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ATG Special Report -- Libraries In The Cyberage

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implicitly criticizing anyone who strays from it. "The banner of ALA is the one under which we organize to take our professional stand on intellectual freedom," he proclaims, and warns us that unless we remain strictly faithful to that orthodoxy, we run the risk of "go(ing) along with the filtering zealots."

Filtering is a difficult issue. But contrary to **Berry's** assertion, the question is not whether one "can learn the varieties of sexual activity without practicing them." The question (or one of them, anyway) is whether children should be allowed to explore the varied world of sexual activity without restriction in public libraries. This question is controversial, as it should be, since it involves a clash of fundamental values — the safety of children and the freedom to inquire. Reasonable people of good will can (and do) disagree on how that conflict should be resolved. But how can any reasonable person of good will — even one who strongly opposes filtering — read a screed like **Berry's** and not end up either weeping or laughing?

Personally, I think a little dissent on this topic (among others) would do the ALA a world of good. There is far too much groupthink in this profession. I suggest it's time that we heed the advice of the **Great Helmsman**, and "(let) a hundred flowers blossom and a hundred schools of thought contend."⁵ Much more than facile speechifying, we need serious people willing to tackle these problems in a serious way. For the ALA to define an official stance on an issue is entirely appropriate, but there should be room in the library profession for more than one viewpoint. Call me a traitor, but it seems to me that no one who tries to tell us what to think should go unchallenged. 🍄

Endnotes

1. <http://slate.msn.com/?id=2065227>.
2. The entire speech is viewable at <http://www.nralive.com/index2.cfm>.
3. *Library Journal*, 4/15/2002, v. 127 iss. 7, p.8.
4. It is difficult to see in what meaningful sense that discussion has been "captured" by either side in the debate, however. I'm not a subscriber to the list myself, but I did go to the considerable effort required to gain access to the list's archives and took a quick look at the conversation that took place over the course of one recent period. It appears to me that, far from having "captured" the discussion, those in favor of filtering are engaged in lively conversation with those who oppose it. It looks to me as if the voices against filtering are at least as numerous — and certainly as vociferous — on the list as those in favor of it. I was, however, struck by the irony that in order to access the archives of a list administered by the Office of Intellectual Freedom, I had to register and give my email address!
5. Mao, Zedong. Address delivered in Peking, 27 February, 1957.

ATG Special Report — Libraries In The Cyberage

by **Mark Y. Herring** (Dean of Library Services, Dacus Library, Winthrop University) <herringm@winthrop.edu>

During the summer of 2000, Dacus archivist **Ron Chepesiuk** and I sat down with a simply goal: put together a series of forums to discuss the groundbreaking changes that libraries had been, and were certain to continue, to undergo as a result of the advent of the World Wide Web. We knew we could not talk about everything but we felt certain there were four or five key issues that ought to get widespread ventilation. Like it or not, libraries are in the cyberage. Although many librarians know this, many of us may feel, at times, we are more like lost in cyberspace. With some discussion and a common theme to hold those discussions together, we thought we might aid in the understanding of libraries and cyberage issues.

Out of a series of meetings we ended up with four forums discussing a wide variety of libraries and cyberage issues: Internet filtering, online/electronic publishing and the rush to e-orcize libraries, copyright in the digital age, and the Humanities and cyberspace. We pitched the idea to the **South Carolina Humanities Council** (**Bob Ellis** in particular) and soon we had ourselves a small grant with the goal of making libraries and cyber-issues better known. The forums occurred during the academic year 2000-2001.

Because we wanted statewide coverage, we planned two of the forums, the first and the last, at **Winthrop**. One took place in Greenville-Spartanburg and another in Charleston. Even before we had the first speaker, we knew we wanted the rights to publish these talks, if for no other reason than because we wanted both a permanent record, and the ability to reach a wider audience. We believe we have accomplished both, but more, we hope to lengthen the discussions by raising these issues in print.

Enter **Against the Grain** and **Katina Strauch**. After a number of discussions, **Katina** agreed to publish our ruminations in

four issues of the well-known **ATG**. We hope you enjoy these. We think the talks are provocative, interesting, and even likely to raise hackles. What we hope they will do is raise awareness to a higher level about the issues themselves, about where librarians

are in them, and about possible courses of action. Particulars of each forum will appear in the general introduction that **Katina** has asked me to write.

Our thanks are in surfeit to **Katina**, to the **South Carolina Humanities Council** without whose help none of this would have been possible, and especially President **Anthony DiGiorgio** of Winthrop University. 🍄

Libraries In The Cyberage — Filtering, Censorship and the First Amendment: Libraries at the Crossroads

by **Mark Y. Herring** (Dean of Library Services, Dacus Library, Winthrop University) <herringm@winthrop.edu>

No other event strikes more at the heart of absolutist interpretation of the First Amendment than Internet filtering; and no other issue raises the hackles of so many on both sides of this argument than whether or not librarians should filter the Internet. When this issue came before our forum in 2000-2001, filtering was a very hot topic, to say the least. Today, with **CIPA** (**Children's Internet Protection Act**) still smoldering in Philadelphia, followed by the Supreme Court's astonishing decision in **CPPA**, the **Child Pornography Prevention Act** (1996) in May 2002, and you have all the makings of a white-hot debate. **CIPA** failed to get the court's attention while in **CPPA**, the court

made one of its finer distinctions: good virtual porn versus bad virtual porn. It reminds one of those fantastic, mystical emanations that **Justice Warren** called "penumbras" or shadows that he saw all over the Constitution, and which, he argued, allowed for abortion-on-demand.

At any rate, the upshot of these cases left those favoring filtering racing back to the drawing board. Librarians' refusal to filter pornography off of library computer defies description. When traces of alar-treated apples were found in jars of apple juice some years ago, and it was then determined that if you ate 750 alar-treated apples for 70 years,

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you might get cancer, we forthwith all but ruined the apple industry. Why? For the children. Apparently now, however, libraries must not be without even one picture from lustylotilas.com or bawdyboys.org, and the **American Library Association** is right there fighting to the death to keep each site in every library.

Since libraries began, librarians have sought to protect what people read by making a most compelling case in support of the First Amendment. Librarians have fought for this issue with panache and verve. But this same passion also led them to reject, in absolutist fashion, any real or perceived disloyalty to the First Amendment, even when the courts afforded no such protection. While librarians often cite approvingly *Roth* they seemingly forget altogether that *Albert v California*, decided during the same **Warren** term, found no First Amendment protection for obscenity.

Until digitized images and their access via the Internet, this absolutist interpretation of the First Amendment never saw the light of a challenged day in court. Librarians accepted everything for fear of censoring anything. The Internet, however, made access to documents easy. Libraries made access to the Internet possible for everyone. Indeed, outside the home, libraries were responsible for 50% of all Internet access. But with easy access to information came easy access to every imaginable (and many not so easily imaginable) pornographic sites.

Issues with respect to the First Amendment and cyberspace have not, however, been easily resolved. Libraries have made compelling First Amendment arguments but their opponents have made equally compelling cases as well. Congress has lent a sympathetic ear to these competing voices, as have a host of other organizations and individuals. While many librarians defend unfettered use of the Internet, they have been caught in a paradox: much of the material objected to are materials libraries have *always* excluded in print format from their shelves. For example, no library in the country subscribes to *Scree** magazine; yet anyone, *including children*, can get what that magazine affords and worse. Newman was right: men will die for a dogma who will scarcely stir for a conclusion. Moreover, the once uncontested argument of librarians within the profession has recently seen many notable dissenters. And the tag argument—if you don't like it simply stay away from it, i.e., change the channel as it were—is not longer so easily done. Recently, www.firstamendment.org purports to offer guidance to this argument. It does not; it offers graphic sexual photographs. While pornographers have always been clever, this may be the first use of the *.org domain for their putrescence.¹

Such is the backdrop for the first of four forums, "Libraries in Cyberspace," on Internet filtering. Held on **Winthrop University's** campus in September, and sponsored by **Dacus Library** and the **South Carolina Humanities Council**, **Carrie Gardner** takes on the anti-filtering argument with typical librarian gusto. Her admission that she encourages her students to look for pornography on the Internet may strike some parents whose children attend her instructions an assignment unnecessarily given. Schoolteachers often fight to the death to teach sex (and now, pornography surfing) but rarely mathematics or biology. Nevertheless, her arguments are compelling as they are provocative.

Carrie is author of two chapters on intellectual freedom and technology along with numerous articles. She has given over 100 speeches, classes and lectures on intellectual freedom. She serves as the Chair of the **American Association of School Librarians Intellectual Freedom Committee**, Chair of the **Pennsylvania School Librarians Association Intellectual Freedom Committee**, and serves on the Board of Directors of the **Pennsylvania School Librarians Association**.

Gardner also serves as Coordinator of **Library Media Services** at **Milton Hershey School** in Hershey, PA. She is a Ph.D. candi-

date at the **University of Pittsburgh**. Her dissertation examines the behaviors of those involved in creating Student Internet Use policies in K-12 school districts. She also serves as Adjunct Faculty member at **Mansfield University**.

Carol Clancy displays equal skill in arguing for the pro-filtering side. In essence, her argument is that since we do so much else "for the children" why are we so reluctant to do what seems obvious in this case, for the children? With documented cases of child-predators using the library-provided Internet access to lure children, the case seems even more to the point. **Clancy's** paper is a veritable treasure trove of facts and figures relating to filtering. It is not the kind of thing many librarians want to see for it flies in the face of one of our most cherished positions: The First Amendment *uber alles*. But **Clancy** is quick to remind us that the materials we are protecting by refusing filters are the very same materials we have always exercised control against: pornography.

Ms. Clancy is a practicing attorney and senior counsel for the **National Law Center**. She has co-authored numerous appellate and *amicus curiae* briefs on obscenity and First Amendment cases and has testified before Congress on a number of issues, including child abuse and problems of conduct toward women.

Libraries In The Cyberage — Filtering, Censorship and the First Amendment: Libraries at the Crossroads

by **Carrie Gardner** (Coord. of Lib. Media Serv., Milton Hershey Schl., PA)

The First Amendment and Libraries: The Perfect Marriage

When I have screens of email, piles of paperwork, a full voicemail box, and major deadlines approaching, I think about **Thomas Jefferson**. I take great comfort in the fact that nothing I'm working (or not working) on is nearly as difficult as creating a country and that's what Thomas Jefferson and his colleagues did when they penned the **Declaration of Independence** and the **United States Constitution**.² Our founding fathers pooled their collective intellects and scoured the great philosophers and governmental systems in order to decide on wording that gives us freedoms unmatched by other governments.

One such freedom, commonly called "freedom of speech" has its roots in the First Amendment, which states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

As a citizen of these great United States and as a librarian I celebrate the fact that I can create, disseminate, discuss, make fun of, protest, and maintain information on the entire universe of knowledge.³ With few exceptions, I cannot lose my other freedoms, namely the right to be out of prison, because of my information-laden activities.

American courts have recognized a corollary right to receive information as being essential and inherent in the First Amendment guarantee of freedom of speech. The courts recognize that in order to form and explore ideas, citizens must have access to information. It is this corollary on which librarians hang their professional hats. They are in the business of providing information. Not only is it their primary role, but it is heavily subsidized by tax dollars in the instances of public school libraries, public libraries, and academic libraries at public colleges and universities. With taxpayer dollars comes the legal obligation to uphold all applicable local, state and federal laws, especially the First Amendment.

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Legal vs. Illegal Information

Just as American citizens are innocent until proven guilty, information enjoys First Amendment protection until declared illegal by a court with appropriate jurisdiction.

The courts have ruled that very few categories of information do not enjoy First Amendment protection and ergo are illegal. These include obscenity, dangerous speech, slander, libel, and child pornography.

Pornography is a term used by many people to describe sexually explicit materials, but it is not a legally defined term. Obscenity is a legally defined term used to identify sexually explicit material that has been declared illegal by a court of law with appropriate jurisdiction. The general guidelines used by most courts in determining if something is obscene is commonly called "The Miller Test." This three-prong test was developed by the Supreme Court of the United States in *Miller v. California* case of 1973.⁴ The test includes:

1. The average person, applying contemporary community standards, must find that the work taken as a whole appeals to prurient interests.
2. The work depicts or describes, in a patently offensive way, sexual conduct as defined by state law.
3. The work taken as a whole, lacks serious literary, artistic, political, or scientific value.

In order to be declared illegal, the work must fail all three parts of the test. Child pornography is always illegal. Until the proliferation of computer technology, child pornography was defined as photographs of actual children engaged in sexually explicit or lascivious conduct. This was very clear-cut. With the advent of computer technology that allows users to create very life-like images of photographic quality, ambiguity has entered this arena. Computer users can create images that depict children engaged in sexually explicit activities without using children. The **Child Pornography Protection Act of 1996** expanded the definition of child pornography to include computer-generated images.⁵ The constitutionality of this law is currently being decided by the courts.

Our Diverse Society

The **United States Government** was roundly critiqued for some of the probing questions on the **2000 Census** form. The census gathered information on ancestry, computer ownership, disability, education, family status, health insurance, ethnic origin, occupation, level of wealth, race, schooling and language use – just to name a few.⁶

The results are fascinating. We are more diverse in every way possible than ever before in the history of the country and of course, there are more of us. We are diverse in our ethnicity, languages, educational levels, religions, wealth status, health insurance coverage, disability status, etc. Diversity, pluralistic, and multicultural are all in vogue terms now. But this is not a fade. Our country now contains a fabulous tapestry of people with a myriad of traits.

American children reflect the traits of their parents but also suffer from society's worst afflictions. These include sexual abuse, extreme poverty, sub-standard medical care, lack of educational opportunities, etc. The **Children's Defense Fund** published the following statistics regarding America's children:⁷

- 1 in 3 will be poor at some point in their childhood
- 1 in 3 is behind a year or more in school
- 1 in 4 was born poor
- 1 in 5 is poor now
- 1 in 5 lives in a family receiving food stamps
- 1 in 6 is born to a mother who did not receive prenatal care in the first three months of pregnancy.
- 1 in 6 has no health insurance
- 1 in 8 never graduates from high school
- 1 in 12 has a disability
- 1 in 920 will be killed by guns before age 20

The Role of a Library

It could easily be argued that the role of a library has not changed since the beginning of time. Libraries have always promoted literature and literacy as well as providing access to information and they continue to do so. But in the year 2001 they provide these services to a diverse clientele and they use electronically networked resources to do so.

It could also be argued that libraries have changed in every aspect. Because of the Internet, most libraries now have the capacity to deliver information from all corners of the globe seconds after it was created. They can deliver interlibrary loan literature and sources of information from thousands of libraries. The formal confines of a publishing process has been replaced by an electronic system that allows anyone so inclined to post information in a variety of formats (text, video, audio, etc) at minimal costs.

Many libraries feel that it is their mission to bridge inequities that exist for Americans. Such inequities involve people who cannot afford the hardware, software

and telephone connections or those who do not have the knowledge to find information stored electronically. Another inequity exists when people have information needs about controversial topics. Such information is often not as readily available as less controversial information.

Filter Software

In order to begin a discussion about the ethical implications of filter use in libraries, it is necessary to give a brief overview of how filter software works. Filter software is created, usually by one of two types of entities: for profit companies or advocacy groups devoted to or against a certain cause. Filter software contains subjective human judgements and software code and must be run on appropriate hardware.

The software can employ keyword filtering. This method involves the software having a built in stop list of words or character strings, which if present on a web-site will prevent the site from being displayed. Some filter packages allow the page to be displayed but they electronically white out the stop list word(s) or character strings. Two obvious ethical questions occur. Is it possible to create a list of words and character strings that accurately reflects what library patrons should not access? Who makes the decisions? There are documented instances where mainstream sites were blocked because a keyword was present but used in a very socially acceptable manner. During the fall of 2000, **Dick Armey**, a U.S. Congressman, discovered that his website was blocked by most of the popular software packages.

The second method of filtering involves site based blocking. The creators of the filtering package hire folks who surf the web looking for websites that should be filtered. When they find a site, they enter that web address (URL) into the denied database. If a user uses a filtered terminal and enters a website that is on the denied list, they are blocked from accessing it. The ethical rub comes in at this point. Someone is deciding what information can be viewed for someone else.⁸

Legal Decisions Regarding Filters

The most far-reaching court case regarding filtering Internet content and the First Amendment was the *American Library Association v. U.S. Department of Justice* and *Reno v. American Civil Liberties Union*.⁹ In a 9-0 decision, the **U.S. Supreme Court** declared the **Communications Decency Act** unconstitutional. This act, had it stood would have banned the display, transmission, or sending of indecent or patently offensive speech over the Internet or other interactive computer services. The Court held that speech on the Internet has the highest level of First Amendment protection.

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Ethical Concerns Regarding Filters

Library policies, library boards, librarians, and American citizens hold many different views regarding filters. Some of the philosophies include:

It is better to filter and delete useful information in order to protect children and/or prohibit the distribution of certain types of information and/or viewpoints.

It is better not to filter in order that people have the information they need, that they can decide what they want to access and that children can learn appropriate behaviors when dealing with the on-line world.

Allow each person to decide if they want filtered access.

Because of the various philosophies, the following scenarios are in place at various public and school libraries.

- Unlimited access. Patrons have no technological restrictions.

- Filtered access. This can be implemented in a variety of ways. Young people and/or children must use a filtered terminal or everyone must use a filtered terminal.

- Permission forms. Parents or legal guardians must sign permission slips in order for their young person to use the Internet, which is commonly called an opt in policy. An opt out policy gives every young person permission to use the Internet unless their parent or legal guardian has signed a form saying they do not want their young person using the Internet.

- Acknowledgment forms. Patrons must sign a form which states the library policy.

- Provide patrons with the choice to use a filtered or unfiltered terminal.

On the surface, many of the above policy avenues seem to violate patrons' First Amendment freedoms. Perhaps. More importantly, I contend filtering imposes one viewpoint on an entire community of library users and in doing so violates and negates the spirit of the country that **Thomas Jefferson** and his contemporaries strove to create. They became dissidents within their own country in order to secure for us, their descendants, freedoms the likes of which, they never enjoyed.

The most ironic part of the filtering debate is that due to technological advances, we now have access to more of the total human information product than ever before. The barriers of oceans, mountains, time and money have been torn down and in their place, people who feel that they know what others should and should not access have become barriers themselves.

Libraries In The Cyberage — Filtering, Censorship and the First Amendment: Libraries at the Crossroads

by Carol A. Clancy, Esq.¹⁰

"[T]he mere possibility that user-based Internet screening software would 'soon be widely available' was relevant to our rejection of an overbroad restriction of indecent cyberspeech." *Reno v. U.S.* 521 U.S. 844 (1997), at 876-877. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

Introduction

Interactive computer services that link the public to Internet access and accompanying software programs, including Internet filters that screen or block objectionable access to objectionable material, represent modern technologies that provide critical tools for the Public Library. Under federal law, an interactive computer service is defined in 47 U.S.C. ' 230(f)(2) as:

any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, *including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.* (Emphasis added.)

Federal law specifically provides that libraries may use software filtering technology in operating such systems that offer public Internet access. 47 U.S.C. ' 230(c), entitled **A Protection for Good Samaritan Blocking and Screening of Offensive Material**, states at ' 230(c)(2)(A):

Civil liability. No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, *whether or not such material is constitutionally protected*; . . (Emphasis added.)

In tandem with offering public Internet access, a variety of filtering software programs are available that can be used to:

1. wisely manage limited library resources,
2. protect the use of library property, and

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Cyberage Endnotes

1. I choose the word but not inflammatory. The utter filth available over the Net would be deemed so by the most ardent defender of the First Amendment: sex with fruit and vegetables; very pregnant women in convoluted sexual encounters; fetishes impossible to describe; depictions impossible not to offend; and children of ages impossible to ignore trapped in sexual situations they could not possibly have agreed to.

2. Koch, Adrienne, ed. *The Life and Selected Writings of Thomas Jefferson*. New York: The Modern Library, 1972.

3. Dewey, Robert E. *Freedom: Its History, Nature and Varieties*. New York: Macmillan, 1970.

4. *Miller v. California* 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d. 419 (1973).

5. *Child Pornography Protection Act of 1996*, Pub. L. 104-208, S 121, 110 Stat. 3009-26, -28.

6. www.census.gov/population/www/index.html.

7. www.childrendefense.org.

8. For more information about filtering, see www.peacefire.com.

9. 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d.874 (1997).

10. The author is Senior Counsel with the National Law Center for Children and Families (NLC). NLC is a private non-profit legal education and research organization, which specializes in Constitutional law issues involving obscenity, child abuse and exploitation, child pornography, material harmful to minors, illegal sexually oriented business activities, and the protection of children and families from the harmful effects of illegal pornography. NLC provides information to elected officials, prosecutors, community leaders and concerned citizens on the law and its enforcement at the local, state, and national levels. For more information, visit the NLC Website at: <http://www.NationalLawCenter.org>. This paper is part of a series regarding "Libraries in the CyberAge," sponsored by Winthrop University, Rock Hill, South Carolina. Originally part of a presentation at the September 14, 2000 forum, titled: "Filtering, Censorship and the First Amendment: Libraries at the Crossroads," the material has been updated and reorganized to include recent legislative events. The views and opinions expressed in this article are those of the author and do not necessarily reflect those of NLC or Winthrop University. See Disclaimer, *infra*, at endnote i.

11. See Sean Geer, Pocket Internet 55 (The Economist Newspaper Ltd. 2000) (hereinafter Pocket Internet).

12. *Id.*, at 158.

13. *Id.*

14. Forbes.com, *Porn Goes Public* (June 14, 1999) <http://www.forbes.com/global/1999/0614/0212060a.html>.

15. Federal Register: May 7, 1999 (Volume 64, Number 88), Notices, page 24855-24860, available from the Federal Register Online via GPO Access at www.access.gpo.gov (DOCID:fr07my99-151) (visited Dec. 3, 1999) <http://ojdpd.ncjrs.org/fedreg/icac.txt>.

16. *Miller v. California*, 413 U.S. 15 (1973), at 20, footnote 2. See also I Final Report, Attorney General's Comm'n on Pornography 227 *et seq.* (1986), "Defining our Central Terms."

3. prevent library patrons and staff from being accosted by a deluge of unwanted, harmful, and often illegal material.

Public Libraries and Cyberporn

Blocking software was originally designed to protect children from exposure to online pornography and other perceive dangers on the Internet.¹¹ Pornography has become one of the Internet's biggest businesses.¹² Forrester, an American research company, estimated that the commercial Internet market for sexually explicit pornography was nearly \$1 billion in 1998, or about 10% the total amount spent on e-commerce.¹³ According to *Forbes Magazine*, the 1999 market segment world sales for Internet sales and memberships was estimated to be \$1.5 billion, and the total commercial exploitation of sex by a worldwide industry was estimated at \$56 billion dollars per year.¹⁴

Pornographic depictions of all types of sexual acts imaginable have been shown, sold, traded, and publicly disseminated, and are still available, both for free and for profit, and can be accessed by both adults and children, by means of the Internet. Such material is particularly prevalent on the World Wide Web, and in Usenet newsgroups. Because of the pervasive, unrestricted, and world-wide nature of the Internet-based sex exploitation industry, any publicly subsidized library must be aware that in providing unfiltered Internet access to staff and patrons it is also providing *free and indiscriminate access to a wide range of pornographic materials and related online criminal activity*. This raises public safety concerns, especially where Internet use involves minors. See Internet Crimes Against Children Task Force Program; Notice, Department of Justice, Office of Juvenile Justice and Delinquency Prevention, which notes:

Industry experts estimate that more than 10 million children currently go online and, by the year 2002, 45 million children will use cyberspace to talk with friends, explore the universe, or complete homework assignments. In cyberspace, children are a mouse click away from exploring our greatest museums, libraries, and universities. Unfortunately, they are also a mouse click away from sexual exploitation and victimization. While providing almost limitless opportunities to learn, the Internet has also become the new schoolyard for predators seeking children to victimize. Yesterday's enticements of puppy dogs and candy bars are augmented in today's chat rooms with anonymity and pornography. Cloaked in the anonymity of cyberspace, sex offenders can capitalize on the natural curiosity of children, seeking victims with little risk of de-

tection. Preferential sex offenders [defined as individuals whose primary sexual focus is children] no longer need to lurk in parks and malls. Instead, they can roam from chat room to chat room trolling for children susceptible to victimization. This alarming trend has grave implications for parents, teachers, and law enforcement officers because it circumvents conventional safeguards in place for the physical world and provides sex offenders virtually unlimited opportunities for unsupervised contact with children.¹⁵

Library installation of Internet filtering software can substantially, but not completely, close the door to some of these online dangers related to the dissemination of pornographic materials.

Description of Pornographic Materials That Do Not Belong in the Public Library

The United States Supreme Court has used the term pornography to describe a particular type of material that is subject to identification based upon a specific type of *sexually oriented* content:

The material we are discussing in this case is more accurately defined as 'pornography' or 'pornographic material.' 'Pornography' derives from the Greek (*porne*, harlot, and *graphos*, writing). The word now means 1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness 3: a portrayal of erotic behavior designed to cause sexual excitement.' *Webster's Third New International Dictionary*, supra. Pornographic material which is obscene forms a subgroup of all 'obscene' expression. . . .¹⁶

Serious works of art, literature, politics, or science; a mere nudity, medical works, disease prevention or awareness information, sexual advocacy, etc., though they deal with sex and include sexual descriptions or depictions, are not considered pornography in the context of their legitimate uses. There are at least five situations in which the Courts have approved some type of restriction on the dissemination of pornographic materials as being consistent with the requirements of the U.S. Constitution:

(1) **Obscenity:** Obscenity, by definition, is a patently offensive appeal to a prurient interest in sex and has no serious literary, artistic, political, or scientific value.¹⁷ Obscenity objectifies and crassly exploits human sexuality, is not protected by the First Amendment, and under federal law is completely banned on the Internet.¹⁸ Public libraries are authorized to use filtering software technology to block this material under 47 U.S.C. '230(c)(2) and the newly enacted **Children's Internet Protection Act (CIPA)**.¹⁹

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Cyberage Endnotes (continued)

17. *Reno v. ACLU*, 521 U.S. 844 (1997); *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957). For more discussion on the legal definition of obscenity, see *infra* at '3. Is filtering of pornographic content within First Amendment boundaries?

18. See *Reno v. ACLU*, 521 U.S. 844, at 877, footnote 44 (1997).

19. CIPA was enacted as part of the Consolidated Appropriations Act of 2001, Public Law No. 106-554.

20. See Tech Law Journal, "House Subcommittee Criticizes DOJ for Not Prosecuting Internet Obscenity," May 24, 2000 <http://www.techlawjournal.com/crime/20000524.htm>.

21. *Hearing on Obscene Material Available via the Internet, Before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce* (May 23, 2000) (Testimony of J. Robert Flores, Esq., Vice President and Senior Counsel, National Law Center for Children and Families), available from the National Law Center for Children and Families at <http://www.NationalLawCenter.org>.

22. *Hearing on Obscene Material Available via the Internet, Before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce* (May 23, 2000) (Testimony of Janet M. LaRue, Senior Director of Legal Studies, Family Research Council), available from the Family Research Council, at <http://www.frc.org> (hereinafter "Testimony of Janet M. LaRue").

23. *Morality in Media, A National Perspective* (released October 19, 1998) (visited April 12, 2000) <http://www.moralityinmedia.org/usatylis.htm>.

24. *Morality in Media*, News Release, dated October 19, 1998, at <http://www.moralityinmedia.org/onlysix.htm>. U.S. Department of Justice data show only eight obscenity prosecutions (where a federal obscenity violation was the lead charge) in fiscal year 1998.

25. *Morality in Media*, report entitled "Federal Obscenity Law Enforcement Continues at Low Rate" (visited April 12, 2000) at <http://www.moralityinmedia.org/wraptrac.htm>.

26. *Reno v. ACLU*, 521 U.S. 844 (1997); *New York v. Ferber*, 458 U.S. 747 (1982). For more discussion on the legal definition of child pornography, see *infra* at '3. Is filtering of pornographic content within First Amendment boundaries?

27. Rod Nordland and Jeffrey Bartholet, "The Web's Dark Secret," *Newsweek*, March 19, 2001 <http://www.msnbc.com/news/542525.asp>.

28. *Id.*

29. *Id.* Anyone with information concerning online child pornography should contact the CyberTipline at 800-843-5678, or e-mail <cybertipline.com>.

30. *Id.* Under the new federal law, knowing failure to make reports as required could subject violators to fines of up to \$100,000.

31. *Id.*

32. *Ginsberg v. New York*, 390 U.S. 629 (1968). For more discussion on the legal definition of material harmful to minors, see *infra* at '3. Is filtering of pornographic content within First Amendment boundaries?

Although federal law forbids the dissemination of this material to either adults or minors, no significant federal obscenity prosecutions of Internet obscenity originated with the **U.S. Department of Justice** during the growth years of the Internet. On May 23, 2000, the lack of federal Internet related obscenity prosecutions was the subject of a Hearing before the **U.S. House of Representatives Committee on Commerce, Subcommittee on Telecommunications, Trade, and Consumer Protection**.²⁰ At this hearing, witnesses testified regarding the widespread availability of obscenity on the Internet, and its harmful effects. Former **U.S. Department of Justice** prosecutor **J. Robert Flores, Esq.**, currently Vice President and Senior Counsel, **National Law Center for Children and Families**, stated:

The pornography industry has also become among the most aggressive marketers on the Internet, using newly developed push technologies alongside offensive and fraudulent marketing ploys. Thus, even if it were ever true, and I doubt it, that only those who sought out obscenity could find it, today only a lucky few are able to avoid it, as the Internet user community is bombarded with advertisements, tricked into visiting sites, given hot links to porn when search engines are asked for innocent sites, sent unsolicited porn spam e-mails, and trapped in endless mousetraps that bounce them from porn site to porn site when they try and leave.

In spite of the explosive growth in the distribution of obscenity, aggressive marketing efforts which assault and trap unwilling Web surfers, and a focus on material which portrays children as a suitable sexual interest for adults, the Department of Justice has refused to take action.²¹

Attorney **Janet M. LaRue**, Senior Director of Legal Studies, **Family Research Council**, testified that: In addition to the many other serious problems caused by the proliferation of hard-core pornography in our country, its accessibility via the Internet is turning America's public libraries into virtual peep shows open to the children and funded by taxpayers. This is primarily due to failure of the **Department of Justice** to enforce federal obscenity laws.²² See also the 1998 report by *Morality in Media, National Perspective*, which lists the number of obscenity prosecutions convictions, criminal referrals, and U.S. Attorneys' declinations, with lead charges as violations of 18 U.S.C. "1460-1468 (federal obscenity laws).²³ The study documents that enforcement of obscenity

laws dropped 86% in the Clinton Administration, down to just 6 prosecutions in 1997.²⁴ **U.S. Department of Justice** data show only eight obscenity prosecutions (where a federal obscenity violation was the lead charge) in fiscal year 1998.²⁵

(2) Child Pornography: Child pornography visually depicts children engaging in sexual activities, is not protected by the First Amendment, and under federal law is completely banned on the Internet.²⁶ Dissemination is proscribed to both adults and minors. Public libraries are authorized to use filtering software technology to block this material under 47 U.S.C. "230(c)(2) and the newly enacted **Children's Internet Protection Act (CIPA)**.

The Internet has fueled the explosive growth of child pornography and networks consisting of pedophiles (i.e., adults who are sexually attracted to children).²⁷ Investigators have stated that before the Internet came along, pedophiles were lonely and hunted individuals, and authorities had child pornography under control. However, with the distribution capacity of the Internet, today networks of child abusers are proliferating worldwide.²⁸ The **National Center for Missing & Exploited Children**, which operates a national **CyberTipline**²⁹ since March 1998, has analyzed 37,000 reports about child exploitation, then categorized and passed them on to federal law-enforcement agencies or to local and international police. Currently, the **CyberTipline** receives between 400 to 450 leads on Internet child pornography and child sexual exploitation a week, but they expect that to increase to over 7,000, once new federal regulations³⁰ go into effect that will require electronic communication and computing services to report violations of child-pornography laws. **John Rabun**, the operational head of the **CyberTipline**, does not believe that the current law enforcement system will be able to adequately respond or control the existing volume of child pornography once this information reporting requirement is in place:

Instead of treating every specific tip or lead, we're going to have triage as you would in the E[mergency] R[oom]. . . . The federal law-enforcement system is simply not equipped to deal with this kind of volume.³¹

(3) Material Harmful to Minors: Material Harmful to Minors (HTM) is a legal term of art representing a form of variable obscenity, in which the definition of obscene is modified to conform to the characteristics of what is recognized as the actual recipient audience: minors. HTM is not protected by the First Amendment when disseminated to minors.³² Public libraries are authorized to use filtering software technology to block a minor's access to this material under both 47 U.S.C. "230(c)(2) and the newly enacted **Children's Internet Protection Act (CIPA)**. Recently adopted federal legislation (The

Children's Online Protection Act or COPA) bans commercial web sites from disseminating this type of material to minors, and requires that any commercial web site that distributes this type of material verify the adult status of recipients through the use of credit cards, adult access codes, adult PIN numbers, or other technologies that may be developed in the future. **COPA** is currently being challenged in the Court system.³³

(4) Sexually Explicit Pornographic Visual Displays Connected to Sexual Harassment: Sexually explicit pornographic visual displays are not protected by the First Amendment when used for an improper purpose, such as use in committing illegal sexual harassment (where the creation of a hostile work environment results). In the work environment, Courts have recognized that potentially expressive activities that produce special harms distinct from their communicative impact. . . are entitled to no constitutional protection,³⁴ and banning such materials in the workplace does not censor such speech everywhere and for all time.³⁵ Public libraries are authorized to use filtering software technology to block this material under 47 U.S.C. "230(c)(2). The newly enacted **Children's Internet Protection Act (CIPA)** authorizes public libraries to use filters to block a minor's access to this type of material, where it constitutes material harmful to minors. **CIPA** authorizes the use of filters to block adult access to this material, where it is obscene or child pornography. In adopting a Library Internet Policy aimed at eliminating sexual harassment in the workplace, great care should be taken to *create an adequate record* which explains the actual need for the sexual harassment policy. This will help overcome some of the problems that occurred in the *Mainstream Loudoun* case, in which the trial court struck a **Library Internet Sexual Harassment Policy** because the record was *inadequate*.³⁶

(5) Sexually Oriented Pornography in the Context of Land Use Planning: Under an approach common in land use cases, appropriate content-neutral time/place/manner restrictions may be placed upon the dissemination of non-obscene sexually oriented pornography as a generic category. This type of regulation creates the adult business or *sexually oriented* business as a separate and distinct generic category of land use. Restrictions are placed upon where the land use may occur. Potentially included in this land use category are establishments that regularly and continuously disseminate in substantial quantities what is *theoretically* regarded as *non-obscene* sexually explicit pornographic material that may be appropriate for an adult audience, but which is inappropriate for minors.

It should be recognized that many sexually oriented businesses may actually disseminate a range of *illegal* materials, such as obscenity or child pornography. When this is

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discovered by law enforcement, such establishments are subject to prosecution under applicable state or federal criminal or civil law. If most sexually oriented businesses do not disseminate the complete range of materials available through unfiltered Internet access (*i.e.*, including child pornography, bestiality, mutilation, torture, excretory functions, orgies, and other perversions), it may be because they fear being held accountable for criminal activity.

In the context of land use planning, non-obscene sexually oriented materials may be contained (but not banned) by creation of zones where the substantial, regular and continuous dissemination of this material is either proper or improper. This type of restriction does not attempt to regulate the *primary* effects of the expression, *i.e.*, the internal effect on the individual of viewing sexually explicit materials, except to the extent the viewer is driven to participate in conduct that would comprise a secondary effect. This is an important distinction. The principal object of this type of regulation is to regulate the *secondary* effects commonly associated with establishments that substantially, regularly and continuously disseminate non-obscene sexually oriented materials, and includes a variety of impacts on public health, safety, and welfare (such as increase in crime, littering of pornographic materials, on-premise sexual activity, etc.).³⁷

Public libraries are authorized to use filtering software technology to block this material under 47 U.S.C. '230(c)(2). The newly enacted **Children's Internet Protection Act (CIPA)** authorizes Public Libraries to use filters to block dissemination of this type of material to minors. CIPA authorizes the use of filters to block adult access to this material, where it is also obscene or child pornography. For a more complete discussion, see '3. Is filtering of pornographic content within First Amendment boundaries?

Open Access to Pornography Opens Access to Danger

Those who have never encountered pornographic imagery on the Internet should be aware that there are serious law enforcement concerns in providing unfiltered access to both children and adults, because illegal materials from both foreign and domestic sites are easily accessible by both groups of patrons, unless precautionary measures are taken. Internet filtering software is needed to provide a *minimum* measure of protection against the intentional or unintentional accessing of pornography by library Internet users (whether they are minors or adults).

The 1986 **Attorney General's Commission on Pornography** consciously decided to include within its report the effects of non-obscene pornographic materials.³⁸ The Commission divided pornography into four clas-

sifications: (1) Sexually Violent Materials, (2) Sexual Activity Without Violence But with Degradation, Submission, Domination or Humiliation, (3) Sexual Activity Without Violence, Degradation, Submission, Domination or Humiliation, and (4) Nudity Without Force, Coercion, Sexual Activity or Degradation. The Commission then analyzed each classification according to three tiers: (1) Social Science Evidence, (2) Totality of Evidence, and (3) Moral, Ethical and Cultural. Potential negative effect was found in all four classifications, as set forth below:³⁹

I. Sexually Violent Materials

A. Social Science Evidence—Negative effects were found to have been demonstrated.

B. Totality of Evidence—Harm found in all sub-tiers

1. Acceptance of Rape Myths
2. Degradation of the Class/Status of Women
3. Modeling Effect
4. Family
5. Society

C. Moral, Ethical and Cultural—Harm found

II. Sexual Activity Without Violence But with Degradation, Submission, Domination or Humiliation

A. Social Science Evidence—Negative effects were found to have been demonstrated.

B. Totality of Evidence—Harm found in all sub-tiers

1. Acceptance of Rape Myths
2. Degradation of the Class/Status of Women
3. Modeling Effect
4. Family
5. Society

C. Moral, Ethical and Cultural—Harm found

III. Sexual Activity Without Violence, Degradation, Submission, Domination or Humiliation

All Commissioners agreed that some materials in this classification may be harmful, some Commissioners agreed that not all materials in this classification are not harmful. It was determined that this classification is a very small percentage of the total universe of pornographic materials. See text (of Report) for further discussion.

IV. Nudity Without Force, Coercion, Sexual Activity or Degradation

All Commissioners agreed that some materials in this classification may be harmful, some Commissioners agreed that not all materials in this classification are not harmful. See text (of Report) for further discussion.

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Today, the widespread dissemination of illegal Internet pornography raises a number of substantial social concerns. See, for example, *Healing Sexual and Pornography Addictions*,⁴⁰ in which **Victor B. Cline, Ph.D.**, as a licensed clinical psychologist, discusses the harmful effect of pornography, and strategies helpful in healing individuals struggling

Cyberge Endnotes (continued)

33. See the Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231) (COPA). This law bans sending to minors over the Web material that is harmful to minors, as that term has been defined in the statute at 47 U.S.C. § 231(e)(6). COPA requires that Websites that distribute the proscribed material verify the *adult status* of recipients through the use of credit cards, adult access codes, adult PIN numbers, or other technologies that may be developed in the future. COPA is being challenged in the Court system. The statute was preliminarily enjoined as unconstitutional, and the preliminary injunction was upheld by the United States Court of Appeals for the Third Circuit on June 22, 2000. See *ACLU v. Reno*, 31 F.Supp.2d 473 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *reh. denied* Sept. 15, 2000 (upholding issuance of temporary injunction, and barring enforcement of COPA on First Amendment grounds because it relies on community standards to identify material that is harmful to minors); *petition for cert. filed* February 2001, *sub nom. Ashcroft v. ACLU*, No. 00-1293. The matter is still pending in the Courts, and no final decision as to the merits of the law has been reached.

34. See *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984).

35. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991).

36. *Mainstream Loudoun v. Board of Trustees of the Loudoun County*, U.S. District Court for the Eastern District of VA., Alexandria Division, Civil Action No. 97-2045-A. See federal trial court opinions at 2 F.Supp.2d 783 (April 7, 1998) and 24 F.Supp.2d 552 (Nov. 23, 1998). See *infra* note 141, and accompanying text. In *Mainstream Loudoun*, a Library Policy on Internet Sexual Harassment was found to be invalid on the grounds that it was *over-inclusive*. See discussion of the *Mainstream Loudoun* case *infra* at '3. Is filtering of pornographic content within First Amendment boundaries?

37. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 50 (1986); see also *Boos v. Barry*, 485 U.S. 312, 321 (1988). For more discussion on what constitutes *secondary effects*, see *infra* '3. Is filtering of pornographic content within First Amendment boundaries?

38. I Attorney General's Commission on Pornography, Final Report 299 (1986).

39. *Id.*, at 1034-1035.

40. Victor B. Cline, Ph.D., "Healing Sexual and Pornography Addictions" (visited April 12, 2000) <http://www.moralityinmedia.org/clineart.htm>.

41. Victor B. Cline, Ph.D., "Pornography's Effects on Adults and Children" (visited April 12, 2000) <http://www.moralityinmedia.org/clineart.htm>.

with these issues, based upon clinical experience with 350 sexual addicts or sexual compulsives. See also *Pornography's Effects on Adults and Children*,⁴¹ in which **Dr. Cline** describes how pornography can destroy certain individuals. The author draws upon concrete examples, some of which are taken from his clinical practice. He identifies and discusses a progressive four-step pattern consisting of:

1. addiction,
2. escalation,
3. desensitization, and
4. acting out sexually.

See also *Treatment and Healing of Sexual and Pornographic Addictions*,⁴² in which **Dr. Cline** describes strategies useful in treating sexual addicts, particularly those addicted to pornography.

For a feminist perspective on this topic, see, *Pornography As A Cause of Rape*, by **Diana E.H. Russell, Ph.D.**, in *Against Pornography: The Evidence Of Harm*.⁴³ See also various papers by the **Coalition Against Trafficking in Women**, regarding predators on the Internet, and the global sexual exploitation of women and children, available online at: <http://www.uri.edu/artsci/wms/hughes/catw/catw.htm>.

See also **National Center for Missing & Exploited Children**, *Online Victimization: A Report on the Nation's Youth*.⁴⁴ This is a survey of 1,501 youths who were regular Internet users, and was commissioned by Congress. The survey indicates that teenagers are a primary vulnerable population. According to this report:

1. Approximately one in five received a sexual solicitation or approach over the Internet in the last year.
2. One in thirty-three received an aggressive sexual solicitation—a solicitor who asked to meet them somewhere; called them on the telephone; sent them regular mail, money, or gifts.
3. One in four had an unwanted exposure to pictures of naked people or people having sex in the last year.
4. One in seventeen was threatened or harassed.
5. These incidents distressed approximately one quarter of young people who reported them.

See also the **Zogby International Survey**, released March 21, 2000, commissioned by **Focus on the Family**.⁴⁵ This study documents a growing addiction to pornography that has ensnared millions of Americans, and which threatens public safety and national productivity. The survey indicates that 1 out of 5 American adults may have looked for sex on the Internet. 20.8% of respondents admitted they had visited a sexually oriented Web site. The percentage was higher among males and young adults.

See the following reports, available as part of the electronic **Online Library** maintained by the **Commission on Online Child Protection**, hosted by the **Congressional Internet Caucus Advisory Committee**.⁴⁶

- (1) **David Burt**, *Dangerous Access, 2000 Edition: Uncovering Internet Porn in America's Libraries*;⁴⁷ and
- (2) The Greenville County, South Carolina, *Library Board Report*.⁴⁸

Study No. 1: Dangerous Access, 2000 Edition

This document reports over 2,000 incidents of Library patrons using online services to access pornography, and updates a 1999 study by **Burt**, entitled **Dangerous Access**, that had documented 503 incidents of patrons accessing pornography in public libraries. In the 1999 study, children were involved in 245 of the incidents, and 20 involved child pornography, a molestation, and several attempted molestations. The 1999 report documented 195 incidents of children accessing pornography, at an average of 12 years of age. In order to produce the 2000 report, 14,000 **Freedom of Information Act** requests were sent to the nation's 9,767 public library systems, asking for copies of complaints, reports, and other documentation of incidents involving patrons accessing pornography. A six-month investigation of the responses received uncovered more than 2,000 documented incidents of patrons, many of them children, accessing pornography, obscenity, and child pornography in the nation's public libraries. Documented incidents included situations in which librarians witnessed adults instructing children in how to find pornography, adults trading child pornography, and both adults and minors engaging in public masturbation at Internet terminals. Analysis of computer logs from just three urban libraries revealed thousands of incidents that went unreported, indicating that the 2,062 incidents represent only a fraction of total incidents nationwide. It is therefore believed that the total number of incidents each year nationwide is more likely to be between 400,000 and 2 million.⁴⁹

Study No 2: The Greenville County, South Carolina, Library Board Report

Conducted over approximately an 8-month period, this study references more than 100 documented incidents in which patrons had viewed/displayed pornographic and/or obscene material. During this period, the Library had a written policy forbidding patrons to access pornography, which was enforced by a tap on the shoulder. In an unsuccessful attempt to curb continued violations of the Library's written policy, the County also installed privacy desks, and eventually positioned all Internet screens so that they could

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be monitored by library staff. The graphic nature of the violations reported is quite shocking. The report discloses the substantial and repetitive nature of the problem, as well as the potential danger involved in offering unfiltered Internet access to adults.

Cyberage Endnotes (continued)

42. Victor B. Cline, Ph.D., "Treatment and Healing of Sexual and Pornographic Addictions" (visited April 12, 2000) <http://www.moralityinmedia.org/vbctreat.htm>.
43. Diana E.H. Russell, Ph.D., *Pornography As A Cause of Rape, in Against Pornography: the Evidence of Harm* (Berkeley, California: Russell Publications, 1994) (visited February 3, 2001) http://www.mills.edu/ACAD_INFO/EMERITUS/RUSSELL/emertius_russell.excerpttoc.html.
44. National Center for Missing & Exploited Children, *Online Victimization: A Report on the Nation's Youth*, (visited February 3, 2001) <http://www.missingkids.com> at <http://www.missingkids.org/download/nc62.pdf>.
45. Zogby International Survey, released March 21, 2000, commissioned by Focus on the Family, available at: <http://www.pureintimacy.org>. A copy of the survey is located at: <http://www.pureintimacy.org/online/survey.html>.
46. The electronic Online Library maintained by the Commission on Online Child Protection, hosted by the Congressional Internet Caucus Advisory Committee, visited January 28, 2001, is located at <http://www.copacommission.org/papers>.
47. David Burt, *Dangerous Access*, 2000 Ed: *Uncovering Internet Porn in America's Libraries* (visited January 28, 2001) <http://www.copacommission.org/papers>. See also *infra* note 57 and note 58, and accompanying text, for an example of a news report confirming that Burt's report only represents the tip of the iceberg. See also *infra* note 189, regarding the hidden nature of the problem.
48. Operations Committee Report On Internet Use Policy To Full Board Of Greenville County Library, (Adopted by Operations Committee July 17, 2000) (Adopted by Full Board July 17, 2000) (hereinafter "Greenville County Library Board Report") (visited January 28, 2001) at <http://www.copacommission.org/papers>.
49. Testimony of Janet M. LaRue, *supra* note 13. See also *supra* note 38, and *infra* note 57 and note 58, and accompanying text.
50. *Miller v. California*, 413 U.S. 15 (1973) sets forth the basic federal constitutional guidelines for defining obscenity. See discussion *infra* at '3. Is filtering of pornographic content within First Amendment boundaries?
51. See 42 U.S.C. '2000e-2; 29 CFR '1604.11; 18 U.S.C. '242; 42 U.S.C. '1981, 1982. See *Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective*, 106 Harvard Law Review, pp. 1075-92 (1993); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991).
52. Testimony of Janet M. LaRue, *supra* note 13, citing Paul Levy, "Complaints filed over Web porn at Minneapolis Public Library; Librarians say they work in a hostile environment," *Minneapolis Star Tribune*, May 4, 2000, at 1B.

The study identified the following problems with a **Library Internet Use Policy** that provides unfiltered Internet access:

A. Pornography and/or obscenity. Examples of problems:

1. Patrons were inadvertently exposing other patrons, including children, to pornography and/or obscenity, either:

- a) While patrons were viewing pornography and/or obscenity, or
- b) After patrons had viewed pornography and/or obscenity and had left their terminals

2. In some instances, adult patrons had intentionally exposed children to pornography and/or obscenity.

3. Without regard to whether other patrons were being exposed, some patrons were viewing materials that clearly fit within the scope of federal and state obscenity laws and the *Miller* Test.⁵⁰

4. Some patrons were viewing child pornography.

5. Children were viewing pornography and/or obscenity.

6. Inappropriate patron activity was linked to patrons viewing pornography.

B. No Time Limits: One staff member estimated that twenty to twenty-five (20-25%) percent of patrons were using the Internet to access pornography and/or obscenity. Enforcing time limits was sometimes a problem for staff. Some of the patrons who use the Internet have been compared to junkies. Those patrons were difficult when politely asked to limit their time or leave at the end of the day.

C. Chat Rooms: Virtually all staff interviewed expressed the view that chat rooms caused many problems. The report stated that chat rooms took up an inordinate amount of time for useless activity and often led to the display of pornographic and/or obscene images. One branch manager stated:

We must clearly do something about chat rooms. I saw an eight-year-old male in a chat room where someone had asked how he was equipped. I watched a thirteen-year-old female using the screen name Sexy P**** type in a line in a chat room asking if anyone would like to have sex with her.... You would not believe some of the things that we see. Unescorted children in chat rooms doing who knows what; a mother who brings in her children and sits for hours in chat rooms, then leaves her children at the library with another family member who is also in a chat room. Five to eight year old children should not be in the library for five to six hours a

day.... These people are like junkies - totally out of control and they use thousands of dollars worth of County equipment to accomplish nothing.

D. Groups of People/Clusters: Staff stated that patrons sometimes clustered around computer terminals. The clustering was disruptive to other patrons and encouraged unruly activity.

E. Lack of Consequences for Violators/Lack of Support by Administration: Staff interviewed stated that the library administration failed to support the original **Internet Use Policy** and gave staff no backup. A number of patrons regularly viewed pornographic and/or obscene material and disregarded staff instructions and harassed staff. Yet these patrons continued to maintain their Library privileges and never experienced any real consequences for their behavior.

F. Effect on Staff: The combination of a lack of time limits, exposure to pornography and/or obscenity, lack of administrative support, and requiring staff to tap on the shoulder and monitor the Internet area was found to have contributed to a high level of frustration and burnout for staff. In short, the current **Internet Use Policy** (i.e., providing unfiltered Internet access) required too high a level of staff involvement and put staff in uncomfortable positions. The report stated that the staff was weary of having to deal with unruly and rude patrons. Many staff stated that some Internet patrons were entirely different from traditional library patrons, e.g., more demanding and aggressive and less responsive. In addition to being exposed to pornography, staff had been the subject of unwanted attention on several occasions. For example:

(1) A female staff observed a man viewing pornography, which included naked and mutilated female bodies. As female staff were leaving for the evening, the male patron was waiting outside the doorway and made a remark to the female staff. The combination of what the man was viewing and the way he made his remark was very disturbing to the female staff.

(2) A female staff received a sexually oriented and aggressive email from a patron. She was upset by receiving the email but also disturbed by the way the matter was handled by administration, who referred her to the Greenville City Police.

(3) Female staff stated that they were occasionally called over to a terminal by male patrons who claim to be stuck in a pornographic site. These male patrons appeared to be seeking some sort of reaction from female staff.

The effect of pornography and/or obscenity on staff was regarded as a serious issue. While acknowledging the need to encourage

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the availability of information consistent with the library's selection criteria, the study concluded that the library clearly had a moral and legal obligation to provide a positive and non-hostile environment for staff. Under the current policy, that had simply not occurred. One male staff noted that female staff...are intimidated by this activity. One female staff reported: "I felt dirty coming home at the end of the day." Another female staff stated: "I take a very dim view of working in a place where this stuff is abundant." One staff stated

Cyberage Endnotes (continued)

53. Sarah Downey, "Not on the Reading List," *Newsweek*, July 8, 2000 (visited August 3, 2000) <http://www.msnbc.com/news/430449.asp>.

54. *Id.*

55. Los Angeles Times, Home Edition, Metro Section, dated January 12, 2000 (visited January 29, 2000) at <http://www.latimes.com>. In 1995, this Library patron had been convicted of one count of oral copulation on a minor, and had served several months in jail before being released on probation.

56. Sarah Downey, "Not on the Reading List," *Newsweek*, July 8, 2000, *supra* note 44.

57. Los Angeles Times, Home Edition, Metro Section, dated January 12, 2000, *supra* note 46.

58. *Id.*

59. Los Angeles Times, Home Edition, Metro Section, dated January 15, 2000 (visited January 29, 2000) at <http://www.latimes.com>.

60. NewsNet5 (Cleveland, Ohio), "Porn Lovers Sit Quietly in Libraries. Computers Attract New Library Patrons," updated 12:23 p.m. EDT July 29, 2000 (visited August 7, 2000) <http://www.newsnet5.com/news/theinvestigators/news-theinvestigator-20000728-134406.html>.

61. American Library Association, "Police Close Library Branch Over Obscenity Complaint," *News Briefs* for July 24, 2000 (visited on August 3, 2000) <http://www.ala.org/online/news/2000/000724.html>; and Martha Carr, "Police Arrest Obscenity Suspect," *East Jefferson Bureau/The Times-Picayune* (visited August 3, 2000) <http://www.nolalive.com/t-p/metro/index.ssf/?t-p/metro/0007210043.html>.

62. Given the clandestine nature of this activity, without analysis of actual library logs, the extent of the cyberporn problem may remain hidden. See David Biek, "Demographic Characteristics of Internet Users at the Tacoma Public Library, With Special Reference to the Issue of Internet Pornography," A White Paper for the National Research Council, Committee on Tools and Strategies for Protecting Kids from Pornography and their Application to Other Inappropriate Material on the Internet, February 28, 2001 <http://www.nationalacademies.org> (hereinafter Biek). This study observes at 20: "public librarians should not believe that a lack of patron complaints, both formal and informal, about sexually explicit materials displayed on library computers or the scarcity of staff observations of the same mean that no such behavior is taking place in their libraries." See *infra* note 189.

that staff feel uncomfortable asking patrons to move or seeing the material themselves - what are we requiring of them? The study concluded:

Concern about intellectual freedom must be tempered by a countervailing concern about the effects of viewing and displaying pornography and/or obscenity in a public place. These effects include the exposure of children and other unwilling patrons to pornography and/or obscenity, both inadvertent and intentional; the viewing and display of child pornography; inappropriate activity; rude and vulgar and boisterous activity; and the creation of a sexually hostile and extremely frustrating atmosphere for staff and patrons. Much of the material described in the incident reports and Internet log entries does not enjoy constitutional protection. Moreover, material which is not otherwise obscene may, when displayed to minors, violate state and federal law.

The tap on the shoulder policy and the use of privacy desks have not solved the problem. The majority of reported incidents have occurred since these measures were implemented. Children and other unwilling patrons and staff are still being exposed to pornography and/or obscenity. Even absent the problem of exposing children and other unwilling patrons and staff, the library has a responsibility and obligation to not provide obscene material and child pornography or, in the context of minors, material that is harmful to minors.

Not only has the tap on the shoulder policy not solved the problem but also it is no less a form of censorship than a software solution, although it is certainly more awkward and inconsistent. Staff are essentially asked to harass patrons away from material provided by the library. Some staff may apply different standards of judgment than others. Some staff don't tap on the shoulder at all. So some patrons may be allowed to access certain material in peace while others are tapped on the shoulder and asked to move to different sites.

Much of the material available on the Internet would fail to meet the library's selection criteria in the first instance. The library should not be put in the position of having to accept everything that is available on the Internet, especially considering that much of the material is useless, disruptive, and illegal. The library must offer material through the Internet which is consistent with its purpose and in a manner that is suitable to the public atmosphere that exists in its buildings.

The Greenville study demonstrates that

the provision of unfiltered Internet access to sexually explicit pornographic materials in the public library setting can act like a magnet that attracts certain types of identifiable secondary effects, including:

1. Statistical increase in use of library property to engage in criminal activity by patrons (*i.e.*, accessing or possessing child pornography is a felony under federal law), and attraction of a congregation of patrons who engage in such conduct;
2. Statistical increase in disruptive and objectionable behavior and inappropriate patron activity on library premises, and attraction of a congregation of patrons who engage in such conduct;
3. Attraction of a clearly identifiable group of undesirable adult patrons, who had as a primary purpose an intent to engage in a consistent pattern of unlawful use of library property, who:
 - a) were attracted to the free accessing of obscenity and child pornography,
 - b) engaged in the purposeful display to minors of materials illegal to disseminate to a minor,
 - c) engaged in specific and repeated violations of the library Written Internet Policy against accessing pornography;
 - d) engaged in harassing behavior directed toward library staff.

The Secondary Effects of Providing Unfiltered Library Internet Access

Both of the above reports (*Dangerous Access* and *The Greenville County Library Board Report*) demonstrate that providing unfiltered access to Internet pornography in public libraries can have a potential impact on public health, safety, and welfare, and can be associated with the creation of certain secondary effects, including a statistical increase in criminal or unlawful activity (both against the person and against library property) on library premises. Foreseeable secondary effects include sexually harassing behaviors, public littering of pornographic materials, increased traffic, and increase in noise (from patrons congregating and discussing or talking about pornographic displays), cruising for sexual contact activity, and a statistical increase in lewd public behavior.

If this type of objectionable conduct by library patrons is left unchecked, it tends to establish a consistent pattern that can become entrenched. It is foreseeable that this could contribute to the creation of a hostile work environment for library staff, and a hostile workplace/study place for other library patrons. Pornography in the workplace can constitute, or be evidence of, sexual harassment in violation of state and federal civil rights laws and create or contribute to a hostile en-

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vironment in violation of Title VII's general prohibition against sexual discrimination in employment practices.⁵¹ It has been reported that seven Minneapolis librarians filed a complaint with the **Equal Employment Opportunity Commission** because of the hostile and offensive working environment caused by daily exposure to Internet pornography. These reports state that their complaint cited conditions in the library where sex offenders congregated, six-year-olds viewed hard-core pornography, child pornography was left on printers, men masturbated, and a porn surfer brandished a knife.⁵²

Incidences of adults and minors downloading illegal child and adult pornographic Internet material from hard-core pornographic commercial Internet sites and hard-core pornographic Usenet newsgroups, have been documented by the sources listed above, as well as by various reports in the popular press, and are now a foreseeable occurrence in public libraries. The following are examples of reported instances in which unfiltered access to the Internet was linked with the perpetration of acts on the library premises that could be classified as disruptive, hostile, or criminal:

1. In Minneapolis, a library employee encountered three teenagers, apparently heated up by what they'd been watching on the computer, having group sex in the bathroom.⁵³
2. In Austin, Texas, library circulation supervisors witnessed an adult patron telling children how to access Internet porn.⁵⁴
3. In Los Angeles, California, a convicted child molester⁵⁵ was arrested for distributing child pornography and for

planning what he thought would be a sexual liaison with six youngsters (one as young as 3 years old) from a computer at the **Los Angeles Public Library**.⁵⁶ News reports stated that this defendant had routinely used computers at the **Los Angeles Central Library** to collect and distribute child pornography, explaining: He would go to the library as soon as it opened up and signed up to use each computer on each floor. . . . From there he maintained his Website, while e-mailing and communicating with members of his club.⁵⁷ This library patron is reported to have sent one undercover officer as many as 300 images of child pornography. It should be noted that while the library staff cooperated in the police investigation, it was not involved with the investigative operation, and had not received complaints from patrons who may have witnessed the defendant's acts.⁵⁸ Subsequently, the arrested library patron was found guilty and sentenced to three years and eight months in prison.⁵⁹

4. In Cleveland, Ohio, a news station conducted an investigation and caught on videotape library patrons viewing Internet porn and engaging in public masturbation.⁶⁰

In addition to the above reports, several articles⁶¹ provide a connection between unfiltered library Internet usage and lewd public behavior in a Louisiana Public Library. According to these reports, at a Louisiana Public Library in Jefferson Parish, a man allegedly engaged in public lewd conduct in front of two girls, 12 and 14 years of age. When the girls and their mother complained, the staff librarian responded to the complaint by sending a memo to the library director. No librarian took any action to report this alleged violation of the criminal law to the police. However, the mother (dissatisfied with the way the library had handled the complaint) contacted the police and reported the incident. She told the police that her two daughters (ages 12 and 14) had witnessed a man masturbating at a computer the night before. The police then obtained a warrant (after the library director and the Parish attorney declined to turn over the computer sign-up logs without a court order), and conducted an investigation of what had occurred on library premises.

As a result of this police investigation, the alleged perpetrator was apprehended. It was then discovered that he had a history of being charged with committing sex offenses, but had never been convicted. He had been convicted of a drug offense, but was out on probation. Recently, he had been arrested for an obscenity offense (walking naked outside his apartment). Because of his obscenity arrest, his probation was first revoked, and then reinstated (because he had not yet been con-

victed). Subsequent to the library incident, Parish officials renewed the request that his probation be revoked. There were also news reports that the family involved might file litigation over the library incident, because of their great personal distress over the occurrence.

It should be noted that in certain instances, the criminal use of library property may be completely hidden from library management or staff.⁶² Besides the example of the Los Angeles, California public library patron noted above, there is also a news report concerning the arrest of a 20-year-old man from Dayton, Minnesota on charges of possessing child pornography, which he allegedly downloaded onto nearly 50 computer disks at a Minnesota Public Library located in Edina.⁶³ This arrested library patron was released on \$25,000 bail, and was ordered by the Court not to possess child pornography, access the Internet or enter public libraries or other public places where computers with Internet access are available for public use. The U.S. Attorney's office had not identified the specific Edina Library where the man allegedly downloaded the materials. In response to reporter inquiries, a representative of the Hennepin County Libraries, after conferring with librarians at the Southdale-Hennepin Area Library and the Edina library, stated that there had been no recent reports of such activities at either branch:

This is the first we've heard about it, she said Friday, after inquiries from reporters. We have had no patron complaints, and no librarians have observed anyone observing or downloading child pornography.⁶⁴

News reports stated that the county library system had a written policy that directs librarians to investigate if a patron reports that someone is viewing child pornography and, in certain cases, to call police. The representative of the Hennepin County Libraries explained: There are 26 libraries in the Hennepin county system, and together they had about 5 million visits last year, she said. "in all of 1999, we had five formal complaints involving patrons viewing inappropriate sexual material, and none so far this year. This has not been a big issue in Hennepin County libraries."⁶⁵

It should be noted that if "five formal complaints" had in fact been received by the Hennepin County libraries in 1999, this library system had not responded to requests for this data (made under the **Freedom of Information Act**) in connection with the *Dangerous Access, 2000 Edition*, by **David Burt**.⁶⁶ (As mentioned before, *Dangerous Access, 2000 Edition* was the result of a six-month nationwide investigation of library documents and incident reports obtained through the **Freedom of Information Act (FOIA)** on the use of library online services for accessing pornography. With only 28.6 percent of libraries complying with

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Cybage Endnotes (continued)

63. E-mail from David Burt (May 7, 2000) (on file with author), citing Chuck Haga, "Dayton Man Charged with Possessing Child Pornography," May 6, 2000, *The Star Tribune* <http://www.startribune.com/stOnLine/cgi-bin/article?thisSlug=EDIN06&date=06-May-2000&work=library>.

64. *Id.*

65. *Id.*

66. E-mail from Janet M. LaRue, Family Research Council (May 8, 2000) (on file with author). See *supra* note 38.

67. Press Release, "Throwing The Book At Library Pornography: Family Research Council To Release Investigative Report The American Library Association Tried To Chill," March 13, 2000, <http://www.frc.org/press/031300b.html>. This press release charges that the American Library Association contradicts its own *freedom of information* policies, including advising libraries to find loopholes to avoid reporting any information related to Internet pornography in public libraries.

David Burt's FOIA requests, there were reports of over 2,000 incidents of patrons — many of them children — accessing hard-core and child pornography in the nation's public libraries. The admission by the Hennepin County Library official acknowledging receipt of previously undisclosed complaints involving patrons viewing inappropriate sexual material confirms the conclusions on this subject drawn by a March 12, 2000 **Family Research Council** news release.⁶⁷ This news release stated that further analysis of computer log files in *Dangerous Access 2000 Edition* revealed that hundreds of thousands of incidents were *not* reported, indicating that the 2,062 known incidents represent only the tip of the iceberg.)

*Please Note: Because of the length of Ms. Clancy's article (about 60 pages) it was necessary to break it here. The rest of this article, and the next two in this series of forums, will appear in the next **Against the Grain**. The entire proceedings will also be available online at www.charlestonco.com. — MH*

DISCLAIMER: This article attempts to highlight and discuss certain prominent legal issues raised by the public library use of Internet filters. Because of the scope and magnitude of the topic, the overview presented is not a definitive or comprehensive analysis, attacking or defending the matters in question. This article is provided as an educational service and a research tool to the public, and is not meant as personal or specific legal advice or analysis. Although every attempt has been made to provide timely and current information, the reader is cautioned that statutory or case law frequently changes. The legal authority cited herein is subject to change, and must be specifically updated by the reader. Although a comparative analysis of selected federal or state law may be presented for instructional purposes, the information contained in this article is not jurisdiction-specific, and does not constitute a complete analysis of the law in the jurisdiction in which the reader may live, and does not constitute legal advice. Legal advice must be tailored to the specific facts and circumstances of each case and attorney-client guidance must be obtained from personal counsel.

PLEASE NOTE: In an effort to make this article more useful as a contemporary research tool, reference has been made throughout to information that was available on-line via the Internet at the time of initial research. The reader is cautioned that URLs frequently change. The reader is advised that the author, NLC (with the exception of its own Website), and the host of this forum, Winthrop University, do not have supervision or control over any Internet URL or Website referenced herein. By the time of publication, information referenced herein may no longer be available on-line or at the URL specifically cited. Further, any reference to a specific Internet URL or Website does not constitute an endorsement by the author, NLC, or Winthrop University, of the accuracy or truthfulness of the information contained at the referenced URL or Website, and is not an endorsement of the URL page or Website itself, or a representation that the author, NLC, or Winthrop University, have any supervision or control over, or are in any way responsible for the referenced URL, Website, or their sponsoring organization. The reader is specifically advised that persons access Internet sites online at their own risk, and therefore individual caution must be exercised when accessing sites online. Some on-line files can contain viruses or otherwise be harmful to your computer. The author, NLC, and Winthrop University have no way of knowing and therefore make no representations that any URL or Website referred to herein contains files which are in fact from a trustworthy source. Further, the author, NLC, and Winthrop University, are not responsible for and do not necessarily endorse any information, material or file which may be linked to any specifically cited URL or Website referenced herein.

people profiles encouraged

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Born & lived: I was born in Palo Alto, CA, but was raised from infancy in the Boston area.

Family: I'm the oldest of seven(!) children; we lived in Belmont when I was a toddler, then moved to Burlington when I was five, then moved to Arlington when I was seven; I spent the rest of my childhood there.

Education: I graduated from **Arlington High School** in the class of '83, attended **Ricks College** for a year, took two years off to serve as a Mormon missionary in France and Belgium, then returned for another year at **Ricks** before transferring to **Brigham Young University** where I earned my BS and MLIS degrees.

First job: My first job was washing dishes at **Brigham's** in Harvard Square. I later moved up to scooping ice cream. The only thing worse than washing dishes was serving ice cream on the day of the **Harvard-Yale** game.

Professional career and activities: Since getting my MLIS I've worked for **Yankee Book Peddler**, the **University of North Carolina at Greensboro** and now the **University of Nevada, Reno**. I write a lot in professional and unprofessional journals and magazines, and stay in touch with my inner logorrheic by participating much too enthusiastically on several online discussion lists. I'm a member of **NASIG** and the **Music Library Association**, and serve on the editorial boards of **ACQNET**, **LCATS** and **Notes**.

In my spare time I like to: Read crime novels, hang out with my wife (**Laura Wolz**, 30ish) and kids (**Maggie**, 9, **Bryan**, 6, and **Tucker**, 3), play clawhammer banjo, write CD reviews, come up with analogies.

Favorite books: I probably would have been a writer anyway, but I tell myself that the reason I'm a writer now is that I read *Harriet the Spy* five or six times while in elementary school. These days I'll read anything by **James Lee Burke**, **Robert B. Parker**, **Elmore Leonard**, **Thomas Perry**, **George Pelecanos**, **Robert Christgau**, **Christopher Buckley**, **Annie Proulx**, **Hugh Nibley**, and **Ian Frazier**. I can't read anything by **Gore** (Did you notice how smart and cute I am?) **Vidal**, and for some reason I can't seem to get past the first hundred pages of *Cold Mountain*. (It's not you, **Charles**, it's me.)

Pet peeves/what makes me mad: Loyalty over reason; rhetoric over substance; librarians who want to fix patrons instead of improving services.

Philosophy: Question your own motives at all times.

Most meaningful career achievement: Feeding my kids.

Quirks: I'm bad at sitting still and paying attention (my leg bounces and my mind wanders), and I suffer from an intense and indiscriminate love of babies. I'm also a very bad judge of the difference between appropriate and inappropriate humor.

How/Where do I see the industry in five years: Five years from now I suspect that research journals will be published almost entirely online, and the concept of an "issue" will have started to sound very 20th-century. Half of research libraries will have stopped journal check-in. Books and humanities journals will still be primarily a print enterprise, but print-on-demand will have finally taken hold in the marketplace and eBook readers will have become the preferred platform for college textbooks. Search engine technology will have matured to the point that, unless we wake up very quickly and start radically rethinking the way we organize, present and distribute our services, a large number of our patrons will see the library as a morgue for old information, not a place to solve their current information needs.