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## The Best of Both Worlds: Financing Software Filters for the Classroom and Avoiding First Amendment Liability, 16 J. Marshall J. Computer & Info. L. 659 (1998)

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# THE BEST OF BOTH WORLDS: FINANCING SOFTWARE FILTERS FOR THE CLASSROOM AND AVOIDING FIRST AMENDMENT LIABILITY

## I. INTRODUCTION

The Internet can be described as a “many-to-many medium.”<sup>1</sup> As no single control group exists,<sup>2</sup> information that may be objectionable to certain individuals is available to users worldwide, including students with Internet access in the classroom. Of course, individual and community standards<sup>3</sup> and sensitivities will vary greatly among on-line users

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1. Marci A. Hamilton, *Regulating the Internet: Should Pornography Get a Free Ride on the Information Superhighway? A Panel Discussion*, 14 CARDOZO ARTS & ENT. L.J. 343, 344 (1996). Mike Godwin, staff counsel for the Electronic Frontier Foundation in San Francisco, California, notes that anyone who has access to a computer can exert power over the Internet. *See id.* at 347. In other words, the power of what information is present on the Internet is not in the hands of a select group but rather in the collective hands of all users. Because of this, it becomes “a lot harder” (if not impossible) to implement a policy or regulate content because of the number of possible users. *Id.*

2. *See id.*

3. *See Miller v. California*, 413 U.S. 15 (1973) (finding defendant guilty for mailing unsolicited brochures containing photographs of young men and women engaging in sex acts including prominent displays of genitalia). A landmark decision in modern obscenity law, this case produced the *Miller* test, which asks “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests.” *Id.* at 18. Because any information on the Internet can be downloaded in any type of community—rural, urban, a Northeastern state, a Southwestern state—in any area of the country, the same images or information could be interpreted differently under the community standards of the *Miller* test, depending on where the user downloads material.

As *Miller* itself speaks against a national community standard, instead favoring a local standard, critics argue this approach is still unjust. For example, two California bulletin board systems operators were recently convicted using a Memphis, Tennessee community standard. *See United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996); JONATHAN WALLACE & MARK MANGAN, *SEX, LAWS, AND CYBERSPACE* 32 (1996). In appealing the Thomas’ conviction, attorney Thomas Nolan argued for the creation of a new type of community: the cyberspace community. *See Thomas*, 74 F.3d at 711. Whereas *Miller* implies a geographical relation to defining community, the nature of the Internet resists a geographical definition. *See WALLACE & MANGAN, supra*, at 32. Nolan argues that the “[c]yberspace community is as much a community as traditional geographic divisions. This community should have the

throughout the country, as well as the world.<sup>4</sup> Ironically, the same characteristic that makes the Internet such a valuable educational resource is the same one that causes the concerns over student use: students can access literally any type of information over the Internet.<sup>5</sup> There are no limits as to what can be found on the information superhighway.<sup>6</sup>

The concern then is *how* to limit what students can access on the Internet. Fifty percent of schools in the United States have Internet or on-line access,<sup>7</sup> and President Clinton<sup>8</sup> has challenged business, indus-

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right to articulate its standard on the issue of obscenity." *Id.* Nolan further suggests that a "definition of community based on connections between people rather than one based on geographic location will ensure that all communities have the right to define protected speech." *Id.* See also Meredith Leigh Friedman, *Keeping Sex Safe on the Information Superhighway: Computer Pornography and the First Amendment*, 40 N.Y.L. SCH. L. REV. 1025, 1026 (1996) ("In the case of computer networks, many argue that if the same material is available nationwide, or even world wide, the local community standards set by *Miller* may no longer be workable, and that the law in this area must be reexamined in light of these technological advances."). Whereas this approach would be nothing short of revolutionary, it does seem consistent with the advances in computer technology and seems well suited to schools. A school administrator in an elementary school in New York City may be better off to determine standards of his school as a community rather than look to the surrounding geography to determine what is acceptable. As schools have education as their primary goal, their standards will differ from other communities.

4. One should not forget that the Internet is truly a worldwide network. See Gordon Feller, *East Meets West On-line*, INTERNET WORLD, Mar. 1995, at 48. Even if information could be banned in this country, there would be no way for any government to enforce their laws on non-citizens using the Internet outside of their territorial limits. See *id.*

5. See 144 CONG. REC. S518-19 (Feb. 9, 1998) (statement of Sen. McCain) ("The same Internet that can benefit our children is also capable of inflicting terrible damage on them."); see also S. 1619, 105th Cong. (1998).

6. See Gus Vendito, *Search Engine Showdown*, INTERNET WORLD, May 1996, at 78. The advent of search engines has made it even easier for inexperienced users to find information and Web sites that interest them. See *id.* A user can just "type a [search term] into a text box, and within seconds the program returns a list of clickable links. No special software is needed." *Id.* Because this type of search takes only a few seconds, it could easily be executed by a student in a classroom while a teacher is helping another student or is in a different part of the room. In addition, a student can easily exit the site in a matter of seconds if an authority figure approaches.

Nevertheless, even "innocent" searches can bring forth sexually explicit material. In *Hasbro, Inc. v. Internet Entertainment Group, Ltd.*, the defendant used the name "Candy Land," a trademark owned by the plaintiff for their children's game, as part of a Web site, <<http://www.candyland.com>>, containing sexually explicit material. No. C96-130WD, 1996 U.S. Dist. LEXIS 11626 (W.D. Wash. Feb. 22, 1996). Defendants were ordered by the court to immediately remove all content from the site, but were allowed to post a referral notice for a limited period. See *id.* at \*2.

7. See *The Demographics of the Internet*, INDUSTRIES IN TRANSITION, Nov. 1, 1995, at 1. As a study conducted for CommerceNet by Nielsen Media Research, the Internet Demographics Survey was the first population-projectable survey regarding Internet usage, and is considered to be the most accurate survey of the kind to date. See *id.* It breaks down on-line users by age, gender, and income, among other factors. See *id.* For example, twenty-five percent of Internet users earn more than \$80,000 per year as compared to a

try, and local governments to connect every classroom in America to the Internet by the year 2000.<sup>9</sup> The Internet can be a tremendous educational resource for students.<sup>10</sup> As school systems have limited budgets and limited books, students can access worlds of unlimited information which are mere keystrokes away via the Internet.<sup>11</sup> However, some parents, educators, and legislators share a growing concern that the information highway is becoming a "red light district."<sup>12</sup>

Legislators have tried to cure the problem and have failed. The most famous of these efforts was the Communications Decency Act of 1996 ("CDA").<sup>13</sup> Ultimately, the CDA failed to survive its constitutional challenges.<sup>14</sup> As a result, the battleground over on-line access for students is moving from the national level to the state level. Individual states are now attempting to do what the CDA could not.<sup>15</sup> It is unlikely that they

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smaller ten percent of the general population. *See id.* This suggests a trend that Internet users have higher incomes than non-users. *See id.* It seems that this would be an attractive lure to educators who look to produce productive citizens.

8. *See* Brad Stone, *Politics '96*, INTERNET WORLD, Nov. 1996, at 44. Even the world of politics is on-line. For the 1996 presidential elections, both of the major party candidates had web sites, Clinton and Gore were located at <<http://www.cg96.org>>, and Dole and Kemp could be found at <<http://www.dole96.com>>. *See id.* at 45. Even the smaller parties were represented on the Internet: Ross Perot's Reform party at <<http://www.reformparty.org>>, the Libertarian party at <<http://www.harrybrown96.org>>, and the Natural Law party at <<http://www.hagelin.org>>. *See id.* at 45-46.

9. *See Clinton Plans Free Computers, Internet Access at Every School*, WASH. TIMES, Oct. 11, 1996, at 1. President Clinton issued the challenge as a call for a commitment of both time and financial resources to insure that all students will have some access at school to the Internet. *See id.* Clinton has said that "I want to see a day when computers are as part of the American classroom as blackboards." *Id.*

10. *See* Carol Holzberg, *Worldwide Encounters*, INTERNET WORLD, Sept. 1996, at 81. The Internet is "[t]outed by many educators as the world's best study aid." *Id.*

11. *See* Robert Sanchez, *A Wired Education*, INTERNET WORLD, Oct. 1995, at 71.

[M]any educators clearly think the Internet's benefits to children far outweigh potential drawbacks. The Net is a link to other schools, libraries, and museums and the world at large. With a bewildering array of resources, the question becomes not whether to link up to the Internet, but a series of how-to's.

*Id.* The cost of a connection to the Internet is usually far less than what it would cost a school to acquire even a fraction of "hard copies" of the same information. *See id.* In some instances, software manufacturers have donated the necessary software and hardware to schools. *See id.* at 73.

12. Stacey J. Rappaport, *Rules of the Road: The Constitutional Limits of Restricting Indecent Speech on the Information Superhighway*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 301 (1995) (citing 141 CONG. REC. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon)). Senator Exon has proclaimed, "the information superhighway should not become a red light district." *Id.*

13. Communications Decency Act of 1996, Pub. L. No. 104-104, §§ 501-552, 110 Stat. 56, 133-42 (codified at 47 U.S.C.A. § 223).

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

15. Ann Beeson, *The Threat of State Censorship Bills* (visited on Jan. 19, 1998) <<http://www.aclu.org/issues/cyber/censor/stbills.html>>. Eleven states have introduced or passed

will succeed.<sup>16</sup>

The Supreme Court in *Reno v. ACLU* recognized that filtering

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legislation that would regulate Internet content. *Id.* They are California (expanding obscenity and child pornography statutes to prohibit transmissions of images by computer); Connecticut (creating criminal liability for sending an on-line message "with intent to harass, annoy or alarm another person"); Florida (amending existing child porn law to hold owners and operators of on-line services explicitly liable for allowing subscribers to violate the law); Georgia (criminalizing the use of pseudonyms on the Internet and prohibiting unauthorized links to sites with trade names or logos; prohibiting on-line transmission of fighting words, obscene or vulgar speech to minors, and information related to terrorist acts and deadly weapons); Illinois (prohibiting sexual solicitation of a minor by use of a computer); Kansas (expanding child pornography statute to include computer generated images); Maryland (amending child pornography law to include on-line communication); Montana (expanding child pornography statute to prohibit transmission by computer and possession of computer generated child pornographic images); New York (criminalizing the transmission of "indecent" material to minors); North Carolina (expanding existing law to prohibit sexual solicitation of a minor by computer); Oklahoma (prohibiting on-line transmission of material deemed "harmful to minors," and directing state agencies, including educational institutions, to remove all illegal obscene material from their computer systems); Virginia (criminalizing the use of state owned computer systems by government employees to access sexually explicit material; criminalizing electronic transmission of child pornography). *Id.*

The Georgia statute was overturned in *ACLU v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997). The New York statute was overturned in *American Library Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). Hawaii, Illinois, Maryland, New York, and Virginia have other bills pending. *Id.*

16. See *Reno v. ACLU*, 117 S. Ct. 2329 (1997). Justice O'Connor, in her concurring opinion, writes that states have had success in creating "adult zones" where children are denied access. *Id.* at 2353. Justice O'Connor offers the following statutes: see, e.g., ALASKA STAT. § 11.66.300 (Michie 1996) (no minors in "adult entertainment" places); ARIZ. REV. STAT. ANN. § 13-3556 (West 1989) (no minors in places where people expose themselves); ARK. CODE ANN. §§ 5-27-223, 5-27-224 (Michie 1993) (no minors in poolrooms and bars); COLO. REV. STAT. § 18-7-502(2) (1986) (no minors in places displaying movies or shows that are "harmful to children"); DEL. CODE ANN. tit. 11, § 1365(i)(2) (1995) (same); D.C. CODE ANN. § 22-2001(b)(1)(B) (1996) (same); FLA. STAT. § 847.013(2) (1994) (same); GA. CODE ANN. § 16-12-103(b) (1996) (same); HAW. REV. STAT. § 712-1215(1)(b) (1994) (no minors in movie houses or shows that are "pornographic for minors"); IDAHO CODE § 18-1515(2) (1987) (no minors in places displaying movies or shows that are "harmful to minors"); LA. REV. STAT. ANN. § 14:91.11(B) (West 1986) (no minors in places displaying movies that depict sex acts and appeal to minors' prurient interest); MD. ANN. CODE, art. 27, § 416E (1996) (no minors in establishments where certain enumerated acts are performed or portrayed); MICH. COMP. LAWS § 750.141 (1991) (no minors without an adult in places where alcohol is sold); MINN. STAT. § 617.294 (1987 & Supp. 1997) (no minors in places displaying movies or shows that are "harmful to minors"); MISS. CODE ANN. § 97-5-11 (1994) (no minors in poolrooms, billiard halls, or where alcohol is sold); MO. REV. STAT. § 573.507 (1995) (no minors in adult cabarets); NEB. REV. STAT. § 28-809 (1995) (no minors in places displaying movies or shows that are "harmful to minors"); NEV. REV. STAT. § 201.265(3) (1997) (same); N.H. REV. STAT. ANN. § 571-B:2(II) (1986) (same); N.M. STAT. ANN. § 30-37-3 (Michie 1989) (same); N.Y. PENAL LAW § 235.21(2) (McKinney 1989) (same); N.D. CENT. CODE § 12.1-27.1-03 (1985 & Supp. 1995) (same); 18 PA. CONS. STAT. § 5903(a) (Supp. 1997) (same); S.D. CODIFIED LAWS ANN. § 22-24-30 (1988) (same); TENN. CODE ANN. § 39-17-911(b) (1991)

software is an acceptable alternative to legislation.<sup>17</sup> Software filters allow Internet users to block unwanted sites, or include only pre-selected sites. A variety of filtering systems are available to help parents and educators protect children using the Internet.<sup>18</sup> These systems allow full access to non-objectionable Web sites for educational and recreational

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(same); VT. STAT. ANN. tit. 13, § 2802(b) (1974) (same); VA. CODE ANN. § 18.2-391 (Michie 1996) (same).

See Courtney Macavinta, *Congress Weighs Net Porn Bills*, (visited March 10, 1998) <<http://www.news.com/News/Item/Textonly/0,25,19023,00.html?pfv>>. Some groups have proposed the creation of a new top-level domain, ".adult," for sexually explicit material. *Id.* Also, ".xxx" has been suggested as a separate domain for adult material. *Id.*

See also Jane Black, *New CDA legislation expected*, available at <<http://www.news.com/News/Item/0,4,11938,00.html>> (last visited Nov. 13, 1997). Harvard University Law Professor Larry Lessig supports Justice O'Connor in her argument for creating an adult zone. See *id.* "There are lots of places in the real world that we zone, and she recognizes that while Cyberspace is not there yet, it has the potential." *Id.* States have also been successful in denying minors access to speech that is "harmful to minors." *Id.* Justice O'Connor offers the following statutes: See, e.g., ALA. CODE § 13A-12-200.5 (1994); ARIZ. REV. STAT. ANN. § 13-3506 (West 1989); ARK. CODE ANN. § 5-68-502 (Michie 1993); CAL. PENAL CODE § 313.1 (West Supp. 1997); COLO. REV. STAT. § 18-7-502(1) (1986); CONN. GEN. STAT. § 53a-196 (1994); DEL. CODE ANN. tit. 11, § 1365(i)(1) (1995); D.C. CODE ANN. § 22-2001(b)(1)(A) (1996); FLA. STAT. § 847.012 (1994); GA. CODE ANN. § 16-12-103(a) (1996); HAW. REV. STAT. § 712-1215(1) (1994); IDAHO CODE § 18-1515(1) (1987); 720 ILL. COMP. STAT. § 5/11-21 (West 1993); IND. CODE § 35-49-3-3(1) (Supp. 1996); IOWA CODE § 728.2 (1993); KAN. STAT. ANN. § 21-4301c(a)(2) (1988); LA. REV. STAT. ANN. § 14:91.11(B) (West 1986); MD. ANN. CODE, art. 27, § 416B (1996); MASS. GEN. LAWS ch. 272, § 28 (1992); MINN. STAT. § 617.293 (1987 & Supp. 1997); MISS. CODE ANN. § 97-5-11 (1994); MO. REV. STAT. § 573.040 (1995); MONT. CODE ANN. § 45-8-206 (1995); NEB. REV. STAT. § 28-808 (1995); NEV. REV. STAT. §§ 201.265(1), (2) (1997); N.H. REV. STAT. ANN. § 571-B:2(I) (1986); N.M. STAT. ANN. § 30-37-2 (Michie 1989); N.Y. PENAL LAW § 235.21(1) (McKinney 1989); N.C. GEN. STAT. § 14-190.15(a) (1993); N.D. CENT. CODE § 12.1-27.1-03 (1985 & Supp. 1995); OHIO REV. CODE ANN. § 2907.31(A)(1) (Supp. 1997); OKLA. STAT. tit. 21, § 1040.76(2) (Supp. 1997); 18 PA. CONS. STAT. § 5903(c) (Supp. 1997); R.I. GEN. LAWS § 11-31-10(a) (1996); S.C. CODE ANN. § 16-15-385(A) (Supp. 1996); S.D. CODIFIED LAWS ANN. § 22-24-28 (1988); TENN. CODE ANN. § 39-17-911(a) (1991); TEX. PENAL CODE ANN. § 43.24(b) (West 1994); UTAH CODE ANN. § 76-10-1206(2) (1995); VT. STAT. ANN. tit. 13, § 2802(a) (1974); VA. CODE ANN. § 18.2-391 (Michie 1996); WASH. REV. CODE § 9.68.060 (1988 & Supp. 1997); WIS. STAT. § 948.11(2) (Supp. 1995).

These laws have been upheld only if they respect the First Amendment rights of minors and adults. *Id.* Such laws must not unduly restrict adult access to the material, and minors must have no First Amendment right to access the material. *Id.*

17. 117 S. Ct. 2329 (1997).

18. CompuServe's "Internet in a Box for Kids" allows parents or other supervisors to screen out Web sites or subjects that they do not want minors to be able to access. Taking a slightly different approach is SurfWatch. This software has a feature where parents or other supervisors can block access to all Internet sites except those that they choose to make available to children. See *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), *aff'd* 117 S. Ct. 2501 (1997). In other words, instead of letting in everything that is screened out, as do most filters, SurfWatch only allows in sites that parents or educators choose. See *id.* A variety of blocking programs can be accessed at <<http://www.netparents.org>>.

purposes.<sup>19</sup>

The use of software filters in schools may raise First Amendment problems. There is no effectual difference between a state passing legislation to regulate content and a state mandating the installation of software filters that block out the same unwanted material: both constitute state action, thereby raising First Amendment issues.<sup>20</sup> The device may differ but the effect is identical. The First Amendment does not condone any device that chills free speech. If state-installed software filters have the same effect as legislation, the constitutional effects will be the same.

So what are schools to do? There is little question as to the value of the Internet as an educational tool.<sup>21</sup> There is also little question over the existence of inappropriate sites.<sup>22</sup> How can schools benefit from the Internet as a resource without exposing the students to unwanted illicit information?

This Comment proposes a hybrid solution to avoiding First Amendment liability in schools that implement software filters. Section two discusses the unique nature of the Internet and how its very nature tends to defy legislation designed to regulate content. Section two also discusses the treatment schools are given in the First Amendment context. Last, section two addresses the conditioning of public funding that has been used by the government in other areas of constitutional rights to determine the feasibility of this option in the schools. Section three analyzes the introduction of the Internet into the traditional framework of school classrooms as nonpublic forums. Section four proposes that conditional funding combined with traditional constitutional treatment of schools will allow schools to implement software filters and avoid First Amendment liability.

## II. BACKGROUND

### A. THE NATURE OF THE MEDIUM

The Internet had its origin in ARPANET, a decentralized computer network developed by the United States' Department of Defense's Advanced Research Projects Agency in 1969.<sup>23</sup> The idea behind ARPANET was to develop a network that had the capability to reroute messages if

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19. *See id.*

20. See Glenn Kubota, Comment, *Public School Usage of Internet Filtering Software: Book Banning Reincarnated?*, 17 LOY. L.A. ENT. L.J. 687, 704 (1997).

21. *See id.* at 688.

22. *See id.*

23. Robin Rowland & Dave Kinnaman, *RESEARCHING ON THE INTERNET: THE COMPLETE GUIDE TO FINDING, EVALUATING, AND ORGANIZING INFORMATION EFFECTIVELY* 157 (1995).

one link could not function.<sup>24</sup> The first links connected four major universities.<sup>25</sup> In the 1980s, ARPANET gave way to NSFnet, a network of super computers around the country.<sup>26</sup> In the early 1990s, commercial groups became involved in the development of what is now known as the Internet.<sup>27</sup>

Inherent in the problem of controlling what Internet users can access is the many ways that information is available on the Internet.<sup>28</sup> Each method of use—electronic mail, a bulletin board, a chat group, a Web site—has its own unique characteristics.<sup>29</sup> The wonder and the frustration of the Internet is its “chaotic” state.<sup>30</sup> The scenario of an adult downloading pornographic images from a bulletin board is quite different from two persons communicating via e-mail.<sup>31</sup> What may be an effective means for monitoring one method may not work at all for another. No single approach can effectively regulate all types of Internet access.<sup>32</sup> No technical ability currently exists to block access to all possible explicit text or imagery on the Internet.<sup>33</sup> To further complicate matters, a computer or an ISP cannot detect the age of a user. A ten year old can navigate the Web with the same ease as an adult.<sup>34</sup> If a person has

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24. *See id.* at 158. The concern at the time was to develop a computer network that could survive a nuclear attack. *See id.*

25. *See id.* The universities included the University of California at Los Angeles, University of California at Santa Barbara, Stanford University, and the University of Utah. *See id.*

26. *See id.* at 161. NSFnet was established by the United States National Science Foundation in 1987. *See id.*

27. *See id.* The influx of the commercial world allowed the Internet to be developed at a much higher rate than it had previously undergone. *See id.* E-mail was an “ad hoc add-on” to the Internet. *Id.*

28. *See* Friedman, *supra* note 3, at 1026. “The core of the problem is trying to fit a new medium of communication into existing law which cannot, as it stands, adequately cope with the technological advances.” *Id.* The Internet itself, and use of the Internet, is expanding and growing at a much quicker rate than the law is adapting to the changing conditions. *See id.*

29. *See* ACLU v. Reno, 929 F. Supp. 824, 834 (E.D. Pa. 1996), *aff’d*, 117 S. Ct. 2329 (1997).

30. *See id.* at 883.

31. *See* Robert F. Goldman, *Put Another Log on the Fire, There’s a Chill on the Internet: The Effect of Applying Current Anti-Obscenity Laws to Online Communications*, 29 GA. L. REV. 1075, 1076 (1995) (noting how the different aspects of the Internet “mimic” the different modes of media which receive differential treatment by the courts).

32. *See* Jeffrey E. Fauceite, *The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Frightened University’s Censorship of Sex on the Internet*, 44 DUKE L.J. 1155, 1161 (1995) (noting that the Internet includes over 8,000 connected networks involving 1.3 million computers and eight million users).

33. *See* Shea, 930 F. Supp. at 947.

34. *See* Katie Hickox, *Wee Web Wizards Command Classrooms*, ORANGE COUNTY REG., Dec. 17, 1996, at A01 (discussing a school program where fifth graders teach their classmates and teachers how to use the Internet as an educational resource).



access to a computer and a modem, they can get on-line and retrieve any information they can find, regardless of their age.<sup>35</sup>

Congress has tried to regulate content on the Internet and have had their efforts rejected by the courts as unconstitutional.

#### B. THE FALL OF THE COMMUNICATIONS DECENCY ACT<sup>36</sup>

The CDA was signed into law by President Clinton on February 8, 1996.<sup>37</sup> In June of 1997, the Supreme Court upheld the judgments of the appellate court cases that challenged the constitutionality of the CDA: *American Civil Liberties Union v. Reno*,<sup>38</sup> and *Shea v. Reno*.<sup>39</sup> In these cases, the courts found the CDA to be unconstitutional on at least two grounds: vagueness and overbreadth.<sup>40</sup> In both cases, the Court found strict scrutiny to be the appropriate standard for reviewing the statute and its constitutionality.<sup>41</sup>

##### 1. *American Civil Liberties Union v. Reno*

On the same day the bill was enacted, the American Civil Liberties Union filed suit seeking a temporary restraining order against the government in regard to enforcing two sections of the provision: Section

35. See *ACLU v. Reno*, 929 F. Supp. at 845 ("There is no effective way to determine the . . . age of a user . . . . [A]n e-mail address provides no authoritative information about the addressee, who may use an e-mail 'alias' or an anonymous remailer."). A minor under eighteen years of age could represent himself to another user as an adult and the other user would have no ready means to verify the representation. See *id.*

36. The Senate version S.314, was sponsored by Senator J. James Exon, of Nebraska, and the House version, H.R. 1004, was sponsored by Congressman Johnson, of South Dakota, which both amended the Communications Act of 1934.

37. See *ACLU v. Reno*, 929 F. Supp. at 827.

38. 929 F. Supp. 824. Plaintiffs contended that two provisions of the CDA that are directed to communications over the Internet infringe upon both First Amendment rights and the Due Process clause of the Fifth Amendment. See *id.* at 827. Plaintiffs introduced motions requesting the court to order preliminary injunctions enforcing the CDA. See *id.* The court granted the motions. See *id.* at 883.

39. 117 S. Ct. 2501 (1997).

40. See *ACLU v. Reno*, 117 S. Ct. at 2347-49 (holding that statute is unconstitutionally vague); *Shea*, 930 F. Supp. at 922 (holding that statute is unconstitutionally overbroad).

41. See Dominic Andreano, *Cyberspace: How Decent is the Decency Act?*, 8 ST. THOMAS L. REV. 593, 604 (1996). Three levels of scrutiny, or standards of review, are used in cases with First Amendment issues. See *id.* They include strict scrutiny, intermediate scrutiny, and rational relationship. See *id.* Strict scrutiny is the highest standard and the most difficult standard to satisfy. See *id.* Two requirements must be fulfilled. See *id.* First, the government must establish a compelling interest in pursuing its objective. See *id.* Second, the means that the government chooses to achieve the end result must be "necessary" to further some governmental purpose. See *id.* See also *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that mandatory right of reply statutes infringed upon the editorial independence of newspapers, and were an impermissible content-based burden on speech).

223(a)<sup>42</sup> and Section 223(d).<sup>43</sup> The District Court in *ACLU v. Reno* granted the motions and struck down the CDA as unconstitutional.<sup>44</sup>

Apart from the First Amendment problems presented by the CDA, the court found inherent problems in the three defenses included in the language of the statute.<sup>45</sup> First, no technology currently exists that would allow for a credit card number to be verified over the Internet.<sup>46</sup> Even if the technology is developed at a future date,<sup>47</sup> the cost incurred to Web site providers would likely force non-commercial Internet users to

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42. 47 U.S.C.A. § 223(a) (1997). Section 223(a) is the "indecentcy" provision of the CDA which subjects to criminal penalties of imprisonment of no more than two years and a fine or both anyone who:

- (1) in interstate or foreign communications . . .
  - (B) by means of a telecommunications device knowingly . . .
    - (i) makes, creates, or solicits, and
    - (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; . . .
- (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity.

*Id.*

43. 47 U.S.C.A. § 223(d) (1997). Section 223(d) is the "patently offensive" provision which subjects to criminal penalties anyone who:

- (1) in interstate or foreign communications knowingly
  - (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
  - (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the use of such service placed the call or initiated the communication; or
- (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity.

*Id.*

44. *See ACLU v. Reno*, 929 F. Supp. 824, 824 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

45. *See id.* at 845-49.

46. *See id.* at 846. Using the Internet to do an on-line verification of a person's credit card information is not yet technically possible. Witnesses testified at trial that neither Visa nor Mastercard considers the Internet to be sufficiently secure under the current technology to exchange credit card information and at the same time protect the integrity of customer accounts. *See id.* Until customers can be assured that credit information they offer over the Internet will remain secure and confidential, it is unlikely that the large credit companies will explore offering services of this type to their customers. *See id.*

47. *See* Larry Loeb, *The Stage is SET*, INTERNET WORLD, Aug. 1996, at 55. Visa International and Mastercard have entered into an agreement, Secured Electronic Transactions ("SET"), in the aims of making secure financial transactions over the web a reality. *See id.* Even before this type of transaction is occurring, it has been dubbed "e-commerce." *Id.*

cease using the medium.<sup>48</sup> Also, the court found it to be unlikely that the use of such technology would diminish sexually explicit material on the Internet.<sup>49</sup> The court also noted that adults without credit cards would not be able to access certain sites, and this would function as an unwelcome restriction of speech.<sup>50</sup> The writing judges did not contend that no legislation intended to limit Internet content will ever withstand a court challenge, but they did imply that perhaps the decisions regarding choice of content are best left to those persons supervising minors and not the Congress.<sup>51</sup>

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48. See *ACLU v. Reno*, 929 F. Supp. at 846. "There was evidence that the fee charged by verification agencies to process a card, whether for a purchase or not, will preclude use of credit-card verification defense by many non-profit, non-commercial Web sites, and there was no evidence to the contrary." *Id.* A significant number of Web sites are not run for profit and an imposed cost could remove all such sites from the Internet. See *id.* Critical Path AIDS Project, one of the plaintiffs, offers information on safer sex and AIDS treatment. See *id.* at 843. During the period of a month in early 1996, their Web site received 3,300 hits daily. See *id.* at 846. If Critical Path were required to pay a fee to process a credit card verification each time a user wanted to access the site, it would quickly deplete its modest budget, and the site and its information would no longer be open to the public. See *id.*

49. See *id.* at 883-84.

Moreover, the CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the CDA.

*Id.*

50. See *id.* at 846. "Imposition of a credit card requirement would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material." *Id.* In other words, without a credit card, potential users would be effectively barred from the Internet. This may not have the sting of denying non-property owners the right to vote, but it clearly limits the class of potential users of the Internet to those of some financial standing. The Internet should be about ideas, not status.

51. See *id.* at 857. In granting the plaintiff's request for preliminary injunctions, Chief Judge Sloviter, Court of Appeals for the Third Circuit writes:

When Congress decided that material unsuitable for minors was available on the Internet, it could have chosen to assist and support the development of technology that would enable parents, schools, and libraries to screen such material from their end. It did not do so, and thus did not follow the example available in the print media where non-obscene but indecent and patently offensive books and magazines abound. Those responsible for minors undertake the primary obligation to prevent their exposure to such material . . . . Whether Congress' decision was a wise one is not at issue here. It was unquestionably a decision that placed the CDA in serious conflict with our most cherished protection—the right to choose the material to which we would have access.

*Id.* Judge Sloviter here reflects thoughts similar to attorney Thomas Nolan, the counsel in *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996). Both advocate the right of an individual to choose the information he will access. See WALLACE & MANGAN, *supra* note 3, at 32 (discussing the creation of a new type of community for the *Miller* test).

Because of the global nature of the Internet and the location of some servers in foreign countries, the CDA, at best, would remove servers of explicit content from the United States. This would by no means lessen the possibility of either adult or child access to explicit content over the Internet.<sup>52</sup> If a tagging or labeling system is pursued by legislators and the technology is developed for its implementation, foreign servers would not be bound by United States law to tag content.<sup>53</sup>

The *ACLU v. Reno* court found that even without the CDA, the government can protect children from pornography under other currently existing laws.<sup>54</sup> Indecent speech, but not obscene speech, is protected and this includes indecent speech on the Internet.<sup>55</sup>

## 2. *Shea v. Reno*

In *Shea*, the court held that the CDA was unconstitutionally overbroad.<sup>56</sup> The *Shea* court also recognized that although the statute provides the possibility of two separate affirmative defenses,<sup>57</sup> the current

52. See *ACLU v. Reno*, 929 F. Supp. at 882.

53. See *id.*

54. See *id.* at 884. District Judge Dalzell writes:

[m]y analysis does not deprive the Government of all means of protecting children from the dangers of Internet communication. The Government can continue to protect children from pornography on the Internet through vigorous enforcement of existing laws criminalizing obscenity and child pornography . . . . [O]ur action today should only mean that the Government's permissible supervision of Internet content stops at the traditional line of unprotected speech.

*Id.* See also Ronald W. Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. MARSHALL J. COMPUTER & INFO. L. 483 (1996) ("[P]articipation in all aspects of the market in child pornography is now subject to prosecution.").

55. Sean Adam Shiff, Comment, *The Good, the Bad and the Ugly: Criminal Liability for Obscene and Indecent Speech on the Internet*, 22 WM. MITCHELL L. REV. 731 (1996). "In *Roth v. United States*, 354 U.S. 476 (1957), the Supreme Court expressly excluded obscenity from the class of speech deserving First Amendment protection." *Id.* Indecent speech, regardless of the medium through which it is offered, is protected. See *id.* Whereas parents and educators may want to block access to indecent but protected speech, a filter system proves to be a more appropriate method to regulate content than legislation. See Vendito, *supra* note 6, at 49 (discussing software filters).

56. See *Shea*, 930 F. Supp. at 922. The court held that the CDA, specifically § 223(d), was unconstitutionally overbroad in that "it bans protected indecent communication between adults." *Id.* "The doctrine of overbreadth recognizes that an unconstitutional restriction of freedom of expression may deter parties not before the court from engaging in protected speech and thereby escape judicial review." *Id.* at 939.

57. See *id.* at 942. The first affirmative defense requires content providers to ". . . take[,] in good faith, reasonable, effective, and appropriate actions under the circumstances to prevent access by minors . . ." *Id.* The second affirmative defense provided by the statute requires content providers to restrict user access by the use of a verified credit card, debit account, adult access code, or adult personal identification number. *Id.*

state of technology renders the affirmative defenses useless.<sup>58</sup> Because the statute in effect bans protected adult communications, the court held it to be unconstitutional.<sup>59</sup>

The court acknowledged that sexually explicit sites exist on the Internet that a minor could encounter either by design or by error.<sup>60</sup> The court found that how many such sites may exist, or their percentage in relation to all Web sites, is unknown.<sup>61</sup> Paralleling the *ACLU v. Reno* court, the court in *Shea* pointed out that some content that Internet users can access in the United States is generated outside of the country, and United States law cannot effectively regulate foreign action.<sup>62</sup>

In discussing labeling or tagging schemes, the court noted that most households that have access to the Internet do not utilize any of the existing blocking software, and that many of the subscribers of blocking

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58. *See id.* at 948. Justice Cabranes writes, "[t]here is no feasible means, with our current technology, for someone to provide indecent content on line with any certainty that even his best efforts at shielding the material from minors will be 'effective,' as the language of the good faith defense requires." *Id.* at 943. Further, most content providers' ability to comply with the requirements of the affirmative defenses as offered by the statute depends on the actions of third parties, software manufacturers for example, whose cooperation is not required or mandated by the statute or by another means. *See id.* at 948.

59. Adults have a First Amendment right to engage in indecent speech. *See Sable Communications of California, Inc., v. FCC*, 492 U.S. 115, 126 (1989) (holding indecent speech is protected under the First Amendment but obscene speech is not). The court, in *ACLU v. Reno*, writes that a law that regulates speech on the basis of its content is presumptively invalid and that "because it would necessarily affect the Internet itself, the CDA would necessarily reduce the speech available for adults on the medium. This is a constitutionally intolerable result." *ACLU v. Reno*, 929 F. Supp. at 883. That children and young students will access the Internet does not give the Congress license to legislate in order to regulate content to only that which is nonoffensive to non-adults. *See id.*

60. *See Shea*, 930 F. Supp. at 930 ("[O]n occasion, a search not intended to retrieve sexually explicit material may retrieve a link to a sexually explicit site. For example, searches of 'Sleeping Beauty,' 'Babe,' and 'Little Women' produced a handful of links to sexually explicit sites."). Where courts have found sexually explicit content at a Web site using a trademark name that children could identify, they have ordered the Web site operators to remove the sexually explicit content. *Hasbro, Inc. v. Internet Entertainment Group, Ltd.*, No. C96-130WD, 1996 U.S. Dist. LEXIS 11626 (1996) (holding Web site operators had infringed upon a trademark name and were ordered to remove all content from the site).

61. *See Shea*, 930 F. Supp. at 931 ("[T]here is no evidence that sexually explicit content constitutes a substantial, or even significant, portion of available Internet content . . . it is difficult to ascertain with any certainty how many sexually explicit sites are accessible throughout the Internet."). Testimony at the trial by a software design company president suggested that there are approximately 5,000 to 8,000 sexually explicit sites. *See id.* While this may sound like a tremendous number, as a percentage of the estimated thirty-seven million total Web sites, even double that amount would be "well less than one tenth of one percent." *Id.*

62. *See id.* Perhaps as many as forty percent of all host computers are located outside of the United States, and as much as thirty percent of the sexually explicit content that can be accessed over the Internet is produced in foreign countries. *See id.*

systems are schools.<sup>63</sup> This being the case, students are more likely to encounter undesirable content at home than at school. It does not seem likely that the Government will have any great success trying to regulate the content that people view in the privacy of their own homes. The court also suggests that the defenses provided by the CDA are not valid.<sup>64</sup>

### 3. *Reno v. ACLU: The Supreme Court Decision*

The Supreme Court affirmed the decision of the three judge District Court that the CDA abridged free speech as protected under the First Amendment.<sup>65</sup> The Supreme Court relied heavily on the findings of fact by the lower court.<sup>66</sup> Justice Stevens, writing for the court, noted that with the advent of search engines using the Internet is "relatively straightforward."<sup>67</sup> Justice Stevens analogized Web pages to books stating that the Internet is comparable to "a vast library including millions of available and indexed publications."<sup>68</sup>

The Court recognized that sexually explicit material is available on the Internet, but found that Web users rarely access sexually explicit material accidentally.<sup>69</sup> Search engines may facilitate a user in finding sites on a topic of interest, but most "sexually explicit images are preceded by warnings as to the content."<sup>70</sup> The Court noted that the Internet differed from broadcast communications in that using the Internet requires the user to participate in a "series of affirmative steps more deliberate than merely turning a dial."<sup>71</sup>

The Court held that the CDA lacked the precision required by the First Amendment to keep minors from accessing potentially harmful speech by suppressing free speech between adults, as well.<sup>72</sup> Justice Stevens wrote that this type of "burden on adult speech is unacceptable

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63. *See id.* at 932. School systems are among the majority of Internet users utilizing blocking software and filtering systems. *See id.* Approximately seventy percent of SurfWatch's 1,500 subscribers are schools, with the remaining subscribers a combination of private households and businesses. *See id.*

64. *See id.* at 950.

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

66. *See id.* at 2334. The District Court made 410 findings of fact relating to how the Internet was developed and how it functions in its current form. *See id.* Of these findings, fifty-four were based on evidence received in open court. *See id.* Three hundred and fifty-six were stipulated by the parties. *See id.*

67. *See id.* at 2335.

68. *See id.* Justice Stevens also compared the Internet to a "sprawling mall offering goods and services." *Id.*

69. *See id.* at 2336.

70. *See id.*

71. *See id.*

72. *See id.* at 2346.

if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."<sup>73</sup> The Supreme Court upheld the District Court's finding of software filters as a means of preventing children from accessing sexually explicit material on the Internet.<sup>74</sup>

### C. SOFTWARE FILTERS

For the purpose of this Comment, software filters will be classified as either inclusive, allowing educators to create a finite list of accessible sites, or exclusive, allowing educators to block sites with objectionable content. The decisions surrounding the use of software filters has been compared to the decisions school boards make when purchasing books.<sup>75</sup> There is a difference in protection for school board action if they do not purchase a certain book, as opposed to if the book is on the school shelves and then later removed.

#### 1. *Inclusive*

Using an inclusive system, educators would preview web sites before adding them to the list of sites available to students. If the teacher decides that a particular sight is appropriate for the students in the classroom, he can add the site to the list.<sup>76</sup> Instead of being able to surf the entirety of the Net, students would be limited to the sites included in their access. Students may suggest possible sites to the teacher to include for the class.<sup>77</sup>

Programs such as WebWhacker allow a teacher to enter a Web site address and download that page and all of its links to a hard drive.<sup>78</sup> This allows a student to "surf" the Internet without an actual connection.<sup>79</sup> This type of set up ensures that students cannot access any inappropriate links.<sup>80</sup>

73. *Id.*

74. *See id.* at 2347.

75. *See generally* Board of Educ. v. Pico, 457 U.S. 853, 872-75 (1982).

76. *See* Lizaan Rex Lutz, *Ann Foster Untangles the Web for Students and Teachers*, HERALD (Rock Hill, S.C.), Nov. 16, 1997, at 2F. Foster, technology trainer for the Rock Hill School District, says of the Internet: "[l]ike a bookstore or any other public media place, there are good things and lots of junk. I search all sites thoroughly to assure the links are safe, that they would contribute something to the subject." *Id.*

77. *See id.* "If a student asks about a particular web site, I will check it out before it can be added as a selection." *Id.*

78. *See* VINCE DISTEFANO, CHILD SAFETY ON THE INTERNET 66 (1997). When downloading the site, the user has the opportunity to include or exclude external links on the page. *See id.*

79. *See id.*

80. *See id.*

## 2. *Exclusive*

Exclusive software filters block access to sites containing objectionable content. A variety of blocking options are available.<sup>81</sup> This type of system would allow students to access a broader spectrum of sites than under an inclusive system, but would prevent access to sites known to have objectionable material.

### D. CLASSROOMS ARE NONPUBLIC FORUMS

Different levels of protection are afforded to speech depending on the designation of the forum where the speech is delivered. Traditional public forums, such as streets and parks, receive the highest protection from regulation.<sup>82</sup> Limited public forums created by government designation are the middle category.<sup>83</sup> Receiving the least protection are non-public forums.<sup>84</sup> School classrooms are non-public forums.<sup>85</sup> Students in the classroom do not share in the degree of protection that adults outside of a

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81. *See id.* at 82. Cyber Patrol can block access during certain times of day, and can restrict the total hours of use per day or per week. *See id.* at 83. Using this feature, teachers could block access during the hours when no class is scheduled in the classroom with computer access. *See id.* This would eliminate the possibility of students using the system at unauthorized times. Surf Watch will screen for newsgroups likely to contain sexually explicit material and also will block access to specific sites. *See id.* at 84.

CyberSitter utilizes a phrase filtering function. This allows the filter to look at how the words are used in context and eliminates the possibility that words with double meanings will be mistakenly blocked. *See id.* at 85. This sophistication overcomes concerns that appropriate sites will be blocked based on the existence of keywords. *See* Ann Beeson et al., *Fahrenheit 451.2: Is Cyberspace Burning?* (Aug. 7, 1997) <<http://www.aclu.org/issues/cyber/burning.html>> (criticizing software filters). A system set up to block web sites with "sex" or "XXX" would likely block access to web sites for Super Bowl XXX or the town government of Middlesex. *See id.* CyberSitter is able to avoid such inadvertent errors. *See* DISTEFANO, *supra* note 78, at 85.

82. *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983). In a traditional public forum, any content based regulations must be necessary to advance a compelling state interest, and must be narrowly drawn. *See id.* Content-neutral time, place, and manner restrictions must be narrowly tailored and also allow for alternative means of communication. *See id.*

83. *Id.* A content based prohibition on speech in this type of forum must effectuate a compelling state interest and be narrowly drawn. *See id.* As long as this type of forum is open, a state is bound by the same standards for a traditional public forum. *See id.* A state is not bound to keep this type of forum open indefinitely. *See id.*

84. *See* G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949, 952 (1991). "A 'nonpublic forum' is a governmentally controlled forum that is neither a traditional public forum nor a designated public forum." *Id.*

85. *See* *Hazlewood School District v. Kuhlmeier*, 484 U.S. 260, 267 (1988). Public forums are open for the indiscriminate use by the general public. *Id.*



school share.<sup>86</sup> Due to the fact that most elementary and secondary students are minors, they need more protection *from* harmful speech than they need the First Amendment protection to engage *in* speech.<sup>87</sup>

In *Bethel School District No. 403 v. Fraser*,<sup>88</sup> the court held that the school boards are in the best position to determine what manner of speech is appropriate.<sup>89</sup> Educators may exercise broad editorial control over curriculum content.<sup>90</sup> The introduction of the Internet as a learning resource does not dictate a higher standard of scrutiny.<sup>91</sup> The Internet is a new medium for presenting information, but its uniqueness does not alter the traditional authority of educators to monitor the student use of the information in the context of the school classroom. Whatever the source of information, educators may regulate the content if it is part of the learning curriculum.<sup>92</sup>

#### E. CONDITIONING OF PUBLIC FUNDING

In other areas of constitutional law, specifically a line of abortion cases, the Supreme Court has held that the existence of a constitutional right does not equate to a governmental duty to finance full access to the right.<sup>93</sup> More simply put, the government may fund select programs but

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86. See *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 676. (noting that an offensive form of expression that an adult may make under the First Amendment does not mean that the same protection must be allowed to children in a public school).

87. See *Fraser*, 478 U.S. at 684. "This court's First amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." *Id.* at 682 (quoting Judge Newman in *Thomas v. Board of Education*, 607 F.2d 1043, 1057. ("In short, the First Amendment gives a high school student the right to wear Tinker's armband, but not Cohen's Jacket.")).

88. 478 U.S. 675 (1986).

89. See *Fraser*, 478 U.S. at 684 ("These cases recognize the obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.").

90. See *Hazlewood*, 484 U.S. at 271 (holding educators may refuse to publish articles in school newspaper that reference sexual activity and birth control because they would be inappropriate for younger students).

91. See *Fraser*, 478 U.S. at 682 ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."). Clearly the court here gives schools the power to control the learning atmosphere of the classroom.

92. See *Hazlewood*, 484 U.S. at 270. Even non-traditional resources may be so regulated if there is faculty supervision and the activity is designed to impart particular knowledge or skills to student participants. See *id.* at 271.

93. See, e.g., *Harris v. McRae*, 448 U.S. 297, 317-18 (1980). In discussing the Hyde Amendment, which prohibits the use of federal funds to reimburse the costs of abortions under the Medicaid program, the court wrote "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.* at 316

is not obligated to fund all related programs or all options within the programs. Further, the government may condition the funding to prohibit specific activities.<sup>94</sup> If recipients choose to accept the funding, they must comply with the conditions or the funding will be eliminated.

At issue in *Harris v. McRae*<sup>95</sup> was the Hyde Amendment, which prohibited the use of federal funds to reimburse the costs of abortions under the Medicaid program. Although the Hyde Amendment denied funding for some medically necessary abortions, the Supreme Court upheld the statute as constitutional.<sup>96</sup> The Hyde Amendment restricted the use of Medicaid funds to certain specified situations.<sup>97</sup> Justice Stewart, writing for the court, wrote "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."<sup>98</sup>

In *Rust v. Sullivan*,<sup>99</sup> Title X grantees and doctors sued the Secretary of Health and Human Services over three regulations that conditioned federal funding of Title X projects.<sup>100</sup> The first regulation required that Title X projects could not provide counseling involving abortion as a method of family planning or refer to abortion as a method of family planning.<sup>101</sup> The second regulation set forth that Title X projects could not engage in activities that "encourage, promote or advocate" abortion as a method of family planning.<sup>102</sup> The third regulation dictated that all Title X projects must be "physically and financially separate" from abortion related activities.<sup>103</sup>

Petitioners argued that the regulations violated the First Amendment rights of Title X clients and health care providers.<sup>104</sup> Specifically, they argued that the three regulations were impermissible viewpoint discrimination because they prohibited all discussion of abortion.<sup>105</sup> The Supreme Court disagreed with their argument finding that a govern-

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94. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (rejecting a facial challenge to regulations of Health and Human Services that limit the ability of recipients who accept funding pursuant to Title X of the Public Health Act to engage in abortion related activities).

95. 448 U.S. 297 (1980).

96. *Harris*, 448 U.S. at 318.

97. *Id.* at 302. The situations included victims of rape or incest, and pregnancies which endangered the life of the mother. *Id.*

98. *Id.* at 316. Justice Brennan voiced a strong dissent noting that the decision of the majority effectively removed abortion as an affordable alternative to childbirth to poor women. *Id.*

99. 500 U.S. 173.

100. *Id.* at 179.

101. See *id.*

102. See *id.* at 180.

103. *Id.*

104. See *id.* at 181.

105. See *id.* at 192.

ment may make a value judgment, and may implement the value judgment by the allocation of public funding.<sup>106</sup>

### III. ANALYSIS

#### A. IMPLEMENTING FILTERING SYSTEMS INTO SCHOOL SYSTEMS

One of the tremendous advantages of the Internet as a learning resource is the availability of information at a relatively low cost.<sup>107</sup> Once Internet access is established, the relative cost of maintaining a system is lower than purchasing the same information in book form (if the information is even available in book form). For some school systems though, the initial set up is cost prohibitive.<sup>108</sup>

##### 1. *Funding*

Following the abortion cases, governments could assist schools in acquiring the equipment needed to implement Internet technology in the classroom and condition the funding on the implementation of a software filter.<sup>109</sup> The government does not have an obligation to subsidize free speech or any other fundamental right.<sup>110</sup> The Supreme Court has repeatedly rejected the argument that First Amendment rights are not fully realized unless they are fully funded by the government.<sup>111</sup> Further, the Supreme Court has held that conditioning the receipt of a benefit on the acceptance of regulations does not violate the First Amendment.<sup>112</sup>

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106. *See id.* at 192-93. The Court quoted from an earlier case, *Maier v. Roe*, 423 U.S. 464, 474 (1977), where state welfare regulations that funded childbirths but not abortions were upheld. *Id.*

107. Russell Isaac Rothstein, *Networking K-12 Schools: Architecture Models and Evaluation of Costs and Benefits* (last modified June 10, 1996) <[http://rpcp.mit.edu/pubs/net\\_k12/abstract.html](http://rpcp.mit.edu/pubs/net_k12/abstract.html)>. The costs related to set up are significantly reduced when schools combine at district and state levels, as opposed to each school paying their own costs. *See id.*

108. *See id.* Rothstein's study found that the average spent per pupil on technology was in the \$180-\$450 range. *See id.* He recommends a \$300 target for U.S. schools, which represents a 300% increase over the current actual technology expenditures in schools. *See id.*

109. *See* S. 1619, 105th Cong. (1998). Senator John McCain (R-Ariz.) has introduced the Internet School Filtering Act which requires schools that receive universal service discounts to use filtering or blocking software on school computer systems. *See id.* The bill prohibits Congress from choosing the filtering software to be used. *See id.* The school, school board or, other authority, is charged with the decision of which system to employ. *See id.* This is to ensure that a community standard is reflected in the implementation of the filtering software. *See id.* If schools do not conform to the certification requirements of the statute, they will be denied funding. *See id.*

110. *Rust*, 500 U.S. at 182.

111. *Regan v. Taxation With Representation Of Washington*, 461 U.S. 540 (1983).

112. *Rust*, 500 U.S. at 182.

Governments, whether federal, state, or municipal, could condition funding for schools to purchase computers and Internet access for classroom use to require the installation and use of some type of filtering software. Doing so would alleviate the concerns of schools who are hesitant to spend their dollars on an uncontrolled medium and all that this uncontrolled medium brings into the classroom. Schools will not be forced to choose between unlimited access or no access at all. Similarly, school districts could develop their budgets so that all funds allocated for Internet use are conditioned on the inclusion of a filtering software.

Many school systems are governed by a special district school board which oversees funding and curriculum issues.<sup>113</sup> Since the same people are often responsible for budgetary and educational decisions, they could best determine what configuration of a system best suits their schools' educational needs.<sup>114</sup>

## 2. *Software Filters*

### a. *Inclusive*

An inclusive filter is especially well suited for the classroom as it allows teachers to parallel available web sites to the planned lessons.<sup>115</sup> Because access is so closely tailored to match the educational goals of the class, there is no time for unrelated searches.<sup>116</sup> This approach is similar to the selection of individual texts for classes. When teachers select books as a medium of information, it is not expected of them to allow student access to all other existing books in the class. Only those texts which the teachers best decides would meet the educational goals of the class are used.<sup>117</sup> It follows that this type of use of the medium of the Internet is also appropriate in the classroom setting. The medium does not dictate what should be allowed in the classroom, the teacher determines what should be allowed in the classroom.

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113. WILLIAM VALENTE, *LOCAL GOVERNMENT LAW* 7 (1995 Supp.). In 1992, there were 14,422 independent school districts in the United States. *See id.*

114. *See Pico*, 457 U.S. at 864 (stating that "local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values'"). School boards must operate within the "transcendent imperatives of the First Amendment." *Id.* School boards violate the First Amendment rights of students when they remove books from the shelves of the school library if their intent is to remove books because they dislike the ideas contained in those books. *See id.* at 871. The Supreme Court has held that the library is the principal locus of First Amendment freedom for students, and that educators can maintain a "compulsory environment" in the classroom. *Id.* at 868.

115. *See Lutz*, *supra* note 76, at 2F.

116. *See id.*

117. *See generally supra* note 111.

b. *Exclusive*

This type of access also has potential for effective application in a classroom. In classes not defined by a substantive curriculum, such as a speech class or a creative writing class, as opposed to a biology class, teachers may want to provide access to a broader range of materials. Here, an exclusive filter would serve the purpose by providing students access to a wider range of subject matter but blocking out unwanted material.

Students who would try to search for material, or unwanted content, would be blocked by the filtering program.<sup>118</sup> Teachers or other adults would have access to passwords and could access otherwise blocked sites if so desired.<sup>119</sup> Filtering software that blocks specific sites, as opposed to any site containing a certain word, sex, for example, is available.<sup>120</sup>

Either type of filtering software would be allowable under *Pico*. The decision in *Pico* does not affect the discretion of school boards in choosing books, or other information mediums, to add to the schools resources.<sup>121</sup> A school board cannot remove information that it disagrees with, but it can configure their computer network to allow in only that material that will be used as part of their established curriculum.<sup>122</sup> If a web site is blocked, and therefore is never a part of the curriculum, it cannot be removed and will not raise *Pico* concerns. If the intent of a school board is to use the Internet to provide educational resources for its curriculum and students, the installation of filtering software will survive a *Pico* challenge.<sup>123</sup> If Internet use is a part of the curriculum, schools may use filtering software to regulate the content students can access without violating their First Amendment rights.<sup>124</sup>

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118. See DISTEFANO, *supra* note 78, at 77.

119. *Id.*

120. *Id.* For example, this type of set up would allow students to access a web site about AIDS and prevention, but would prevent access to pornographic sites. *Id.* "School libraries that do not stock their shelves with adult magazines are not expected to provide access to electronic versions of these print publications." *Id.*

121. See *id.* at 871.

122. Either an inclusive or an exclusive filter can accomplish this.

123. See Kubota, *supra* note 20, at 715 (arguing that *Pico*'s intent test is applicable to software filters.). The author notes that the application of filtering software makes it highly difficult to prove the specific intent of a school board as would be required under *Pico* to defeat the use of filtering software. See *id.* "Because the intent of the school is difficult to determine, the analysis articulated in *Pico* will generally be inconclusive and insufficient to find an infringement of a student's First Amendment right to receive information." *Id.*

124. See *Hazlewood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Educators are given the authority to control the content of the curriculum to ensure, (1) that students learn what the activity is designed to teach them, (2) that the students are not exposed to any inappropriate material, and (3) to allow a school to "disassociate itself" from speech inconsistent with its teaching goals. *Id.* at 271.

## B. TAILORING THE FIT

1. *Matching Available Preferences to the Individual User*

Depending on the sophistication of the chosen system, software filters could be customized to match the preferences of classroom teacher and the individual user.<sup>125</sup> Thus, a classroom of students could simultaneously be on-line but each individual student could access only what their individual set up allows.<sup>126</sup> This type of differentiation would especially be appropriate between different levels of education. There may be subject matter that would be appropriate for a high school student, but would be inappropriate for an elementary school student.

Further, one can configure filtering systems to limit access to subject matter. By using an inclusive filter, teachers could set up the systems so that the computers in the science labs only access science related web sites.<sup>127</sup> Critics argue that this type of selective use is adverse to the nature of the Internet and the ideals of free speech. However, not every valuable lesson in school involves the free exchange of ideas. For example, the elements of the Periodic Table are not subject to debate, but students can learn about the elements using the Internet.<sup>128</sup>

2. *Acceptable Use Policies and the "Nolan" Test*

One way schools have attempted to deal with the issues presented by the Internet in the class room is by adopting Acceptable Use Policies ("AUPs").<sup>129</sup> The policies set forth clear rules as to where, when, and who can access the Internet from school locations.<sup>130</sup> Each school can

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125. See DISTEFANO, *supra* note 78, at 80.

126. See *infra* Part II.B.2 for a discussion of Acceptable Use Policies.

127. See Lutz, *supra* note 76, at 2F.

128. For example, students, using a search engine, with "periodic table of elements" as a keyword search term could generate a list of Web pages including <<http://chem.scasd.k12.pa.us/chem1/PeriodicTableReference.html>> (last modified Mar. 15, 1997). This page has links to a variety of web sites that have information about the elements. See *Los Alamos National Laboratories* <<http://cst.lanl.gov/julie/imagemap/periodic/periodic.html>> (last modified Feb. 17, 1998). The page features a multi-color table of the elements. Students can click on an individual element to learn about its use, properties, etc. *Id.*

129. See DISTEFANO, *supra* note 78, at 283. An acceptable use policy is "a binding document signed by all users that explains the rules of Internet use at an institution." *Id.*

130. Matt Owen, *Net Use Restricted to Licensed Surfers*, POST AND COURIER (Charleston, S.C.), Oct. 14, 1997 (discussing the Fort Dorchester High School policy which requires students to obtain a permit to use the Internet at school). Students must take a fifteen question test and earn an eighty percent or higher score to be issued a permit. See *id.* Students who pass the exam pay one dollar for a laminated card which they must keep on display while on-line. See *id.* Students who fail the test three times must take an Internet Driving Course taught by one of the high school teachers. See *id.* If students violate the rules of the policy, they can have their cards and Internet access revoked. See *id.* There is an

adopt a policy that is custom designed to suit their needs.<sup>131</sup> Many sample policies are available on-line.<sup>132</sup>

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appeal process for students who have their cards revoked for violating the school policy. *See id.*

131. *AUP Tips to Keep Your District Out of the Internet's Liability Web*, YOUR SCHOOL AND THE LAW, Apr. 25, 1997 (discussing the need to match an AUP the individual school district's practice and to strictly adhere to the adopted AUP).

132. *See Bellingham Public Schools, Board Policy [for] Student Access to Networked Information Resources* (last modified Jan. 26, 1998) <<http://www.bham.wednet.edu/2313inet.htm>>. The Bellingham School District Policy is as follows:

**BELLINGHAM SCHOOL DISTRICT 501**

**BOARD POLICY 2313**

**STUDENT ACCESS TO NETWORKED INFORMATION RESOURCES**

The Board recognizes that as telecommunications and other new technologies shift the ways that information may be accessed, communicated and transferred by members of the society, those changes may also alter instruction and student learning. The Board generally supports access by students to rich information resources along with the development by staff of appropriate skills to analyze and evaluate such resources. In a free and democratic society, access to information is a fundamental right of citizenship.

Telecommunications, electronic information sources and networked services significantly alter the information landscape for schools by opening classrooms to a broader array of resources. In the past, instructional and library media materials could usually be screened—prior to use—by committees of educators and community members intent on subjecting all such materials to reasonable selection criteria. Board Policy 2311 requires that all such materials be consistent with district-adopted guides, supporting and enriching the curriculum while taking into account the varied instructional needs, learning styles, abilities and developmental levels of the students. Telecommunications, because they may lead to any publicly available files in the world, will open classrooms to electronic information resources which have not been screened by educators for use by students of various ages.

Electronic information research skills are now fundamental to preparation of citizens and future employees during an Age of Information. The Board expects that staff will blend thoughtful use of such information throughout the curriculum and that the staff will provide guidance and instruction to students in the appropriate use of such resources. Staff will consult the guidelines for instructional materials contained in Board Policy 2311 and will honor the goals for selection of instructional materials contained therein.

Students are responsible for good behavior on school computer networks just as they are in a classroom or a school hallway. Communications on the network are often public in nature. General school rules for behavior and communications apply (see Board Policy 3200). The network is provided for students to conduct research and communicate with others. Access to network services will be provided to students who agree to act in a considerate and responsible manner.

Independent student use of telecommunications and electronic information resources will be permitted upon submission of permission forms and agreement forms by parents of minor students (under 18 years of age) and by students themselves. Regional networks such as WEDNET require agreement by users to acceptable use policies outlining standards for behavior and communication.

Access to telecommunications will enable students to explore thousands of libraries, databases, and bulletin boards while exchanging messages with people throughout the world. The Board believes that the benefits to students from access in the form of information resources and opportunities for collaboration, exceed the disadvantages. But ultimately, parents and guardians of minors are responsible for setting and conveying the standards that their children should fol-

AUPs are especially useful where the effectiveness of filtering software is lacking.<sup>133</sup> What schools cannot accomplish with technology, they can implement in their AUP.<sup>134</sup> AUPs can be used in the absence of filtering software or until filtering software is installed.<sup>135</sup> There are a variety of means to determine if students are adhering to the policy.<sup>136</sup>

Many school administrators contend that such policies can reduce the legal risks from students using the Internet.<sup>137</sup> Schools must be careful not to violate the law in disciplining a student for a violation of their AUP.<sup>138</sup> As the legislature and case law develops in this area,

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low when using media and information sources. To that end, the Bellingham Public Schools support and respect each family's right to decide whether or not to apply for independent access.

The Board authorizes the Superintendent to prepare appropriate procedures for implementing this policy and for reviewing and evaluating its effect on instruction and student achievement.

Adopted: April 27, 1995

Bellingham Public Schools, 1306 Dupont, Bellingham, WA 98225 (360) 676-6400

*Id.* See Bellingham Public Schools, *Parent Permission Letter* (last modified Jan. 26, 1998) <<http://www.bham.wednet.edu/permis2.htm>>, for the school district's sample parent permission form. See also *Policy on District-Provided Access to Electronic Information, Services and Networks* (visited Mar. 15, 1998) <<http://doe.state.in.us/LearningResources/aupmod>>; Debbie Abilock, *NueveaNet AUP* (visited Mar. 15, 1998) <<http://www.nueva.pvt.k12.ca.us/nnaup/html>>; *Authorized Internet Use Policy 4520* (visited Mar. 15, 1998) <<http://www.greeceny.com/aup.html>>.

133. *Attorney Advises Educators on Use of Filtering Software*, YOUR SCHOOL AND THE LAW, Dec. 12, 1997 (suggesting AUPs as an alternative to software filters).

134. *Id.*

135. *Id.* See also Jeff Richgels, *Local Schools, Libraries Opt to Forgo Cybersmut Filters*, CAPITOL TIMES (Madison, Wis.), July 18, 1997, at 7C. Madison, Wisconsin libraries limit access with a thirty minute time period and a two person at a time policy. See *id.* Users must be nine years of age or older, and must sign up to use one of the terminals. See *id.* Madison Public Schools, which have Internet access for all grade levels, also favor an AUP over any use of filtering software. See *id.* See also Sara Woodard, *Out of Site, Out of Mind; It's 10PM, Do You Know What Your Kids Are Doing On the Internet?*, TIMES-PICAYUNE, Feb. 3 1997, at C1 (discussing St. Martin's Episcopal School's choice to use an AUP instead of filtering software). Jean Parmalee, a teacher at the school, notes "if we put a filter on as a way of protecting our students, then we are assuming responsibility as a school. If we have a use policy, it's up to the students to be responsible." *Id.*

136. *Pearl Software Introduces Cyber Snoop Version 2.07*, BUSINESS WIRE, Nov. 3, 1997. Cyber Snoop allows an adult to "retrace nearly every step an Internet user makes by creating a complete audit trail of Internet activity." *Id.* The software keeps a log of any violations of a school's AUP and can trace the violation to an individual user. See *id.*

137. See *id.* See also Michele McNeil, *Board OKs Policy for Uses of Computer*, INDIANAPOLIS NEWS, Sept. 27, 1997, at S03. Center Grove, Indiana superintendent Denny French states "I think probably every school corporation adopts a similar program, and it is to protect the school and to also make parents aware of liability." *Id.*

138. *Combat Liability as Kids Cruise the Internet: Adhere to Your AUP*, MANAGING SCHOOL BUSINESS, Mar. 20, 1997. As the Internet is an educational tool, access cannot be denied to a student without due process. AUP due process means:

1. The student must be given notice of the alleged infringement;
2. The student must be given a chance to respond; and



school administrators will want to adapt their AUPs to the changes in the law to provide the optimal protection available under the law.

There is nothing to prevent a school from fitting the AUP to match the educational needs of the students.<sup>139</sup> Material that may be appropriate for a 12th grader, may not be appropriate for a kindergartner, thus, there would be a need to differentiate between the levels of users.<sup>140</sup> Students could be issued forms to complete with their parents designating what constitutes acceptable use for them.<sup>141</sup>

By creating AUPs, school boards and administrators will be in effect creating the type of community suggested by Thomas Nolan: one whose members define offensive content for themselves.<sup>142</sup> The same group that develops the curriculum for students can best function as the community that determines acceptable content for students.<sup>143</sup> If the group has the freedom to define the community standards, they will include only content that would benefit the community, and will not include content that would offend their community standards.

Further, by having the control policies generated at the local level, schools will benefit from the flexibility of creating their own standards. As educational goals and needs shift with changes over time, the local school communities can amend their acceptable use policy accordingly.<sup>144</sup> A student who first has Internet access in elementary school can change their AUP as they progress through school into the later

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3. The student cannot be denied access to the Internet without a hearing.

*Id.*

139. See DISTEFANO, *supra* note 78, at 112.

140. *Id.*

141. Not all parents are so willing to sign an AUP. See Terry Williams, *Schools Blackmail Parents with Computer Waiver Rule*, WASH. TIMES, Nov. 12, 1997, at C2. One parent writes:

Wow! Talk about shifting responsibility and covering your backside. Suddenly I am responsible, and school officials are not. Apparently, they are helpless to control the very technology they require. I have now accepted responsibility for a system I know nothing about . . . Don't wimp out, then hide behind the document you blackmailed parents into signing. Our children deserve our guidance and our protection.

*Id.*

142. See WALLACE & MANGAN, *supra* note 3, at 32.

143. See *ACLU v. Reno*, 929 F. Supp. 824, 880 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997). "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Id.* at 881

144. See J.L. Lemke, *Curriculum Vs Information Access: The Coming Paradigm Wars in Education*, The Fourth Conference On Computers, Freedom And Privacy: "Cyberspace Superhighways: Access, Ethics And Control," Mar. 1994 at 77.

In the curricular model learning is carefully guided along prescribed paths toward prescribed outcomes; in the Information Access model, individuals and groups direct their own learning and change this direction in unpredictable ways as they encounter and assimilate new information . . . in the Information Access model

years of high school.<sup>145</sup>

#### IV. CONCLUSION

The Internet is the most revolutionary medium of information exchange in the history of man. American children need to learn the skills required to use the Internet to ensure that they will be competitive in all fields of knowledge and industry. They must have access in the classroom.

Simultaneously, they need protection from some of the information traveling on the information superhighway. It is the challenge of educators to impart to students not just raw knowledge but the values necessary to maintain and to evolve a civilized society. Filtering software is the best tool in existence to meet both of these needs. It allows students to have access to the growing world of information and also provides some barrier from harmful and objectionable material on the web.

To be most effective, filters must be as closely fit to the individual user as possible. Where technology leaves off, AUPs fill in the void. Educators, parents and students working together can develop AUPs that reflect an acceptable standard for the individual student.

Courts will not uphold any statute that infringes upon the First Amendment right of adults to engage in speech, including indecent speech. The courts will not allow the development of the Internet to suffer in the name of preventing any unwanted contact by a child with unwanted material on the Internet. It follows that courts will also disfavor any device that a state implements that would chill adult speech. In the classroom though, the courts have consistently backed the power of educators to protect children. The courts *will* uphold the educators right to exercise control over the style and content of student speech in school sponsored activities. School classrooms are nonpublic forums and educators do not need to satisfy strict scrutiny, but only the rational relationship test.

Whereas the freedom and chaos of the Internet may occasionally result in a child coming across some unwanted content, the educational benefits provided by the Internet far outweigh its potential risks. The individual educator must meet the challenge of helping the students under his supervision sort out the wheat from the chaff.

As the Internet continues to expand, more software manufacturers will continue to introduce filtering systems into the market place. Schools will be able to determine what they find offensive and set up

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users establish their own changing criteria of relevance based on their perceived interests, needs, and the current state of their knowledge.

*Id.*

145. See DISTEFANO, *supra* note 78, at 112.

their computer systems to filter out any unwanted content consistent with their community standards. Congress and the states can assist schools with funding conditioned on the implementation of filtering software. They will not need to legislate in order to regulate content because individual users will be able to filter out the types of information they do not want to access, the children will be protected, and the free exchange of ideas will continue.

*Peter G. Drever, III*