MEMORANDUM OF LEGAL OPINION
"Library Procedures for Disabling Software Filtering and
Unblocking Web Sites"
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I. INTRODUCTION

Concerned Women for America provides these comments for consideration by public library officials with respect to implementing software filtering requirements in conformity to 21 U.S.C. 2134 and the decision by the U.S. Supreme Court in *U.S. v. American Library Association* (*ALA*), No. 02-361, 2003 U.S. LEXIS 4799 (June 23, 2003), upholding the constitutionality of the Children's Internet Protection Act (CIPA).

It is imperative that libraries comply with the CIPA regulations so that their federal funding under the CIPA will not be jeopardized. The FCC has made it easy for citizens to file a complaint for violations by providing a complaint form online at http://www.fcc.gov/cgb/ecfs/.

Furthermore, libraries face paying significant damage awards to library employees who prevail in hostile work environment claims based on exposure to unrestricted Internet pornography. The Minneapolis Public Library settled such a hostile work environment claim with 12 library employees on August 15, 2003, in the amount of $435,000:

> Minneapolis library officials will consider restricting patrons' access to Internet porn and pay $435,000 to a dozen librarians to settle a lawsuit that alleged the prevalence of the images constituted a hostile work environment, the librarians' lawyer said Friday. Library officials confirmed the settlement in a statement. They didn't confirm the amount, but said it involves a payment from their liability insurer. (http://wcco.com/localnews/local_story_227152529.html)

The Minneapolis Library's statement acknowledges that it failed to address the employees' claims in a timely manner:

> The Library acknowledges that it has a duty to protect its employees from unlawful sexual harassment. Since the introduction of the Internet at the Minneapolis Public Library, and to the present, the Library has been attempting to strike a balance between allowing the public access to lawful materials and protecting its employees and patrons from exposure to offensive materials. In retrospect, the Library regrets that it did not respond sooner to the changes presented by Internet access in the Library. (http://www.mplib.org/settlement_030815.asp)

II. CONGRESSIONAL PURPOSE AND REQUIREMENTS OF THE CIPA

The Supreme Court's ruling in *ALA* took note of the express purpose of Congress for enacting the CIPA:

> By connecting to the Internet, public libraries provide patrons with a vast amount of valuable information. But there is also an enormous amount of pornography on the Internet, much of which is easily obtained. 201 F. Supp. 2d 401, 419 (ED Pa. 2002). The accessibility of this material has created serious problems for libraries, which have found that patrons of all ages, including minors, regularly search for online pornography. *Id.,* at 406. Some patrons also expose others to pornographic images by leaving them displayed on Internet terminals or printed at library printers.
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> Upon discovering these problems, Congress became concerned that the E-rate and LSTA programs were facilitating access to illegal and harmful pornography. S. Rep. No. 105-226, p. 5 (1998). Congress learned that adults "use library computers to access pornography that is then exposed to staff, passersby, and children," and that "minors access child and adult pornography in libraries." (*ALA*, 2003 U.S. LEXIS 4799 at 12, 13)

The CIPA's requirements: "Under CIPA, a public library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them." (*Id*. at 10, 11)

The CIPA expressly permits unblocking of "wrongly blocked" Web sites and disabling of software filtering in narrowly defined circumstances: "Disabling during certain use. An administrator, supervisor, or other authority may disable a technology protection measure under paragraph (1) to enable access for bona fide research or other lawful purposes." 21 U.S.C. § 9134 (f) (3).

III. THE FCC ORDER OF JULY 24, 2003

In its Order of July 24, 2003, the FCC did not include procedural guidelines for responding to an adult's request to have software filtering disabled or for the unblocking of a particular Web site. The Order leaves the implementation of the procedure to local libraries:

> In order to comply with the statute's Internet filtering requirement, many libraries must prepare a budget for the purchase of software and related costs, design, procure and/or order software appropriate for their systems, install the software and implement a procedure for unblocking the filter upon request by an adult. This process, as Congress recognized, would almost certainly take some time to complete. (Order at page 6, No. 11)

IV. OPPONENTS OF THE CIPA HAVE ISSUED STATEMENTS THAT ARE INCONSISTENT WITH THE COURT'S RULING IN *ALA*. THESE STATEMENTS WILL BE USED TO CONVINCE LIBRARY OFFICIALS THAT THE COURT'S RULING REQUIRES SOFTWARE FILTERS TO BE DISABLED UPON AN UNCONDITIONAL REQUEST OF AN ADULT LIBRARY PATRON.

ACLU statements:

The ACLU's press release about the *ALA* ruling mischaracterizes the Supreme Court's decision with respect to disabling requests: "The ruling minimized the law's impact on adults, who can insist that the software be disabled." (http://www.aclu.org/Cyber-Liberties/Cyber-Liberties.cfm?ID=12978&c=55)

> We think libraries probably can comply by setting up a system that turns off the software without a face-to-face request to a librarian. We think libraries could

> probably have a bank of computers where the librarian turns off the software every morning or maybe even where the computers have been permanently configured with the software turned off. Then, adults who want to use terminals are told prior to their use that these are computers where the software is turned off and they should not use them unless they want unfiltered access. (http://www.aclu.org/Privacy/Privacy.cfm?ID=13270&c=252)

"If adults are allowed full access, but minors are forced to use blocking programs, constitutional problems remain. … Library blocking proposals that allow minors full access to the Internet only with parental permission are unacceptable." Fahrenheit 451.2: Is Cyberspace Burning?, ACLU August 1997.

(http://archive.aclu.org/issues/cyber/burning.html)

An ACLU article, "Censorship In a Box: Why Blocking Software is Wrong for Public Libraries," ACLU, August, 1998, provides answers to hypothetical questions that are inconsistent with the Court's ruling in *ALA*:

> **Q:** Why shouldn't librarians be involved in preventing minors from accessing inappropriate material on the Internet?
> **A:** It is the domain of parents, not librarians, to oversee their children's library use. This approach preserves the integrity of the library as a storehouse of ideas available to all regardless of age or income. As stated by the American Library Association's Office of Intellectual Freedom: "Parents and only parents have the right and responsibility to restrict their own children's access — and only their own children's access — to library resources, including the Internet. Librarians do not serve in loco parentis."
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> **Q:** Would libraries that do not use blocking software be liable for sexual harassment in the library?
> **A:** No. Workplace sexual harassment laws apply only to employees, not to patrons. The remote possibility that a library employee might inadvertently view an objectionable site does not constitute sexual harassment under current law.
> Available at: http://www.aclu.org/Privacy/Privacy.cfm?ID=5001&c=252

Statements by the American Library Association that are inconsistent with CIPA:

"Few libraries report having difficulties with people looking at pornography. The vast majority of children and adults continue to use the library and the Internet responsibly and appropriately." *Libraries & the Internet Toolkit*, American Library Association, available at:

http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/Intellectual_Freedom3/Intellectual_Freedom_Toolkits/Libraries_and_the_Internet_Toolkit/2002toolkit.pdf.

"Libraries, acting within their mission and objectives, must support access to information on all subjects that serve the needs or interests of each user, regardless of the user's age or the content of the material." *Access to Electronic Information, Services*, and *Networks: An Interpretation of the Library Bill of Rights*, available at: http://www.ala.org/alaorg/oif/electacc.html.

V. THE COURT'S RULING IN *ALA* DOES NOT REQUIRE SOFTWARE FILTERS TO BE DISABLED UPON AN UNCONDITIONAL REQUEST OF AN ADULT.

It is vitally important that the library's procedure with respect to when software filtering may be disabled and when a Web site may be unblocked, complies with the CIPA and the Court's interpretation. If the procedure permits that software will be disabled at the request of any adult user on demand, that would in effect contradict the language and intent of the CIPA and the Court's holding and render the CIPA meaningless.

The comments by the Supreme Court Justices are emphatically clear that the provisions for unblocking a Web site and having a filter disabled are not unlimited. Neither the CIPA nor the Court's ruling permits unblocking or disabling a filter simply on the request of any adult. The request must be either for the purpose of unblocking a wrongly blocked Web site or disabling the filter for the purpose of doing "bona fide research" or other lawful purpose.

Chief Justice Rehnquist made clear that unblocking and disabling a filter are permitted for "any erroneously blocked site" and to "enable access for bona fide research or other lawful purpose":

> Assuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled. When a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter. As the District Court found, libraries have the capacity to permanently unblock any erroneously blocked site, *id.,* at 429, and the Solicitor General stated at oral argument that a "library may … eliminate the filtering with respect to specific sites … at the request of a patron. With respect to adults, CIPA also expressly authorizes library officials to "disable" a filter altogether "to enable access for bona fide research or other lawful purposes." 20 U.S.C. § 9134(f)(3) (disabling permitted for both adults and minors); 47 U.S.C. § 254(h)(6)(D) (disabling permitted for adults). (2003 U.S. LEXIS 4799 at 28, 29)

Justice Kennedy's concurring opinion also acknowledges that disabling is permitted to view "constitutionally protected Internet material":

> If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case. (*Id*. at 37)

Justice Breyer acknowledged in his concurring opinion that an adult library patron may access an "overblocked" Web site and have a filter disabled for the purpose of "bona fide research or other lawful purpose":

> At the same time, the Act contains an important exception that limits the speech-related harm that "overblocking" might cause. As the plurality points out, the Act allows libraries to permit any adult patron access to an "overblocked" Web site; the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, "Please disable the entire filter." See *ante,* at 12; 20 U.S.C. § 9134(f)(3) (permitting library officials to "disable a technology protection measure … to enable access for bona fide research or other lawful purposes"); 47 U.S.C. § 254(h)(6)(D) (same). (*Id*. at 44, 45)

Even Justice Souter emphasized in his dissenting opinion that the CIPA cannot be read to permit unblocking "upon adult request, no conditions imposed and no questions asked":

> [T]he unblocking provisions simply cannot be construed, even for constitutional avoidance purposes, to say that a library must unblock upon adult request, no conditions imposed and no questions asked. First, the statute says only that a library "may" unblock, not that it must. 20 U.S.C. § 9134(f)(3); see 47 U.S.C. § 254(h)(6)(D). In addition, it allows unblocking only for a "bona fide research or other lawful purposes," 20 U.S.C. § 9134(f)(3); see 47 U.S.C. § 254(h)(6)(D), and if the "lawful purposes" criterion means anything that would not subsume and render the "bona fide research" criterion superfluous, it must impose some limit on eligibility for unblocking. ... ("Courts should disfavor interpretations of statutes that render language superfluous"). (*Id*. at 67, 68)

VI. INDEPENDENT TESTING OF SOFTWARE FILTERING TECHNOLOGY HAS DEMONSTRATED ITS ACCURACY IN BLOCKING PORNOGRAPHY WITH MINIMAL BLOCKING OF CONSTITUTIONALLY PROTECTED MATERIAL. THIS WILL MINIMIZE LEGITIMATE REQUESTS FOR DISABLING THE TECHNOLOGY OR UNBLOCKING A WRONGLY BLOCKED SITE.

On December 10, 2002, the Kaiser Foundation released the results of a study titled, *See No Evil: How Internet Filters Affect the Search for Online Health Information*, by Paul Resnick, Ph.D., and Caroline Richardon, Ph.D., of the University of Michigan. According to Kaiser, "The Internet filters most frequently used by schools and libraries can effectively block pornography without significantly impeding access to online health information."

According to the study, "When set at the least restrictive level of blocking ("pornography only"), filters block an average of 1.4% of all health sites" and "block an average of 87% of all pornographic sites." The least restrictive setting comports with the requirements of the CIPA. The Kaiser study was published in the *Journal of the American Medical Association* on December 11, 2002.

In connection with the litigation over the Children's Internet Protection Act (CIPA), the U.S. Department of Justice (DOJ) commissioned eTesting Labs to compare the four leading institutional-grade Web content filtering applications for effectiveness at blocking pornographic material. In October 2001, eTesting Labs compared the accuracy of N2H2 Internet Filtering for Microsoft Proxy 2.0, SmartFilter 3.01, SurfControl's CyberPatrol 6.0, and WebSense 4.3 in blocking 200 randomly selected URLs containing pornography. "Of the products we tested, the N2H2 product provided the best CBR (Correct Blocking Ratio) at 0.980," according to the DOJ report. Among the four major enterprise-filtering providers, N2H2 placed first at 98%, SmartFilter placed second at 94%, WebSense third at 92%, and SurfControl was the least effective at 83%. The study is available at http://www.n2h2.com/etest.php.

On August 15, 2003, the National Telecommunications Information Administration (NTIA) under the auspices of the U.S. Department of Commerce released a report pursuant to section 1703 of the CIPA evaluating the effectiveness of technology protection measures and safety policies used by educational institutions. The CIPA requested NTIA to evaluate whether the currently available Internet blocking or filtering technology protection measures and Internet safety policies adequately address the needs of educational institutions. The CIPA also invited NTIA's recommendations to Congress on how to foster the development of technology protection measures that meet these needs. The NTIA's report concludes:

> [T]he currently available technology measures have the capacity to meet most of the needs and concerns of educational institutions and makes the following recommendations: 1) technology vendors should offer training services to educational institutions on specific features of their products; and 2) expand CIPA's definition of "technology protection measures" to include additional

technologies in order to encompass a wider array of technological measures to protect children from inappropriate content.

VII. CONCLUSION

Library procedures must comply with the CIPA and the Court's ruling in *ALA* or libraries will risk losing federal funding provided by the CIPA, as well as losing damage awards to successful hostile work environment claimants.

The procedures must require that requests to have a Web site unblocked are limited to Web sites or pages that are or have constitutionally protected material and that requests to have a filter disabled are limited to "bona fide research or other lawful purpose."

Futhermore, the record in *ALA v. U.S.* in the district court established that patrons seldom ask to have sites unblocked, a point made emphatically by the ACLU during trial. The ACLU's "Proposed Facts" at the conclusion of the trial, which are available online at http://archive.aclu.org/court/findingsFinal.pdf, state:

> 281. The Fulton County, Indiana, library receives only about 6 unblocking requests each year. (Ewick 4/3/02 at 34)
> 282. The Greenville Public Library in Greenville, South Carolina, has received only 28 unblocking requests since August 21, 2000. (Belk 3/29/02 at 52)
> 283. The Westerville Public Library in Westerville, Ohio, has received fewer than 10 unblocking requests since 1999. (Barlow 4/2/02 at 34)

What the ACLU and the American Library Association are proposing would simply render the CIPA a mouse click away from meaninglessness, as Justice Souter emphasized:

> If the patron selects unfiltered access, the next screen could include a message stating: "Click here if you wish the library to disable the entire filter during your Internet session. By clicking on this box, you declare that you will use the Internet for lawful purposes." Upon the patron's assent, the terminal could provide

unfiltered Internet access. (CIPA Legal FAQs Last update: 8 July 2003 http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/ALA_Washington/Issues2/Civil_Liberties,_Intellectual_Freedom,_Privacy/CIPA1/legalfaq.htm.)

A library staff member must be the one who disables the filter, not the patron. We respectfully urge library officials to promulgate rules that comply with the language and intent of Congress expressed in the CIPA and with the holding of the Supreme Court.

Furthermore, because of the accuracy of software filtering, legitimate requests for unblocking or disabling a software filter should be minimal.

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From 1998-2002, she served as senior director of legal studies for the Family Research Council. From 1992-1998, Mrs. LaRue was senior counsel for the National Law Center for Children and Families in the California office, focusing entirely on pornography law. Prior to that, she was special counsel with the Western Center for Law and Religious Freedom. She has also practiced criminal and juvenile law.

Mrs. LaRue has testified before Congress, numerous state and local legislatures regarding pornography, sexually oriented businesses, and child safety bills. She was instrumental in the passage of a California statute prohibiting distribution of pornography in unattended public news racks accessible to minors, and helped to successfully defend the statute with *amicus curiae* briefs in the Court of Appeals for the Ninth Circuit and in the U.S. Supreme Court. She has authored several *amicus curiae* briefs in the U.S. Supreme Court, federal and state appellate courts on numerous constitutional issues. She is co-author of an *amicus* brief in the Supreme Court in *United States v. American Library Association*. She has assisted legislators and law enforcement agencies to regulate sexually oriented businesses and prosecute obscenity and child pornography cases. She is a nationally recognized expert in pornography law.

Mrs. LaRue has had extensive public speaking and debate experience in law schools, universities, and national media on various constitutional issues. Two law schools, major newspapers and magazines have published her writings. She recently co-authored a book titled, *Protecting Your Child in an X-Rated World*, released by Tyndale House in April 2002. She appears regularly in the national media, including appearances on NBC's

“Today Show,” the CBS "Early Show," FOX NEWS, ABC News, CNN, MSNBC, CNBC, Court TV and “The O’Reilly Factor.”