sup> However, the lingering issue is whether that filtering effort, as

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24. Mark S. Nadel, *The First Amendment's Limitations on the Use of Internet Filtering In Public and School Libraries: What Content Can Librarians Exclude?* 78 TEX. L. REV. 1117, 1154 (2000). “David Biek, main library manager for the Tacoma Public Library, maintained that 95 percent of the blocked sites at the library were blocked correctly. If a site is wrongly blocked, the library can override it easily and can also provide an option of looking at a text-only version.” See Norman Oder, *CIPA Trial Ends with Judicial Skepticism About Overblocking*, LIBRARY J., May 1, 2002, <http://www.libraryjournal.com/article/CA213854.html>.

25. Patrick Garry, *The Flip Side of the First Amendment: A Right to Filter*, 2004 MICH. ST. L. REV. 57, 70 (2004). Statistics on Internet Pornography show that 90% of 8 to 16 year olds have viewed porn online while doing homework, that the average age of first Internet exposure to porn is 11, and children’s character names (including Pokemon and Action Man) are linked to thousands of porn links. See Ropelato, *supra* note 4.

26. The argument made in the *Amici* Brief for the Association of Am. Publishers, et. al. takes aim at blocking by saying that “requiring library patrons to ask for a Web site to be unblocked will deter many patrons because they are embarrassed, or desire to protect their privacy or remain anonymous.” Petitioner’s Brief, *supra* note 21, at 22.

27. Oder, *supra* note 24. See *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194 (2003).

28. *Am. Library Ass’n, Inc., v. United States*, 201 F. Supp.2d 401, 407 (E.D. Pa. 2002), *rev’d*, 539 U.S. 194 (2003).

29. Oder, *supra* note 24 (citing *Am. Library Ass’n*, 201 F. Supp. 2d 401). “A recent report by David Burt for the Family Research Council claims to document more than two thousand incidents of patrons’ accessing pornography and obscenity in the nation’s public libraries. Burt extrapolates this data to predict between 400,000 and 2,000,000 incidents like this per year.” Nadel, *supra* note 24, at 1146.

30. *Am. Library Ass’n*, 539 U.S. at 194.

31. “The E-Rate program is a tremendous success, [and] . . . one of the most significant programs of modern government . . .” William E. Kennard, Chairman, Fed. Communications Comm’n to the Educational Technology Leadership Conference: E-Rate: A Success Story (Jan. 14, 2000), *available at*

alleged by the CIPA's opponents, unduly restricts the free speech rights of adults. It is very difficult to measure whether people are clearly denied information. It is possible, for instance, that people might not mention to a librarian that they are unable to obtain what they were trying to locate, or that their embarrassment over wanting to obtain information blocked by a pornography filter caused them to simply abandon the effort. These effects are nearly impossible to measure. Therefore, a study had to be designed that would determine a gauge for measuring how often adults were denied access to information. This study would focus on two criteria: the first one being the number of complaints made to the library administration about blocked information, and the second being the number of requests made to disable or remove the blocker.

The study was conducted by the University of South Dakota Law School during the summer of 2008. It sought to establish the frequency and intensity of complaints registered to librarians by adults who felt their free speech rights had been violated by CIPA's Internet filtering mandates. In addition to establishing the librarian's perception of the number of complaints and the intensity of the user's complaint, researchers also asked library personnel to specify what reasons they are given when patrons requested to have the filter disabled. Finally, researchers asked librarians if adult patrons ever requested or demanded that filtering software be permanently removed from the computers.

The study focused only on public libraries in South Dakota that subscribed to the federal E-rate program. The directors of all these libraries were interviewed during July of 2008. A participation rate of 100 percent was achieved in the study.

Each library surveyed had a user population of at least several thousand users. The libraries had as few as three computers available to the public, and as many as twelve. Most of the libraries used a network system for their computers, and several libraries reported having wireless connectivity, as well as the hard-wired connections. The libraries also varied in terms of hours that they were open to the public.

In each instance, the person interviewed in the study was the library's director. With the exception of one library, all libraries participated in both the Internet connectivity and the telecommunications portion of the E-rate program.<sup>32</sup> The percentage of the connectivity cost deferred by the government was determined by the number of children participating in the school lunch programs in the area.<sup>33</sup>

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<http://www.fcc.gov/Speeches/Kennard/2000/spwek002.doc>.

32. USAC, *supra* note 18 (stating both Internet connectivity and telecommunications were part of the E-rate program).

33. Seventy-five percent of the libraries qualified to have 70% or more of their connectivity costs deferred, with the least amount deferred for any library being 60%. See Universal Service Administrative Company, *E-Rate Discounts for Schools and Libraries*, [http://www.universalservice.org/\\_res/documents/sl/pdf/E-rate-Overview.pdf](http://www.universalservice.org/_res/documents/sl/pdf/E-rate-Overview.pdf) (last visited Oct. 3, 2008). "Discounts range from 20% to 90% of the costs of eligible services, depending on the level of poverty and the urban/rural status of the population served. Eligible schools, school districts and libraries may

## B. SIGNIFICANT FINDINGS OF THE STUDY

Public libraries present a unique problem when trying to block harmful material from reaching children. Unlike schools, which can filter without concern for adult speech rights, public library space and computers are shared by adults and children. First Amendment claims will be stronger and more numerous in public libraries where, according to CIPA opponents, “CIPA forces limitations on the free speech of children onto adult patrons and staff by mandating that all computer stations in a library be filtered.”<sup>34</sup> In *United States v. American Library Ass’n Inc.*,<sup>35</sup> critics voiced concern that patrons may be too embarrassed to approach a librarian to unblock a site,<sup>36</sup> to which the court responded: “the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment.”<sup>37</sup>

In the present study, seeking to establish the degree to which adults have been burdened by Internet filtering, it was found that ninety percent of the libraries had participated in the E-rate program from the beginning of that program, and that all libraries using the Internet connectivity option had filtering software installed on all the public terminals in the library. Fifty percent of the libraries stated that they had received requests to unblock the filters for legitimate purposes; the other fifty percent of the directors said they could not ever recall being asked to unblock the filters. Of the requests to unblock the filter, various reasons were given for such requests. These reasons, according to the library directors, included: patron desire to read Hotmail e-mails which had been filtered, patron desire to do drug research for prescriptions, patron desire to use certain dating services that the filter blocked, and a student’s need to research a school project. By a clear margin, the most frequently stated reasons for wishing to have the filter unblocked were the desire to access Hotmail and to use dating services.

Two directors mentioned that adults complained that the filtering software slows down the computer during the search process, and in fact, some libraries have changed software to accommodate that complaint. However, no directors stated that adults had ever asked them to remove filters completely or that any adults had ever complained that their First Amendment rights had been violated. One director noted that she had an adult patron offer to pay for more user-friendly filtering software, but no suggestion was made to eliminate the filter. A concern that CIPA did not anticipate, that some directors commented upon during the interviews, was that many libraries now have wireless access which enables patrons to bring their own computers into the library and those computers do not have filters installed.

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apply individually or as part of a consortium.” *Id.*

34. Jaeger & McClure, *supra* note 20.

35. 539 U.S. 194 (2003).

36. *Id.* at 209 (quoting *Am. Library Ass’n, Inc., v. United States*, 201 F. Supp.2d 401, 411 (E.D. Pa. 2002), *rev’d*, 539 U.S. 194 (2003)).

37. *Id.*

The most significant downside to the E-rate program reported by the library directors was the amount of paperwork that must be submitted each year. There are no less than five forms, six submission deadlines, and a possibility of an appeals process to comply with.<sup>38</sup> Indeed the complexity of the application process has deterred more libraries from participating in E-rate than any problems resulting from patron complaints.

## V. CONCLUSION

A national survey commissioned by the Digital Media Forum suggests strong public support for Internet filtering. The survey found that mandated filtering received “broad support across income, race and educational groups,”<sup>39</sup> and was “not perceived as censorship, but rather a protection” against unwanted material.<sup>40</sup> Similarly, library directors in South Dakota have reported no instances of adults complaining about First Amendment rights being violated as a result of the filters used in public libraries.

Yet, despite filtering efforts, and state laws restricting minors from computer access to obscene materials in libraries,<sup>41</sup> there is virtually no guarantee that children will be protected from images that are harmful.<sup>42</sup> Filters cannot catch all images being accessed; furthermore, adults can bypass filters, or request that they be unblocked. A recent instance in Kansas was brought to the public’s attention by the mother of a child attending a summer reading program. The child and mother walked right by an adult viewing obscene material on the way to the children’s area.<sup>43</sup>

Blocking harmful material also becomes increasingly difficult because “people are making movies in their houses and dragging and dropping them’

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38. USAC, *supra* note 18.

39. See Rebecca S. Weiner, *Education: Survey Finds Support for School Filters*, N.Y. TIMES, Oct. 18, 2000, <http://www.nytimes.com/2000/10/18/technology/18EDUCATION.html>. The survey of 1,900 individuals found that 92% of Americans, an overwhelming majority, stated “pornography should be blocked on school computers.” *Id.*

40. *Id.* (“Support is greater for filters rather than banning pornography and hate speech outright. However, the survey did find that 74 percent of individuals said the government should ban online pornography altogether . . .”).

41. The law requires public libraries to adopt “a local policy that establishes measures to restrict minors from computer access to obscene materials.” S.D.C.L. § 22-24-56 (2004). Libraries that are non-E-rate subscribers have implemented local policy contract agreements restricting minors from computer access to obscene materials. S.D.C.L. § 22-24-56. “Twenty-one states have Internet filtering laws that apply to public schools or libraries.” National Conference of State Legislatures, *Children and the Internet: Laws Relating to Filtering, Blocking and Usage Policies in School and Libraries*, [www.ncsl.org/programs/lis/cip/filter\\_laws.htm](http://www.ncsl.org/programs/lis/cip/filter_laws.htm) (last visited Oct. 4, 2008). State laws vary from requiring public libraries to have Internet policies in place to requiring that filtering software be installed. *See id.*

42. “But filters are not foolproof,” said Joan Irvine, executive director of the Association of Sites Advocating Child Protection, “and will not typically address images and information obtained via popular methods of communication, particularly among a younger generation.” *See* Juli S. Charkes, *Library Walks Fine Line on Web Pornography*, N.Y. TIMES, Jan. 27, 2008, <http://www.nytimes.com/2008/01/27/nyregion/nyregionspecial2/27librarywe.html>.

43. Crystal Hoffman, *Patron questions library’s obscenity policies*, THE KANSAN, June 18, 2008, <http://www.thekansan.com/news/x1743975863/Patron-questions-libraris-obscenity-policies>.

onto free Web sites,”<sup>44</sup> whereas, the commercial pay-for sites of the earlier Internet were hard for minors to access. In addition to traditional Web sites, Joan Irvine, executive director of Sites Advocating Child Protection states “[a] lot of times the noncommercial porn activity takes place via peer-to-peer groups, networks, chat rooms and instant messaging.”<sup>45</sup> Finally, the addition of wireless access in many libraries enables library patrons to bring their own laptops to the library. Personal computers are not necessarily filtered, and the mobility of laptops enables patrons to locate anywhere in the library.

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44. Matt Richtel, *For Pornographers, Internet's Virtues Turn to Vices*, N.Y. TIMES, June 2, 2007, <http://www.nytimes.com/2007/06/02/technology/02porn.html>. Harvey Kaplin, a former pornographic movies insider, says the ease of making pornographic movies is “killing the marketplace.” *Id.*

45. Charkes, *supra* note 41. The Internet industry continues to create “privacy tools” to enable users to protect their searches on the Internet. Gregg Keizer, Microsoft Adds Privacy Tools to Internet Explorer 8, *Computerworld*, Aug. 25, 2008, <http://www.computerworld.com/action/article.do?command=view ArticleBasic&articleId=9113419>. The newest tool blocks include In Private Browsing “that some have dubbed “porn mode” in a nod to the most obvious use of a browser privacy mode” *Id.*