INSTALLATION OF INTERNET FILTERS IN PUBLIC LIBRARIES: PROTECTION OF CHILDREN AND STAFF VS. THE FIRST AMENDMENT

I. INTRODUCTION

Recently, state and federal governments have struggled to implement statutes that regulate Internet content in order to prevent children from accessing potentially harmful material, such as pornography. Many of these statutes have been constitutionally challenged because their overbroad nature impinges upon adults' First Amendment rights to access similar information.[1] Most recently, the Internet regulation debate has focused on whether public libraries may install filtering technology to block pornographic material, and if so, whether they should be required to install such technology.[2]

Proponents of Internet regulation have traditionally argued that the government has a compelling interest in protecting children from potentially harmful material.[3] In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*,[4] the community of Loudoun County, Virginia, also asserted that such regulations are necessary to protect library employees from sexual harassment.[5] The United States District Court for the Eastern District of Virginia ultimately dismissed this argument because there were an insufficient number of complaints of sexual harassment in Loudoun County to support such a claim.[6] Despite the court's findings in *Mainstream Loudoun*, evidence exists that a number of library employees across the U.S. have complained about exposure to sexual images as a result of patrons accessing such material on the Internet.[7] In May 2001, the

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[1] *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997).

[2] *See, e.g.*, Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library, 24 F. Supp. 2d 552 (E.D. Va. 1998) [hereinafter "*Mainstream Loudoun II*"]. (The District Court issued opinions deciding the case and on defendants' motion to dismiss (2 F. Supp. 2d 783 (E.D. Va. 1998). This Note refers to the final of opinion of the court as "*Mainstream Loudoun II*" and the court's opinion on the motion to dismiss as "*Mainstream Loudoun I.*").

[3] *See, e.g.*, The Communication Decency Act of 1996, 47 U.S.C. § 223 (1996).

[4] *Mainstream Loudoun II*, 24 F. Supp. 2d 552.

[5] *See id.*

[6] *See id.* at 565-66.

[7] *See* Kim Houghton, Note, *Internet Pornography in the Library: Can the Public*

Minneapolis office of the Equal Employment Opportunity Commission ("EEOC") issued a finding that the Minneapolis Public Library may have created a hostile work environment, in violation of Title VII, "by exposing its staff to sexually explicit images on unrestricted computer terminals."[8] When deciding whether or not to install Internet filters, the conflict between the EEOC's decision and recent court decisions has placed libraries in a position where they are likely to be "sued if they do, sued if they don't."[9]

This Note examines the effect of the Minneapolis EEOC's decision on the debate over Internet filters. Part II discusses the history of Internet regulation. Part III discusses current Congressional legislation regarding the installation of Internet filtering technology and the relevant caselaw on the use of Internet filtering in libraries. Part IV analyzes the conflict between the First Amendment and workplace harassment laws. Finally, this Note asserts that the EEOC's decision sets up a dangerous situation by allowing the government to require libraries to censor computer usage. Such censorship will severely hinder the primary function of public libraries: to provide free, public access to books, knowledge, and the Internet.

For over fifty years the Supreme Court has held the "chief purpose" of the First Amendment is to prevent prior restraints on speech.[10] The Court presumes prior restraints to be unconstitutional because they impose such a severe chilling effect on expression.[11] The Court, however, has also held that some categories of expression are beyond the scope of First Amendment protection and, therefore, may be regulated with prior restraints on speech.[12] Expressions not protected by

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Library Employer Be Liable for Third-Party Sexual Harassment When a Client Displays Internet Pornography to Staff?, 65 BROOK. L. REV. 827 (1999) (discussing specific examples of complaints by library employees who claim to have been subjected to sexual harassment by patrons viewing pornographic material online) (citing Filtering Facts, *Reports of Pornography in Libraries*, *available at* http://www.filteringfacts.org.kidlib.html (last visited Dec. 20, 1998)) (Filtering Facts website is no longer maintained).

[8] Carl S. Kaplan, *Cyber Law Journal: Controversial Ruling on Library Filters*, N.Y. TIMES, June 1, 2001, *available at* http://www.nytimes.com/2001/06/technology/01CYBERLAW.html.

[9] *EEOC: Unfiltered Computers "Harass" Librarians*, *available at* http://www.overlawyered.com/archives/01/june1.html (last visited Jan. 30, 2003).

[10] *See, e.g.*, New York Times v. United States, 403 U.S. 713, 714 (1971) (overturning an injunction preventing publication of the Pentagon Papers); Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (striking down a prior restraint on the distribution of leaflets that criticized a Chicago real estate agent); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 71 (1963) (finding that a morality commission's notice to booksellers that they may be prosecuted for obscenity for carrying certain objectionable books constituted an unconstitutional prior restraint); Near v. Minnesota, 283 U.S. 697, 713 (1931).

[11] *See Bantam Books*, 372 U.S. at 70.

[12] *See* T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA 22 (2001).

the First Amendment include "fighting words"[13] and obscenity.[14] Some material, such as expression of a sexual nature, may be regulated only as applied to children.[15] Additionally, the Supreme Court has held that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[16]

II. HISTORY OF INTERNET REGULATION

A. The Communications Decency Act of 1996[17]

Since the mid-1990's, U.S. Congressional attempts to regulate pornographic material on the Internet have been short-lived.[18] The Communications Decency Act of 1996 ("CDA") purportedly criminalized the online transmission of indecent or patently offensive material to children.[19] First, section 223(a) prohibited knowingly initiating the transmission of "any comment, request, suggestion, proposal, image or other communication which is obscene or indecent" to a recipient known to be under the age of eighteen.[20] Second, section 223(d) prohibited sending or displaying material deemed "patently offensive" by community standards to anyone under the age of eighteen.[21] The CDA punished violation of either of these provisions with a fine or imprisonment.[22] The CDA also provided an affirmative defense for anyone who took reasonable actions in good faith to restrict minors' access to prohibited communications, such as requiring age verification before allowing a user to enter a site.[23]

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[13] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[14] *See* Roth v. United States, 34 U.S. 476, 485 (1957); Miller v. California, 413 U.S. 15, 24 (1973) (defining obscenity as material that: (1) "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (2) depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law; and (3) taken as a whole, lacks serious literary, artistic, political, or scientific value).

[15] *See* Ginsberg v. New York, 390 U.S. 629, 638 (1978) (finding a statute forbidding minors to receive material that is deemed obscene to them, although not obscene to adults, constitutional).

[16] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969).

[17] 47 U.S.C. § 223. The invalidation of some provisions of this Act will be discussed *infra*.

[18] *See Reno*, 521 U.S. 844 (invalidating provisions of the Communications Decency Act); ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000) *cert. granted, sub nom* (invalidating the Children's Online Protection Act, 47 U.S.C. § 231); Ashcroft v. ACLU, 532 U.S. 1037 (2001).

[19] *See* 47 U.S.C. § 223(a), (d).

[20] *Id.* § 223(a).

[21] *See id.* § 223(d).

[22] *See id.* § 223(a), (d).

[23] *See id.* § 223(e)(5)(A), (B).

In *Reno v. ACLU*,[24] the Supreme Court found the CDA violative of the First Amendment.[25] The Court determined that the Internet is subject to the highest level of First Amendment protection.[26] All content-based regulation of Internet speech, therefore, must pass strict scrutiny.[27] The Court further held that the CDA's use of the terms "indecent" and "patently offensive" were too vague and not the least restrictive means necessary to achieve the government's interest in protecting children.[28] The Court feared that the "general, undefined terms 'indecent' and 'patently offensive' cover large amounts of non-pornographic material with serious educational or other value"[29] and would have a chilling impact that would silence "some speakers whose messages would be entitled to constitutional protection."[30] Although the Court found the government to have a compelling interest in protecting children, the absence of a clear definition of 'indecent' and 'patently offensive' "undermines the likelihood that the CDA had been carefully tailored to the congressional goal of protecting minors from potentially harmful materials."[31]

In *Reno*, the Court also acknowledged that the nature of the Internet itself posed significant problems for enforcing the CDA.[32] For example, the potential size of an Internet audience could make it difficult for a sender to determine if a minor under the age of eighteen would receive a particular message.[33] The Court found that the current state of technology does not provide "any effective method for a sender to prevent minors from obtaining access to its communications . . .

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[24] 521 U.S. 844.

[25] *See id.* at 874; U.S. CONST. amend. I.

[26] Due to the scarcity of available frequencies, media which rely on the broadcast spectrum have traditionally been subject to limited First Amendment protection. *See Red Lion*, 395 U.S. 367 (1969). In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court held that a radio station that broadcasted a monologue which was indecent and offensive, although not obscene, could be subjected to administrative sanctions by the Federal Communications Commission. The Court found that the scarcity of the broadcast spectrum coupled with the pervasive nature of the medium justified this limited First Amendment treatment. Unlike broadcast, the Internet is not dependent upon a scarce resource. *Reno*, 521 U.S. at 867-68. Furthermore, the Internet is not as pervasive in nature as broadcast media because, unlike radio or television, "the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material." *Id.* at 867. *Compare* Sable Communications of Cal. Inc. v. FCC, 492 U.S. 115, 127 (1989) (finding a blanket prohibition on indecent interstate commercial phone messages unconstitutional on the grounds that placing a phone call "requires the listener to take affirmative steps to receive the communication").

[27] *See Reno*, 521 U.S. at 870-71.

[28] *See id.* at 871.

[29] *Id.* at 877.

[30] *Id.* at 874.

[31] *Reno*, 521 U.S. at 874.

[32] *See id.* at 876

[33] *See id.*

without also denying access to adults."[34] It also recognized the possibility that adult communication could be hindered just because one or more members of a large chat group claimed to be a minor.[35] The Court has repeatedly held that the government interest in protecting children from harmful material does not justify the suppression of adult-to-adult communication.[36] The Court explained that, "'[r]egardless of the strength of the government's interest' in protecting children, 'the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.'"[37]

According to *Reno*, another problem posed by the nature of the Internet is the application of the CDA's "community standards" criterion.[38] Because Internet communication is available to a nation-wide audience, whether material was "indecent" or "patently offensive" would be "judged by the standards of the community most likely to be offended by the message."[39] The Court found this particularly troubling because the CDA is a criminal statute.[40] Many speakers might remain silent rather than risk criminal prosecution under such a vague regulation.[41] Criminal sanctions have a much greater chilling effect on speech and pose a greater danger to the First Amendment than do civil regulations.[42] Furthermore, the CDA applied to all transactions, whether commercial or private in nature, regardless of whether the material contained "serious literary, artistic, political, or scientific value" and even if the minor's parents approved of their child's receipt of such material.[43] Thus, "a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community found the material 'indecent' or 'patently offensive,' if the college town's community thought otherwise."[44]

Finally, the *Reno* Court rejected the government's argument that the CDA amounted to nothing more than a sort of "cyberzoning."[45] The government relied on *Renton v. Playtime Theatres, Inc.*,[46] which upheld a zoning ordinance that prevented adult movie theaters from opening up shop in residential

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[34] *Id.*

[35] *See id.*

[36] *See Reno*, 521 US. at 875-76 (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74-75 (1983) (finding a ban on mailing unsolicited contraceptive advertisements unconstitutional); *see also* Butler v. Michigan, 352 U.S. 380, (1957) (holding that a ban on the sale of adult books that are harmful to children is unconstitutional).

[37] *Reno*, 521 U.S. at 875 (quoting *Bolger*, 463 U.S. at 74-75).

[38] *See id.* at 877.

[39] *Id.* at 878.

[40] *See id.* at 872.

[41] *See id.*

[42] *See Reno*, 251 U.S. at 872.

[43] *Id.* at 865.

[44] *Id.* at 878.

[45] *See id.* at 867-68.

[46] 475 U.S. 41 (1986).

neighborhoods. The Court, however, found that the government's reliance on *Renton* was flawed in two ways.[47] First, the CDA applied "broadly to the entire universe of cyberspace."[48] Second, unlike the statute at issue in *Renton*, the CDA was concerned with the "primary" rather than "secondary" effects of the offensive speech it sought to curb.[49] The Court concluded that the CDA, therefore, constituted a "content-based blanket restriction on speech, and as such, [could not] be properly analyzed as a form of time, place, and manner regulation."[50]

Finding that the CDA placed "an unacceptably heavy burden on protected speech," which was not narrowly tailored to the government's interest of protecting minors from harmful material, the *Reno* Court declared the CDA a "patently invalid unconstitutional provision."[51] *Reno* has been hailed by many as "the legal birth certificate of the Internet"[52] and as a "mighty firewall that will protect the Internet in the future from the torching effects of censorship."[53]

B. The Child Online Protection Act: Child of the CDA

Congress' next attempt to regulate pornographic material on the Internet came in 1998, with the Child Online Protection Act ("COPA").[54] COPA was enacted in an attempt to address the Court's concerns expressed in its invalidation of the CDA.[55] The statute virtually mirrors the CDA, except that COPA applies to communication on the World Wide Web "for commercial purposes that is available to any minor and that includes any material that is harmful to minors."[56] Whether material is harmful to minors is determined by a three-part test. Courts must look to whether:

> (A) the average person, applying contemporary community standards, would find, 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;
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> (B) the material 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

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[47] *Reno*, 521 U.S. at 868.

[48] *Id.*

[49] *See id.* at 868.

[50] *Id.* (inner quotation omitted).

[51] *Id.* at 882

[52] Stephen C. Jacques, *Comment:* Reno v. ACLU*: Insulating The Internet, The First Amendment, and The Marketplace of Ideas*, 46 AM. U. L. REV. 1945, 1985 (1997) (quoting Edward Felsenthal & Jared Sandberg, *High Court Strikes Down Internet Smut Law*, WALL ST. J., June 27, 1997, at B1).

[53] *Id.*

[54] 47 U.S.C. § 231 (1997).

[55] *See* ACLU v. Reno, 217 F.3d 162, 169 (2000).

[56] 47 U.S.C. § 231(a)(1).

a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, the material lacks serious, literary, artistic, political, or scientific value for minors.[57]

Much like the CDA, COPA also provides Web publishers with an affirmative defense if they can show that they attempted to limit minors' access to their site through the use of some form of age verification, such as the use of a credit card.[58]

The American Civil Liberties Union ("ACLU") challenged COPA on the grounds that it "suffers from the same fundamental defects that led the Court to strike down the CDA."[59] In June 2000, the United States Court of Appeals for the Third Circuit held that:

> [B]ecause the standard by which COPA gauges whether material is 'harmful to minors' is based on identifying 'contemporary community standards,' the inability of Web publishers to restrict access to their Web sites based on geographic locale of the site visitor, in and of itself, imposes an impermissible burden on Constitutionally protected First Amendment speech.[60]

The United States Supreme Court heard oral arguments in the case on November 28, 2001.[61] In May, 2002, the Court vacated and remanded the Third Circuit's decision. The Court held that "COPA's reliance on community standards does not *by itself* render the statute substantially overbroad for the purposes of the First Amendment."[62] The Court declined to express a view as to whether COPA suffers for substantial overbreadth for any other reasons, whether the statute is unconstitutionally vague, or whether the District Court was correct in concluding that the statute would not survive strict scrutiny analysis until the Court of Appeals examined these issues.[63] Because the Government did not ask the Court to vacate the preliminary injunction entered by the District Court, they remain enjoined from enforcing COPA absent further action by the lower courts.[64]

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[57] *Id.* § 231(e)(6).

[58] *See id.* § 231(c)(1).

[59] Brief for Respondent at 8-9, Ashcroft v. ACLU, 532 U.S. 1037 (2001).

[60] *ACLU v. Reno*, 217 F.3d at 166. *See also* Lawrence Lessig & Paul Resnick, *Zoning Speech On The Internet: A Legal And Technical Model*, 98 MICH. L. REV. 395 (1999) (discussing the difficulties of regulating Internet access control across jurisdictions).

[61] *See* Ashcroft v. ACLU*: ACLU Defends Internet Free Speech In Argument Before the Supreme Court, available at* http://www.aclu.org/issues/cyber/Ashcroft_v_ACLU_feature.html (last visited Mar. 9, 2002).

[62] Ashcroft v. ACLU, 122 S. Ct. 1700, 1713 (2002).

[63] *Id.*

[64] *Id.* at 1714.

C. State Regulation

Some states, including Michigan and New Mexico, have attempted to criminalize the use of the Internet to distribute material that is harmful to children.[65] Each of these state's statutes have been held invalid on the grounds that they violate the Commerce Clause by subjecting interstate commerce to inconsistent state regulation.[66] The Internet (like railways and highways) is by its very nature an instrument of interstate commerce.[67] An Internet user who posts a Website has no means by which to prevent users in other states from accessing that site.[68] In fact, the random way in which information travels over the Internet makes it probable that an actor would be subject to "regulation by states that actor never intended to reach and possibly was unaware were being accessed."[69]

Due to the random structure of the Internet, an email from one state resident to another state resident may travel out of state before reaching its destination.[70] For this reason, any argument that a state regulation applies purely to intrastate commerce must fail.[71] A regulation "cannot effectively be limited to purely intrastate communications over the Internet because no such communications exist."[72] Even assuming arguendo that Internet communication could exist purely intrastate, such a regulation would still be "an invalid indirect regulation of interstate commerce" because the local benefit conferred by such a regulation would not be sufficient to justify placing a burden on interstate commerce.[73]

III. INTERNET FILTERING: THE LATEST DEBATE

A. The Children's Internet Protection Act

Congress' latest attempt to regulate pornographic material on the Internet comes in the form of the Children's Internet Protection Act ("CIPA"), which became effective on April 20, 2001.[74] The Act requires all public and school libraries to install "technological protection measure[s]" on all computers in order

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[65] *See* ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999) (invalidating N.M. Stat. Ann. § 30-37-3.2(A); American Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) (finding unconstitutional N.Y. Penal Law § 235.21(3)); Cyberspace Communications, Inc. v. Engler, 55 F. Supp. 2d 737 (E.D. Mich. 1999) (invalidating 1999 Public Act 33 which amended M.C.L. 722.671 *et seq.*).

[66] *See, e.g., Johnson*, 194 F.3d at 1161.

[67] *See Engler*, 55 F. Supp. 2d. at 744.

[68] *See id.*

[69] *Pataki*, 969 F. Supp. at 168-69.

[70] *See Johnson*, 194 F.3d at 1161.

[71] *See id.*

[72] *Pataki*, 969 F. Supp. at 171.

[73] *See Johnson*, 194 F.3d at 1161.

[74] Pub. L. No. 106-554, §§ 1712, 1721, 114 Stat. 2763 (2000).

to protect minors from accessing "visual depictions" of material which is obscene and could be considered child pornography.[75] Libraries must ensure that these measures are operating to block material that is harmful to minors during any use of the computers.[76] Authorized personnel may disable the protection measures in order to allow adults "access for bona fide research or other lawful purposes."[77]

CIPA adopts the definition of "obscene" given in Title 18 of the U.S. Code.[78] CIPA defines "harmful to minors" as:

> any picture, image, graphic image file or other visual depiction that -
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> (i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excrement;
>
> (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and
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> (iii) is enforcing the operation of such technology measure during any use of such computers.[79]

Each section of CIPA is tied to a federal program that libraries depend upon for funding. One section applies to libraries that receive Universal Service ("E-rate") discounts for "the provision of Internet access, Internet service, or internal connections."[80] The E-rate program was established as part of the Telecommunications Act of 1996 in order to ensure that all regions of the US receive "access to advanced telecommunications and information services" at reasonable and affordable rates.[81] Under the E-rate program local telecommunications carriers must honor a library or school's request to receive service "at rates less than the amounts charged for similar services to other parties."[82] In order to qualify for E-rate discounts, libraries must file a form with the FCC certifying that they are complying with CIPA.[83] Another section applies to libraries that do not receive E-rate discounts, but instead receive funds under the Library Services and Technology Act ("LSTA") in order to "purchase computers to access the Internet, or to pay for direct costs associated with accessing the Internet."[84]

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[75] 47 U.S.C. § 254(h)(5)(C)(i) (2000).
[76] *See id.* § 254(h)(5)(B).
[77] *Id.* § 254(h)(6)(D).
[78] *See id.* § 254(h)(7)(E).
[79] *Id.* § 254(h)(7)(G).
[80] 47 U.S.C. § 254(h)(6)(A)(ii).
[81] *Id.* § 254(b)(2).
[82] *Id.* § 254(h)(1)(B).
[83] *See id.* § 254(h)(6)(A).
[84] 20 U.S.C. § 9134(f)(1) (2000).

B. Challenging CIPA

In March 2001, the ACLU and the American Library Association ("ALA") along with several public libraries, library associations, library patrons, and Internet authors and publishers from across the country, filed suit in the United States District Court for the Eastern District of Pennsylvania, challenging the constitutionality of CIPA.[85] The suit alleges that CIPA violates the First Amendment and, thereby, imposes an unconstitutional condition on libraries participating in the E-rate and LSTA programs.[86]

As of February 2002, only one federal court had addressed whether a public library may enforce content-based restrictions on access to Internet speech without violating the First Amendment.[87] In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, the United States District Court for the Eastern District of Virginia examined the "Policy on Internet Sexual Harassment" voluntarily adopted by the Loudoun County Library Board.[88] Similar to CIPA, the policy adopted by the Library Board required the installation of Internet filters on all library computers so as to block child pornography and obscene material deemed harmful to juveniles.[89] The policy included an unblocking provision, also similar to that found in CIPA, whereby patrons could request access to blocked sites by submitting a written request including their name, telephone number, and a detailed explanation of why they wished to access the blocked site.[90] The *Mainstream Loudoun* court held that the policy at issue in that case offended "the guarantee of free speech in the First Amendment" and was, therefore, unconstitutional.[91]

The Supreme Court has held that before a prior restraint may be imposed, there must be a judicial determination that the material at issue is in fact obscene.[92] The use of Internet filters constitutes an unconstitutional prior restraint because the technology does not provide adequate standards or procedural safeguards for determining what material to block.[93] The available filtering programs have not been designed to comply with CIPA.[94] The blocking criteria filtering programs

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[85] *See* Multnomah County Pub. Library v. United States, No. 01-CV-1322 (E.D. Pa. Mar. 20, 2001).

[86] *See id.*

[87] *See Mainstream Loudoun II*, 24 F. Supp. 2d at 552.

[88] *See id.* at 556.

[89] *See id.*

[90] *See id.*

[91] *Id.* at 570.

[92] *See Bantam Books*, 372 U.S. at 70 (holding that a system of prior restraint is tolerated only where it operates under judicial supervision).

[93] *See Mainstream Loudoun II*, 24 F. Supp. 2d at 568-70.

[94] *See* Response of Plaintiffs to Defendant's Motion to Dismiss at 5, *Multnomah County Pub. Library* (No. 01-CV-1322) [hereinafter "*Response*"]; *see also* Computer Professionals for Social Responsibility, *Filtering FAQ, available at* http://www.cpsr.org/filters/faq.html (last visited Feb. 2, 2003).

currently used are not based on the legal definitions of obscenity, child pornography, or "harmful to minors."[95] Rather, software vendors make independent decisions as to what types of content their programs will block.[96] Because the criteria for blocking a site is established by the software producers and often kept secret, library staff will often be unaware of what material they are blocking.[97]

The Third Circuit Court of Appeals has held that the public library is a limited public forum designated for the "communication of the written word."[98] Traditional public forums are places such as public parks "which by a long tradition or by government fiat have been devoted to assembly and debate."[99] When the government voluntarily opens a forum to the public for expressive activity, a limited public forum is created.[100] Once the government chooses to make a limited public forum available for expressive activity, any content-based restrictions on such activity must be "narrowly drawn to effectuate a compelling state interest."[101]

Relying on *Board of Education v. Pico*,[102] the *Mainstream Loudoun* court analogized the use of Internet filters to the removal of books from the library.[103] Applying *Pico*, the *Mainstream Loudoun* court held that "the First Amendment applies to, and limits, the discretion of a public library to place content-based

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[95] *See* Complaint for Declaratory and Injunctive Relief at ¶ 89, *Multnomah County Pub. Library* (No. 01-CV-1322) [hereinafter "*Complaint*"]; *see also Mainstream Loudoun II*, 24 F. Supp. 2d at 569.

[96] *See Filtering FAQ*, *supra* note 94 ("Several vendors have extended blocking beyond merely 'objectionable' materials. In some instances, political sites and sites that criticize blocking software have been blocked.").

[97] *See id.*

[98] Kreimer v. Bureau of Police, 958 F.2d 1242, 1259 (3d Cir. 1992).

[99] Perry Educ. Ass'n v. Perry Local Educ., 460 U.S. 37, 45 (1983).

[100] *See id.*

[101] *Id.* at 46.

[102] 457 U.S. 853 (1982). *Pico* involved a school board's decision to remove books that were believed to be "anti-American, anti-Christian, anti-Semitic, and just plain filthy" from a high school library. *Id.* at 856. Although the Supreme Court did not issue a majority opinion, a plurality opinion authored by Justice Brennan held that the government's right to remove materials from a school library based on their content is necessarily limited by the First Amendment. *See id.* at 864-69. Brennan found that school boards could remove books because they were not educationally suitable, but not simply because the board disapproved of the ideas they contained. *See id.* at 872. In a concurring opinion, Justice Blackmun wrote that school boards could limit their library collections based on educational suitability or budgetary constraints. *See id.* at 879. In dissenting opinions, both Chief Justice Burger and Justice Rehnquist rationalized giving schools boards discretion to remove books by noting that such materials remained available through public libraries." *See id.* at 892 (Burger, C.J., dissenting); *id.* at 915 (Rehnquist, J., dissenting).

[103] *See Mainstream Loudoun I*, 2 F. Supp. 2d at 792.

restrictions on access to constitutionally protected materials within its collection."[104] The court further found that "the factors which justified giving high school libraries broad discretion to remove materials in *Pico* are not present" in the case of public libraries.[105] Public library patrons include adults who are entitled to exercise speech and communications that may be inappropriate for children.[106] Additionally, "[p]ublic libraries lack the inculcative mission that is the guiding purpose of public high schools."[107] Adults use the public library "to pursue their personal intellectual interests, rather than the curriculum of a high school classroom. As such, no curricular motive justifies a public library's decision to restrict access to Internet materials on the basis of their content."[108]

The *Mainstream Loudoun* court concluded that "any resource-related rationale that libraries might otherwise have for engaging in content-based discrimination" does not apply to the Internet.[109] Most Internet publications are freely accessible. Therefore, by purchasing Internet access, the library has effectively purchased all Internet publications.[110] While there is no additional cost to make an Internet publication available to a patron, the library "must actually expend resources to restrict Internet access to a publication that is otherwise immediately available."[111] Furthermore, "Internet publications, which exist only in 'cyberspace,' do not take up shelf space or require physical maintenance of any kind. Accordingly, considerations of cost or physical resources cannot justify a public library's decision to restrict access to Internet materials."[112] Once they have decided to provide Internet access, a library "may not adopt and enforce content-based restrictions on access to protected Internet speech absent a compelling state interest and means narrowly drawn to achieve that end."[113]

Even if a court finds CIPA does not constitute a prior restraint, the use of technology protection measures is likely unconstitutional because it is not narrowly tailored to the government's interest in protecting children and, therefore, does not satisfy strict scrutiny.[114] The current technology cannot distinguish between protected and unprotected speech and will "function literally as automated censors, blocking speech in advance of any judicial determination that it is unprotected."[115] Studies have shown that the current filtering programs block access to thousands of sites containing protected and often innocent

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[104] *Id.* at 794
[105] *Id.* at 795.
[106] *See id.*
[107] *Id.*
[108] *Mainstream Loudoun I*, 2 F. Supp. 2d at 795.
[109] *Id.*
[110] *See id.* at 793.
[111] *Id.*
[112] *Id.* at 795.
[113] *Mainstream Loudoun I*, 2 F. Supp. 2d at 795.
[114] *See Complaint*, *supra* note 94, at ¶¶ 255-566.
[115] *Response*, *supra* note 95, at 9.

material.[116] A report released by the Electronic Privacy Information Center found that a "family-friendly" search engine produced by the NetShepard Corporation blocked access to over ninety percent of online material that might be of interest to young people, including the American Red Cross and the San Diego Zoo homepages.[117] A report by the Censorware Project on the Cyberpatrol Software, found that in addition to blocking thousands of web pages with harmless, and perhaps educational content, Cyberpatrol often inaccurately described the content of wrongfully blocked sites.[118] For example, the U.S. Army Corps of Engineers Construction Engineering Research Laboratories' website was described by Cyberpatrol as containing "Full Nude Sex Acts."[119]

In addition to blocking numerous sites containing protected speech, the software is not able to block all sites containing unprotected speech.[120] Presently "no technology blocks access to content communicated through e-mail, chat or online discussions."[121] Additionally, programs have difficulty blocking inappropriate images on pages that do not contain any text.[122] In November 2000, a local watchdog group in Montgomery County, Maryland, conducted a test of the Internet filters installed in the county library.[123] The group found that ninety percent of the inappropriate sites they tested, including Playboy and Hustler, were easily accessible despite the filters.[124]

Because technology protection measures block some protected speech while allowing unprotected speech to remain unblocked, the regulation is both over and under inclusive.[125] "There are less restrictive and more effective ways to assist

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[116] *See, e.g.*, Consumer Reports Online, *Digital Chaperones for Kids: Which Internet Filters Protect the Best? Which Get in the Way?*, *available at* http://www.consumerreports.org/main/detail.jsp?CONTENT%3C%3Ecnt_id=18867&FOLDER%3C%3Efolder_id=18151&bmUID=1015825500778 (last visited Feb. 2, 2003).

[117] *See* Electronic Privacy Information Center, *Faulty Filters: How Content Filters Block Access to Kid-Friendly Information on the Internet*, *available at* http://www.2.epic.org/reports/filter_report.html (last visited Oct. 28, 2001).

[118] *See* The Censorware Project, *Blacklisted by CyberPatrol*, *available at* http://censorware.net/reports/cyberpatrol/adayoyo.html (last visited Feb. 2, 2003); The Censorware Project, *Censored Internet Access in Utah Schools and Libraries*, *available at* http://www.gilc.org/speech/ratings (last visited Mar. 16, 2002) (discussing an additional study conducted by the Censorware Project found that the SmartFilter software banned pages such as the Holy Bible, the U.S. Constitution, and the Declaration of Independence).

[119] The Censorware Project, *Blacklisted by CyberPatrol*, *supra* note 118.

[120] *See Filtering FAQ*, *supra* note 94.

[121] *Complaint*, *supra* note 95, at ¶ 20.

[122] *See Filtering FAQ*, *supra* note 94.

[123] *See* Jennifer Jacobsen, *Library Porn Filter Fails to Satisfy All Software Said To Be Too Porous, Too Impervious*, FAIRFAX J., *available at* http://jrnl.net/news/00/Nov/jrn46071100.html (last visited Feb. 2, 2003).

[124] *See id.*

[125] *See Complaint*, *supra* note 95, at ¶ 257.

patrons in avoiding unwanted content."[126] If "a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."[127] *Mainstream Loudoun* listed three examples of less restrictive alternatives to blanket filtering: (1) the installation of privacy screens at computer terminals; (2) monitoring by library staff; and (3) the installation of filtering software on only some Internet terminals designated for use by minors.[128]

CIPA is not narrowly tailored to meet the government's interest in protecting children because the technology protection measures must be in effect at all times, even during use by an adult patron. CIPA, therefore, "on its face 'suppresse[s] speech adults [a]re constitutionally entitled to send and receive.'"[129] Blocking access to material deemed harmful to juveniles, improperly limits "the speech available to adults to what is fit for 'juveniles.'"[130]

The ACLU and the ALA contend that CIPA's exception that allows the technology to be disabled for "bona fide research or other lawful purposes" only exacerbates the statute's constitutional defects.[131] The statute does not define what constitutes a "bona fide research or other lawful purpose."[132] Additionally the statute provides that libraries "may" disable the software, but does not require them to do so.[133]

Implementing an unblocking procedure did not save the Loudoun County Library policy from a successful First Amendment challenge.[134] The *Mainstream Loudoun* court held that the unblocking procedure was unconstitutional because it forced "adult patrons to petition the Government for access to otherwise protected speech."[135] The court found that the unblocking policy in question would have a greater effect because the unblocking policy granted the "library staff standardless discretion to refuse access to protected speech."[136] Similarly, CIPA's "bona fide research" exception would require librarians, with no legal training, to make "unreviewable legal determinations" as to what speech patrons may have access to.[137]

The *Multnomah* plaintiffs also assert that the required installation of technology protection measures places an unconstitutional condition on the receipt of

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[126] *Response*, *supra* note 94, at 12.

[127] United States v. Playboy, 529 U.S. 803, 816 (2000).

[128] *See Mainstream Loudoun II*, 24 F. Supp. 2d at 567.

[129] *Response*, *supra* note 94, at 12 (quoting *Mainstream Loudoun I*, 2 F. Supp. 2d at 796).

[130] *Mainstream Loudoun I*, 2 F. Supp. 2d at 796.

[131] *See Response*, supra note 94, at 19.

[132] *See id.*

[133] *See id.*

[134] *See Mainstream Loudoun I*, 2 F. Supp. 2d at 797.

[135] *Id.*

[136] *Id.*

[137] *See Response*, *supra* note 94, at 22.

government funds that distorts the traditional function of the public library.[138] The Supreme Court recently held that the government may not restrict funding for programs that fund private as opposed to government speech if such a restriction would distort the traditional function of the medium.[139] Therefore, any restriction on the use of these funds that suppresses this speech distorts the traditional function of the library.[140]

Finally the ACLU and the ALA assert that CIPA is also invalid because it forces libraries to put "technology protection measures on all of their computers (whether or not the terminals are funded by the E-rate or LSTA programs) or lose federal funding."[141] Because it would be unreasonable and impractical for libraries to create separate facilities to house unrestricted Internet terminals not funded by the e-rate or LSTA programs, "there is no alternative channel for [the] expression . . . Congress seeks to restrict."[142]

IV. THE FUTURE OF INTERNET FILTERING IN PUBLIC LIBRARIES

The ACLU and the ALA are likely to succeed in their challenge of CIPA. By requiring the use of filters to block out all Internet content that is harmful to minors, CIPA restricts adult library patrons to information that is fit for children.[143] Furthermore, current filtering software is not capable of blocking only content that meets the legal definition of obscenity.[144] Thus, the use of Internet filters is not the least restrictive means of achieving the government's interest in protecting children.[145] Congress itself has noted that filtering is "not the preferred solution" due to the risk that "protected, harmless, or innocent speech would be accidentally or inappropriately blocked."[146] There are many less restrictive ways to ensure that children are not exposed to harmful images on library computer terminals.[147] Libraries may wish to enact a policy limiting the amount of time that patrons may spend online, install privacy screens around each

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[138] *See id.* at 13-17

[139] *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 544 (2001) (finding the prohibition of federally funded legal representation in cases challenging existing welfare law unconstitutional).

[140] *See Response*, *supra* note 94, at 15 (citing FCC v. League of Women Voters of Cal., 468 U.S. 364, 396-97 (1984) (holding that the First Amendment precluded the government from prohibiting editorializing by public radio networks even though the restriction was enacted to control the use of public funds)).

[141] *Complaint*, *supra* note 95, at ¶¶ 122-23.

[142] *See Response*, *supra* note 94, at 18-19 (quoting *Velazquez*, 531 U.S. at 546-47).

[143] *See Mainstream Loudoun I*, 2 F. Supp. 2d at 796.

[144] *See Complaint*, *supra* note 95, at ¶ 89; *see also Mainstream Loudoun II*, 24 F. Supp. 2d at 569.

[145] *See Mainstream Loudoun II*, 24 F. Supp. 2d at 567.

[146] H.R. REP. NO. 105-775, at 19 (1998).

[147] *See Mainstream Loudoun II*, 24 F. Supp. 2d at 567.

terminal, or assign staff to assist children in their use of the Internet.[148]

A requirement mandating installation and use of Internet filters in public libraries might, however, pass judicial scrutiny if the government asserted the additional compelling interest of preventing workplace sexual harassment of library staff.[149] Although in the past it was always possible that a random exhibitionist might choose to expose himself among the stacks in the public library,[150] the availability of sexual material on the Internet has made it more likely that library staff will come in contact with sexual images in the workplace.[151] Staff members that are uncomfortable with such material could bring a hostile working environment claim under Title VII[152] and similar state sexual harassment statutes.[153] "Employees could argue that the sexualized atmosphere created by patrons viewing an unfiltered Internet creates 'an intimidating, hostile or offensive work environment,' in violation of EEOC regulations."[154]

Title VII prohibits two types of sexual harassment in the workplace, quid pro quo and hostile working environment.[155] Quid pro quo sexual harassment occurs when "a supervisor conditions job benefits . . . on an employee's participation in sexual activity."[156] Hostile working environment harassment occurs when an employee's working conditions are altered by the creation of a hostile environment because of the employee's sex.[157] "'When a workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.'"[158]

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[148] *See* ACLU, *Censorship in a Box: Why Blocking Software is Wrong For Public Libraries*, *available at* http://www.aclu.org/issues/cyber/box.html (last visited Feb. 2, 2003).

[149] *See* Eugene Volokh, *The Constitution Under Clinton: A Critical Assessment: Freedom of Speech, Cyberlaw, Harrassment Law, & The Clinton Administration*, 63 LAW & CONTEMP. PROBS. 299, 328 (2000).

[150] *See* Family Research Council, *available at* http://www.frc.org (last visited Jan. 21, 2001).

[151] *See* Volokh, *supra* note 149, at 328-30.

[152] 42 U.S.C. § 2000e-2e(a)(1) (2000) (stating that it "shall be unlawful practice for an employer . . . to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex.").

[153] *See* Junichi P. Semitsu, Note, *Burning Cyberbooks in Public Libraries: Internet Filtering Software vs. The First Amendment*, 52 STAN. L. REV. 509 (2000).

[154] *Id.* (citing U.S. Equal Employment Opportunity Commission, *available at* http://www.eeoc.gov/facts/fs-sex.html (last visited Feb. 23, 2003)).

[155] *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 119 n.1 (5th Cir. 1996), *rev'd on other grounds*, 523 U.S. 75 (1998).

[156] *Id.* (citing Jones v. Flagship Int'l, 793 F.3d 714, 721-22 (5th Cir. 1986), *cert denied*, 479 U.S. 1065 (1987)).

[157] *See id.* (citing Harris v. Forklift Sys., Inc. 510 U.S. 17 (1993)).

[158] *Oncale*, 523 U.S. 75, 78 (quoting *Harris*, 510 U.S. at 21).

Employer liability for sexual harassment by non-employees is formally recognized by the EEOC as a violation of Title VII.[159] According to the EEOC regulations regarding sexual harassment, "an employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action."[160]

An employer has an affirmative defense to a hostile work environment claim if the employee has suffered no tangible job consequences.[161] In raising this affirmative defense the employer must show: (1) the employer has made a reasonable effort to protect employees from harassment; and (2) the employee unreasonably failed to take advantage of these measures.[162]

The filtering policy implemented by the Loudoun County Library Board was partially based on preventing sexual harassment.[163] The *Mainstream Loudoun* court, however, found that there was insufficient evidence to support a claim of sexual harassment resulting from patrons viewing sexually explicit material over the Internet.[164] The Library Board only had evidence of four complaints nationally and only one of those complaints occurred in Virginia.[165] In her opinion for the court, Judge Brinkema asserted that it was significant that the Library Board could not point to "a single incident in which a library employee or patron has complained that material being accessed on the Internet was harassing or created a hostile environment."[166] The court held that this evidence was insufficient as a matter of law to sustain the Board's burden that the policy was reasonably necessary.[167] Judge Brinkema explained:

> No reasonable trier of fact could conclude that three isolated incidents nationally, one very minor isolated incident in Virginia, no evidence whatsoever of problems in Loudoun County, and not a single employee complaint from anywhere in the country establishes that the Policy is necessary to prevent sexual harassment or access to obscenity or child pornography.[168]

The severity and pervasiveness component requires that the fact finder must conclude that the speech was not only offensive based on race, religion, sex, or some attribute, but also that it was either severe or pervasive enough to create a

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[159] *See* 29 C.F.R. § 1604.11(e) (2002).

[160] *Id.*

[161] *See* Burlington Indus., Inc. v. Ellerth, 542 U.S. 742, 765 (1998).

[162] *See id.*

[163] *See Mainstream Loudoun II*, 24 F. Supp. 2d at 565.

[164] *See id.*

[165] *See id.* The Virginia complaint was actually brought by a patron who complained after observing a boy viewing what she believed was pornography. *See id.*

[166] *Id.* at 566.

[167] *See id.*

[168] *Mainstream Loudoun II*, 24 F. Supp. 2d at 566.

hostile or abusive environment for both the plaintiff and a reasonable person.[169] The U.S. Supreme Court has adopted an "objective-subjective" standard to determine whether the alleged harassing speech is severe and pervasive enough to sustain a harassment claim under Title VII.[170] In determining whether conduct is in fact severe or pervasive courts look to a number of factors, such as the frequency of the conduct, whether the conduct is physically threatening or humiliating, and whether the conduct unreasonably interferes with the employee's work performance.[171]

Since the court's decision in *Mainstream Loudoun*, complaints from library staff who feel harassed by patrons surfing the web for pornography have increased all over the country.[172] A Kansas public library reported repeated staff exposure to online sexual content by a patron who would pull up pornographic images and then ask female staff for assistance in removing them.[173] A librarian in a Maryland public library complained of a patron who frequently attempted to engage staff in discussions about the pornographic images he was printing off the Internet.[174]

In response to complaints filed by Wendy Adamson, a reference desk librarian at the Minneapolis Public Libraries central branch, and eleven of her colleagues, the EEOC conducted the first investigation regarding unlimited Internet access in libraries.[175] According to Adamson, both staff and patrons encountered unwanted sexual images on terminals on a regular basis, and computer printouts of these images were left throughout the library.[176] Adamson also claimed to have witnessed men engaging in masturbation while at the terminals and that patrons had verbally abused her when she tried to enforce time limits on Internet use.[177] The complaint was filed after she and her co-librarians repeatedly notified officials of their concerns and did not receive a response.[178] In her complaint, Virginia Pear, another staff member at the Minneapolis Public Library, stated that she felt that the library's policy, which included monitored time limits on terminal

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[169] *See* Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 634 (1997).

[170] *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986).

[171] *See* Farragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998) (noting that a merely unpleasant environment is not sufficient to support a claim); Jordan v. Clark, 847 F.2d 1368, 1375 (9th Cir. 1988) (finding touching and sexist comments insufficient to support a claim).

[172] *See* Volokh, *supra* note 149, at 330 (citing David Burt, *Dangerous Access, 2000 Edition: Uncovering Internet Pornography in America's Libraries*, *available at* http://www.frc.org/misc/b1063.pdf).

[173] *See* Houghton, *supra* note 7, at 852.

[174] *See id.* at 853.

[175] *See* Kaplan, *supra* note 8.

[176] *See id.*

[177] *See id.*

[178] *See id.*

access, exasperated the problem.[179]

In May 2001, the EEOC's Minneapolis office issued a determination that the library may have created a hostile work environment by exposing the staff to sexually explicit images on unrestricted computer terminals.[180] According to statements made to the press by Adamson, the EEOC privately suggested to the library that it pay each of the twelve complaining employees $75,000 in damages.[181] If mediation efforts fail to secure a settlement, either the EEOC or the librarians could pursue the case in court.[182]

The EEOC's determination in the Minneapolis case sets a precedent that poses a threat to First Amendment freedoms.[183] Perhaps the most troubling aspect of the EEOC's decision is that harassment law covers a much broader area of speech than did the CDA.[184] Workplace harassment and hostile environment laws have already been used to suppress various forms of constitutionally protected speech in both the public and the private sector.[185] In one instance a Florida District Court granted an injunction barring the possession or display of any "sexually suggestive" material.[186] The court in that case defined "sexually suggestive" as anything depicting "a person of either sex who is not fully clothed . . . and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body."[187] As Professor Eugene Volokh points out, this definition would extend to include numerous works of art.[188]

Although courts have adjudicated numerous sexual harassment cases, few have discussed the First Amendment implications of applying Title VII to expression.[189] Such an analysis would require courts to balance the compelling government interest in preventing workplace discrimination against competing First Amendment rights.[190] In balancing these interests, some courts have found that regulation of discriminatory speech in the workplace constitutes a time, place, and manner restriction necessary to protect employees who are members of a "captive audience."[191] The "captive audience" doctrine balances the listeners right to

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[179] *See* Complaint of Virginia Pear, *available at* http://techlawjournal.com/internet/20010532com.asp (last visited Jan. 25, 2003).

[180] *See* CARTER ET AL., *supra* note 12, at 598.

[181] *See* Kaplan, *supra* note 8.

[182] *See* CARTER ET AL., *supra* note 12, at 598.

[183] *See* Eugene Volokh, *Squeamish Librarians*, *available at* http://law.ucla.edu/faculty/volokh/harass/library.htm (last visited Jan. 29. 2003).

[184] *See* Volokh, *supra* note 149, at 310.

[185] *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

[186] *See id.* at 1542.

[187] *Id.*

[188] *See* Volokh, *supra* note 169, at 653.

[189] *See* Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment - Avoiding a Collision*, 37 VILL. L. REV. 757, 766-67 (1992).

[190] *See Robinson*, 760 F. Supp. at 1536.

[191] *See id.*

privacy with speaker's right to express him or herself.[192] The doctrine permits limited regulation where the target audience has no realistic way of avoiding the expression.[193]

Additionally, harassment law does not focus solely on the content of the speech at issue.[194] Rather, the focus is on patron conduct.[195] Patrons who purposely reset terminal browsers to pornographic sites, leer at library staff, or masturbate while viewing pornography online are engaging in harassing conduct.[196] Therefore, sexual harassment claims will be analyzed under the less stringent First Amendment analysis set forth in *United States v. O'Brien*.[197] At least one court has held that sexually explicit pictures and verbal harassment that occur in the workplace are not protected expression because "they act as discriminatory conduct in the form of a hostile work environment."[198] Since the goal of Title VII is to eliminate workplace discrimination, independent of expression, Title VII is a permissible restriction on speech, pursuant to the secondary effects doctrine.[199] That expression is "swept up" in the proscription of conduct under Title VII and does not violate the First Amendment.[200]

Assuming that the restriction of expression that violates Title VII is a time, place, and manner restriction designed to curb the discriminatory secondary effects of sexual harassment, Internet filtering is not an appropriate remedy. The *Robinson* court stressed that any regulation must be narrowly tailored to the "minimum necessary to remedy the discrimination problem."[201] Internet filtering will block sexually explicit material from users who intend to view such material passively as well as from patrons who might use such material to engage in harassing conduct towards library staff.[202] Furthermore, as discussed previously,

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[192] *See* Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in The Workplace? Running The Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 420 (1996).

[193] *See id.*

[194] *See* Volokh, *supra* note 149, at 311.

[195] *See* Eugene Volokh, *Harassment Law and Free Speech Doctrine*, *available at* http://www.law.ucla.edu/faculty/volokh/harass/substance.htm (last visited Jan. 21, 2002).

[196] *See id.* (arguing that it is precisely the communicative impact of harassment that creates a hostile workplace in violation of Title VII).

[197] *See* 391 U.S. 367, 376 (1968) ("[When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

[198] *Robinson*, 760 F. Supp. at 1535.

[199] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 389-90 (1992).

[200] *See* Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 884 (D. Minn. 1993).

[201] *Robinson*, 760 F. Supp. at 1536.

[202] *See* Strossen, *supra* note 189, at 771 ("[I]f individual employees look at nude photographs . . . without directly displaying them to any other employee who does not want to see them, that conduct—even if offensive to some employees—would clearly constitute protected expressive activity.").

Internet filtering blocks large quantities of material that may not be considered sexually explicit. Therefore, much like the CDA, the use of filters constitutes a "content-based blanket restriction on speech, and as such cannot be 'properly analyzed as a form of time, place and manner regulation.'"[203]

V. CONCLUSION

Even if Congress does not succeed in passing a federal statute mandating Internet filtering, many local governments and library boards may choose to adopt filtering policies in order to protect against themselves against Title VII claims.[204] The monetary cost of losing a Title VII case is a greater burden than the cost of losing a First Amendment case.[205] Commentators on both sides of the filtering debate have recognized that the immense cost of defending against claims similar to the Minneapolis case will put pressure on libraries to install Internet filters. Gary Glenn, president of the American Family Association of Michigan, has stated that, "if state lawmakers refuse to require Internet filtering technology as a matter of common public decency, or to protect children from having to share the library with adult porn users, perhaps now they'll be forced to do so to protect taxpayers from financial liability for sexual harassment and civil rights lawsuits filed by librarians."[206]

Forcing libraries to install filtering software, by either government mandate or intimidation, impedes the library's right to determine what materials to acquire.[207] If libraries are forced to engage in self-censorship, the traditional library function of aiding in the receipt of information will be distorted. Neither the federal government nor the threat of legal liability should be allowed to force libraries to censor Internet access.

Kiera Meehan

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[203] *Reno*, 521 U.S. at 868.

[204] *See* Kaplan, *supra* note 8.

[205] *See* N2H2, *Internet Usage & Legal Liability*, *available at* http://www.n2h2.com (estimating that the average cost of defending a hostile workplace sexual harassment claim is $250,000, and the average settlement awarded is almost ten times that amount) (last visited Mar. 16, 2002).

[206] American Family Association of Michigan, *Michigan Family Group Hails EEOC Ruling on Library Internet Porn*, *available at* http://www.afamichigan.org/releases/20010525a.html (last visited Feb. 24, 2003).

[207] *See* Jonathan P. Wallace, *Purchase of Blocking Software By Public Libraries Is Unconstitutional*, *available at* http://www.spectacle.org/cs/library.html (last visited Jan. 25, 2003).