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Best Interests Not To View This.com: Should the First Amendment Ever Come Second?

Joel R. Reidenberg
Fordham University School of Law, jreidenberg@law.fordham.edu

PANEL III: www.TheGovernmentHas DecidedItIsInYour(Read: Our)BestInterestsNotTo ViewThis.com: Should the First Amendment Ever Come Second?

Moderator: Prof. Joel R. Reidenberg*

Panelists: Ann Beeson†
Jacob M. Lewis‡
Charles Sims§
Lee Tien‖

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* Professor of Law, Fordham University School of Law. A.B., *magna cum laude*, Dartmouth College, 1983; J.D. Columbia Law School, 1986; D.E.A., *magna cum laude*, Université de Paris 1 (Panthéon-Sorbonne), 1987; Ph.D., *summa cum laude*, Université de Paris 1 (Panthéon-Sorbonne), 2003. Professor Reidenberg teaches courses in information privacy and information technology law. He has co-authored two leading books on international data privacy issues, and written numerous articles on Internet regulation.

† Litigation Director, Technology and Liberty Program at the American Civil Liberties Union's National Office in New York City. B.A., University of Texas, 1986; M.A., University of Texas, 1990; J.D., Emory University School of Law, 1993. Ms. Beeson has recently led efforts to challenge the government's expanded surveillance powers under the Patriot Act. She has argued seminal cases on free speech rights in cyberspace before the Supreme Court and has successfully litigated numerous censorship cases at the state and local level throughout the United States.

‡ Appellate Litigation Counsel, Appellate Staff of the United States Department of Justice's Civil Division. A.B., Harvard College, 1978; J.D., Harvard Law School, 1981. Mr. Lewis has defended the constitutionality of the Child Online Protection Act before the Third Circuit, and is involved in the government's appeal of the district court's decision invalidating the Children's Internet Protection Act.

§ Partner Proskauer Rose, LLP. B.A., *magna cum laude*, Amherst College, 1971; J.D., Yale Law School, 1976. Mr. Sims concentrates on copyright, First Amendment, and defamation law and has represented motion picture studios in groundbreaking litigation against hackers under the Digital Millennium Copyright Act.

‖ Senior staff attorney, Electronic Frontier Foundation. B.A. Stanford University, 1979; J.D. Boalt Hall School of Law, 1987. Mr. Tien specializes in the law and policy of

MS. BARTLETT:[#] Good afternoon.

For those of you who were not here this morning, I am Kathy Bartlett. I am the Symposium Editor of the *Fordham Intellectual Property, Media and Entertainment Law Journal* (*IPLJ*). On behalf of the entire *Journal*, I would like to welcome you to our third panel discussion and extend my sincere thanks to our distinguished guest speakers for being here. I look forward to what I hope will be another lively discussion.

It is my pleasure to introduce Professor Joel Reidenberg, who will be moderating this panel. Professor Reidenberg is a Professor of Law at Fordham University School of Law, where he has been teaching since 1990. He has written numerous English and French publications on information technology law and policy, and we are very grateful for his participation.

PROFESSOR REIDENBERG: Thank you, Kathy.

Welcome to our panel this afternoon. I will probably be a somewhat less interventionist moderator than my colleague a little bit earlier, but I fear I may get drawn into the fray. Our panel topic is essentially—I will use the second phrase of the title—*Should the First Amendment Ever Come Second?* In looking at the panelists who will speak this afternoon and seeing their backgrounds, we find a diverse set of issues that this panel can address, ranging from filtering to intellectual property concerns.

I think one common theme among the different topics is the confrontation between the First Amendment and an Information Society. If we look at the trend, both in the U.S. as well as globally over the past twenty years, we have moved from a services to an information-based economy.

It is in that context that we see the First Amendment. The First Amendment is usually thought of as the quintessential rule for

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free speech, privacy and freedom of information on the Internet, and has written several law review articles on these issues.

[#] Kathy Bartlett, Symposium Editor, *Fordham Intellectual Property, Media, and Entertainment Law Journal*, Fordham University School of Law; B.F.A., *summa cum laude*, Jacksonville University, 1981; M.F.A., University of South Florida, 1986; J.D. expected, Fordham University School of Law, 2003.

freedom of speech,[1] but it is really about free flows of information and regulating—or, rather, not regulating—the flows of information. If the First Amendment is, in effect, a general rule of immunity granting unfettered flows of information, we confront the problems that are apparent today; essentially, how do we go about regulating a society that is information-based? If the First Amendment constrains us in our ability to regulate information flows, do we wind up with a society that is lawless and reckless, or do we figure out ways in which we can structure information flows in society consistent with the First Amendment? I hope we can illuminate these questions today in the context of some specific examples.

The ultimate irony, which I was telling one of the panelists just before we started, is the title *Should the First Amendment Ever Come Second?* I worry at times that if we cannot figure out ways of setting boundaries for certain kinds of nefarious activity taking place on the Internet, then perhaps the Second Amendment might come first. Think about that.

This afternoon we have a tremendous group of panelists. Seated in front of you are the players in the debate, whether in the public policy fora, the courts or the Congress.

We will start with Ann Beeson, who is the Litigation Director of the Technology and Liberty Program at the American Civil Liberties Union (ACLU). Ann has been very active in the field. She was the lead counsel in *Ashcroft v. ACLU*,[2] which was the challenge to the Child Online Protection Act;[3] and counsel for the plaintiffs in *Reno v. ACLU*,[4] which is the case that struck down a portion of the Communications Decency Act.[5] Ann is recognized

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1 *See, e.g.*, Abrams v. United States, 250 U.S. 616, 628–29 (1919) (Holmes, J., dissenting) (arguing that the Constitution is premised upon the theory that the marketplace of ideas is the best way to achieve the ultimate truth and that freedom of speech must only be limited where there is a "present danger of immediate evil"); Patterson v. Colorado, 205 U.S. 454, 462 (1907) (holding that the freedom of speech and press clauses of the First Amendment are intended to guard against prior restraints on publication).

2 535 U.S. 564 (2002).

3 Child Online Protection Act [COPA], 47 U.S.C. § 231 (2000).

4 521 U.S. 844 (1997).

5 Communications Decency Act [CDA], 47 U.S.C. § 223.

as one of the Top Fifty Women Litigators in the country by the *National Law Journal*.[6] We are delighted to have her start this afternoon.

MS. BEESON: Thanks.

I just want to talk a little bit about two different lawsuits that I am involved in directly at the moment.

The first one is a constitutional challenge to the Children's Internet Protection Act (CIPA).[7] That is the law that actually mandates that every public library in the country use Internet filters on all of their Internet access computers.[8] The name of the case is *American Library Ass'n v. United States*.[9]

The other case I want to talk about briefly—and I want to talk about how these two cases are related—is one that we recently filed in the District of Massachusetts, called *Edelman v. N2H2*,[10] which involves, in part, a constitutional challenge to provisions of the Digital Millennium Copyright Act (DMCA).[11]

I think there are two themes in what I want to say. First of all, one of the themes is to see how it is that restrictions on the use of copyrighted works can be used to reinforce, and in some cases to justify, censorship in other ways, and, in particular, mandate a filtering technology. The second theme, I think, would be that even though all of the proponents of legislation like the DMCA have said that the primary purpose of it—and I do believe that their

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[6] Margaret Cronin Fisk, *Women at the Top: Fifty Litigators Who Succeed In and Out of the Courthouse*, NAT'L L.J., Dec. 17, 2001, at C2.

[7] Children's Internet Protection Act [CIPA], 47 U.S.C. § 254.

[8] *See* Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 407 (E.D. Pa. 2002) ("CIPA requires that libraries, in order to receive [Library Services and Technology Act (LSTA)] funds or E-rate discounts, certify that they are using a 'technology protection measure' that prevents patrons from accessing 'visual depictions' that are 'obscene,' 'child pornography,' or in the case of minors, 'harmful to minors.'") (quoting 20 U.S.C. § 9134(f)(1)(A) (2000) (LSTA); 47 U.S.C. § 254(h)(6)(B), (C) (E-rate)), *prob. juris. noted*, 123 S. Ct. 551 (2002).

[9] *Id.*

[10] Complaint for Declaratory and Injunctive Relief, Edelman v. N2H2, Inc. (D. Mass. filed July 25, 2002) (No. 02-CV-11503), http://archive.aclu.org/court/edelman.pdf.

[11] Digital Millennium Copyright Act [DMCA], Pub. L. No. 105-304, 112 Stat. 2860 (1988) (codified as amended at 17 U.S.C. §§ 512, 1201–1205, 1301–1322 and 28 U.S.C. § 4001).

intention is honorable—is to protect copyright,[12] in fact many provisions of the law have been very explicitly used to allow companies to hide flaws in their technological programs and in their work.[13] You will see how this plays out again in this particular debate.

I want to first explain, just to give you a sense, because I hope at least that there are some students in the room, of just how complicated litigation is and how hard it is to develop evidence in our cases.

Some of you may know that before the federal challenge to the federal filtering law, there was an earlier challenge to a local policy in Loudoun County, Virginia, which required Internet filters on all the terminals in the Loudoun County Public Library.[14] We were also the lawyers in that case. That was the first time that we had to figure out how in the world we were going to prove to the court that these filters necessarily blocked access to a wide range of valuable speech on the Internet.

We did it in that case through a range of anecdotal evidence, which was not, frankly, very overwhelming. We were only able to come up with anecdotal examples of the kinds of sites that were blocked by the programs.[15] We won that case and it didn't go any further than the district court.[16]

After that case was decided, we began to see that this issue of mandated filters in public libraries was going to be a major First Amendment issue across the country, because we started seeing more and more local libraries decide to filter. So we embarked on

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[12] *See, e.g.*, S. REP. NO. 105-190, pt. 1, at 1–2 (1998) (The DMCA "will provide certainty for copyright owners and Internet service providers with respect to copyright infringement liability online."); H.R. REP. NO. 105-551, at 9 (1998) ("[T]he law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted works.").

[13] *See* Am. Civil Liberties Union [ACLU], *In Legal First, ACLU Sues over New Copyright Law*, ACLU Archives, *at* http://archive.aclu.org/issues/cyber/Edelman_N2H2_feature.html (last visited Feb. 17, 2003).

[14] Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library, 24 F. Supp. 2d 552 (E.D. Va. 1998).

[15] *Id.* at 557–61.

[16] *Id.* at 570.

a more major project to document how filters were blocking access to sites, and particularly in libraries around the country.

Before the federal filtering law was passed, we were actually very close to filing three simultaneous lawsuits against local Internet filtering policies in Alaska, Georgia, and Michigan.[17] I was actually quite disappointed that the CIPA was passed because it ruined my vacation to Alaska, which I didn't get to take because we didn't file the lawsuit.

We again faced this problem—what are we going to put in as expert testimony on over-blocking? We did a lot of searching around. We found a quite young, but also quite brilliant, researcher who is affiliated with the Berkman Center at Harvard.[18] We sat down with him, and we asked what he could do to get us much better evidence of just how flawed these programs are.

The first question that he asked was whether or not he could just literally hack into the programs, reverse-engineer the programs, and obtain a full copy of the list of sites that the products block. We talked about that in detail. We realized that if he did that, he would almost certainly be liable under the provisions of the DMCA that prevent you from circumventing access to a technological protection measure, and from creating a tool that would help you in that process.[19]

And so we decided that we were too busy trying to figure out how to litigate mandatory filters to also at that point file a challenge to the DMCA, so we put that on a shelf for a little bit. We, instead, then came up with a way to document over-blocking which involved downloading literally every single site that Yahoo!

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[17] The ACLU joined with other organizations to bring a lawsuit challenging a Michigan statute that added criminal prohibitions against using computers or the Internet to disseminate sexually explicit materials to minors. *See* Cyberspace Communications, Inc. v. Engler, 142 F. Supp. 2d 827 (E.D. Mich. 2001).

[18] A complete biography of Ben Edelman and his work with The Berkman Center for Internet and Society at Harvard Law School is available at http://cyber.law.harvard.edu/edelman.html.

[19] *See* 17 U.S.C § 1201(a)(1) (2000) (prohibiting circumvention of a "technological measure that effectively controls access to a work protected under this title"); *id.* § 1201(a)(2)(A) (prohibiting manufacturing or providing any "technology, product, service, device, component, or part" designed to circumvent a technological measure that controls access to a protected work).

and Google had ever indexed, basically the entire index of sites from Yahoo! and Google, and running those millions of sites through four different major filtering products.[20]

It took him many, many, many hours to do this research. We had to pay him a lot of money to do it. He actually made, I think, significantly more money than I did as a lawyer for the ACLU, and he hadn't even gotten his college diploma yet—which our friends at the Justice Department made a big deal out of in the trial court, and which actually backfired. Too bad you weren't there, Jake. You would have been amused by it.

MR. LEWIS: I'm not the trial attorney.

MS. BEESON: No, he's not.

Anyway, Ben's research, of course, still did not by any means document every single site that this product wrongly blocks, for a whole number of reasons that are discussed in the opinion of the three-judge court that heard the case,[21] which of course includes the fact that the search engines do not even begin to reach all of the sites on the Internet.

Because he had to come up with some assumptions about how to determine when a site was wrongly blocked, his definition was that the site was wrongly blocked if Yahoo! categorized it as a government site and N2H2 categorized it as pornography. That was a sign that something was wrong and that one of the two classification systems had wrongly categorized it.

He came up with over 4,000 sites, which we submitted on CD-ROM to the court,[22] that were very clearly improperly classified. You know, this is always the most enjoyable part of these talks. I can never resist the urge to give a couple of examples. There are many, many, but some of them are just such fun.

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[20] *See* Expert Report of Benjamin Edelman, Multnomah County Pub. Library v. United States, (E.D. Pa. 2002) (No. 01-CV-1322), http://cyber.law.harvard.edu/people/edelman/pubs/aclu-101501.pdf. Edelman investigated four major filtering products, SurfControl Cyber Patrol 6, N2H2 Internet Filtering 2.0, Secure Computing SmartFilter 3.0, and Websense Enterprise 4.3. *See id.*

[21] *See* Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 427–31, 446–47 (E.D. Pa. 2002), *prob. juris. noted*, 123 S. Ct. 551 (2002).

[22] *See id.* at 442–43; Expert Report of Edelman at 23–26, *Multnomah County Pub. Library* (No. 01-CV-1322).

Orphanage Emmanuel,[23] which is a Christian orphanage in Honduras, was blocked by Cyber Patrol as "adult sexually explicit." The home page of a Buddhist nun was categorized as nudity by N2H2.[24] A Danish anti-death penalty site categorized as pornography—I think that's kind of funny, because if it had been a pro-death penalty site, I, as an ACLU lawyer, might have categorized that as pornography, but an anti-death penalty site, hard to see.[25] The Sydney University Australian football team—now who knows what was really there, but SmartFilter categorized it as sex.[26] Anyway, the list goes on and on, as I say, there are lots of examples.

Again, though, this is not at all quantitative research. It does not show what percentage of the time, for example, these products improperly classify things. For that reason, Ben's research was ongoing, even after we finished the evidence and the filtering case was decided. He is currently looking into how foreign governments are using filters to block access specifically to political sites and to anti-religious sites in some cases. For that reason, even after we won the filtering case at the district court level, he wanted to go on with his research.

He came back to us and asked if we would represent him in a challenge to N2H2. He wanted to obtain a copy of their full list. But if he did that, he may be liable under the DMCA. And so we filed the suit in Massachusetts.[27]

Just to wind up, before I go on to the N2H2 suit, what happened in the filtering case, was the court found that the evidence showed that the products in evidence blocked a wide range of protected speech.[28] The court also found that was inevitable because the very nature of these software programs was such that they could never become perfect enough to distinguish between what is protected speech and what is unprotected

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[23] *See Am. Library Ass'n*, 201 F. Supp. 2d at 446–47.

[24] *See id.*

[25] *See id.*

[26] *See id.*

[27] *See* Complaint for Declaratory and Injunctive Relief, Edelman v. N2H2, Inc. (D. Mass. filed July 25, 2002) (No. 02-CV-11503), http://archive.aclu.org/court/edelman.pdf.

[28] *See Am. Library Ass'n*, 201 F. Supp. 2d at 446–49.

speech.[29] The case is now in front of the Supreme Court, which will probably decide next week whether or not it will take jurisdiction over the case.[30] It is widely expected that it will, so it will probably be heard sometime in the spring.

In July we filed a lawsuit against N2H2.[31] That lawsuit asks for a couple of things. It is a declaratory judgment action. It asks the court, first, to interpret provisions of the DMCA to have some kind of fair use exception, which is not at all clear from any of the earlier case law on the DMCA; and find, in particular, that Ben's reverse-engineering of the N2H2 program would be constitutionally protected fair use.[32]

It also asks to declare the N2H2 licensing agreement to be unenforceable.[33] That is another very interesting, separate issue, which has serious First Amendment implications, because of course the N2H2 license specifically prohibits Ben, the computer researcher, from reverse-engineering the program.[34] That is becoming a very common way that owners of software programs try to extend their property rights much further than the law itself would normally allow.

I think I am going to stop there, because I know I am going over, and I am sure you will have a lot of questions.

But again, the relationship between these two cases just shows that, first of all, with respect to the DMCA, it is not just kids wanting access to DVDs that is at issue. The issue is whether or not very serious computer researchers can investigate, and analyze and publish, their research documenting flaws in programs that the public has a very strong concern in learning the accuracy of.

That's all.

PROFESSOR REIDENBERG: Thank you.

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29 *See id* at 410.

30 *See* United States v. Am. Library Ass'n, 123 S. Ct. 551 (2002) (noting probable jurisdiction).

31 Complaint for Declaratory and Injunctive Relief, *Edelman* (No. 02-CV-11503)

32 *See id.* at 27.

33 *See id.* at 27–28.

34 *See id.* at 20.

This shows, I think, a very interesting area of linkage related to some of the open questions with the DMCA.

Edelman had not yet been challenged, had he?

MS. BEESON: What do you mean? Had they threatened to sue him?

PROFESSOR REIDENBERG: Right.

MS. BEESON: They had done several things, which I didn't get into. It is very clear that N2H2 intends to enforce its property rights against him, and they have said that in their latest 10-Q.[35] I was going to read the language. It actually says in their latest filing with the SEC that they intend to assert all of their legal rights against Edelman if he violates the agreement or their proprietary rights.[36]

PROFESSOR REIDENBERG: That's under a licensing agreement, but not under the DMCA.

MS. BEESON: No, no. Under both. Under every single—

MR. SIMS: But none of that is a threat to sue under the DMCA.

MS. BEESON: Well, they make it quite clear that they will use all available legal remedies, not just the licensing agreement.

PROFESSOR REIDENBERG: The DMCA, though, has two interesting exemptions from the anti-circumvention provision. One is that it is permissible to hack to disable software that is trying to collect personal information.[37] The other is the exemption for trying to discover what the list is of blocked web

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[35] *See* N2H2, Inc., SEC Form 10-Q for Quarter Ending June 30, 2002 ("We intend to defend the validity of our license agreement and to enforce the provisions of this agreement to protect our proprietary rights. We also intend to assert all of our legal rights against Mr. Edelman if he engages in future activity that violates the agreement or our proprietary rights."), http://www.sec.gov/Archives/edgar/data/1077301/000089102002001251/v83748e10vq.htm.

[36] *See id.*

[37] *See* 17 U.S.C. § 1201(i) (2000) (permitting circumvention where the technological measure is capable of "collecting or disseminating personally identifying information . . .").

sites in filtering programs.[38] In essence, the DMCA, which was designed for intellectual property protection, now confronts privacy issues and creates exceptions. The scope of these exceptions is going to be very important for someone like Edelman, trying to put together these lists of blocked programs.

You can also ask the question, if only these 4,000 obscure sites were identified as being blocked, how significant is that blocking? How significant a censorship is that, compared to the harm that might be sought in avoidance by the mandate that filtering be imposed?

We will turn now to Jacob Lewis, who might have a different view of filtering. Mr. Lewis is the Appellate Litigation Counsel in the Civil Division at the Department of Justice. He is a graduate of Harvard College and Harvard Law School, but we won't hold that against him. He has defended the constitutionality of the Child Online Protection Act and was one of the attorneys involved in the defense of the Children's Internet Protection Act.[39]

MR. LEWIS: Thank you.

Before I say anything, because David Carson went through this process earlier, these are my own views. I have to give the standard disclaimer. When the Justice Department makes a filing in court, it really is an enormous institutional process. The language that is in our briefs, and in this case the jurisdictional statements, say, in the *American Library Association* case, is the product of a number of minds, many of which are greater than mine, that actually come up with the government's position.[40] So anything I say that is different from those filings should not be held against the government in a later filing as a "gotcha!" Obviously, I have a fair amount of background and thinking on these kinds of issues, and I hope to give you the benefit of that, but to the extent that, either advertently or inadvertently, I diverge from the

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[38] *See id.* § 1201(g) (permitting circumvention to conduct "good faith encryption research . . .").

[39] Mr. Lewis was a member of the litigation team that defended the CIPA from the ACLU's contention that it violated free speech guarantees. *See* ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000).

[40] *See* Brief for the United States, United States v. Am. Library Ass'n, 201 F. Supp. 2d 401 (E.D. Pa. 2002) (No. 02-361), *prob. juris. noted*, 123 S. Ct. 551 (2002).

government's position, you should not confuse my statements with the statements that the government has made in cases that have, are, or will be in litigation.

To go back to the point of the 4,000 sites, that really is an extremely important question. I think that Ben Edelman's universe of sites that he ran through to get the 4,000 was about 500,000.

But the point is that the Internet contains a vast number of web sites. The three-judge district court in the *American Library* case estimated one or two billion web pages, billions of unique web sites.[41] So it may be all too easy to find even thousands of sites where it clearly seems that the blocking is off the wall. I am not saying that any of the ones on the list are off the wall. There may be justifications for them.

But assume for the moment that there were 4,000, and with diligence you could find even a few more thousand. In the context of the web, with millions and billions of web pages, that by itself would not tell you that there is a significant amount of over-blocking going on. In the context of this kind of lawsuit, which is a facial challenge to the statute before it has been enforced without any particulars, it does not tell you that, in the words of the legal standard, that the statute is substantially overbroad.

One of the problems with any of this kind of litigation involving the Internet is the Internet is so vast that numbers which in isolation appear to be large may not be large when compared against the world of the Internet.

Second, Ann talks about the Children's Internet Protection Act as "mandating" filtering in public libraries. But the Act is actually a condition of federal funding.[42] The public libraries are free not to take the funds that are under the particular federal programs. In fact, I am not quite sure of the exact figures, but my understanding

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[41] *See Am. Library Ass'n*, 201 F. Supp. 2d at 419 (stating that "a figure of 2 billion is a reasonable estimate of the number of Web pages that can be reached . . . by standard search engines"), *prob. juris. noted*, 123 S. Ct. 551 (2002).

[42] *See* 47 U.S.C. § 254(h)(6)(A)(i) (2000) (describing the "[r]equirements for certain libraries with computers having Internet access").

is that federal funding as a percentage of total funding of public libraries is quite a small amount.[43]

In any event, the freedom is there. If any particular public library does not like the condition on the statutory programs that provide funding for Internet-connected computers they do not have to take the money. The condition then goes away, it is irrelevant so far as they are concerned.

I can't really speak to the N2H2 litigation. I know there is a challenge lurking somewhere in there to the constitutionality of the DMCA. If that ripens, probably a trial branch at the Justice Department will be getting involved, since the Department of Justice defends the constitutionality of federal enactments.

I am grateful to be an appellate attorney. I only do courts of appeals cases, so I get to either ride the momentum of a case that goes well; or on occasion, maybe more than one occasion, pick up the pieces, or try to pick up the pieces, after they have all fallen apart below. In any case, there will be some time before the N2H2 case would even come up to my office.

On the other hand, the CIPA litigation has been through my office and now the government's appeal is before the Supreme Court.[44] My understanding is the Court was scheduled to consider whether they would take the case today. Since the other parties to the case have not really opposed the Court granting review, I would be very surprised if the Court didn't grant review.[45]

To my mind, the interesting thing about the library filtering case, the CIPA litigation, is less the nuances of public forum doctrine or the particulars of the blocking software, but the fact that the case may actually turn to a large extent on what one views as the nature and role of a public library.

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[43] *See, e.g.*, Betsy Sywetz, Public Testimony Submitted for Spring 1999 Hearings by the Regents Commission on Library Services, Huntington Station, N.Y., *at* http://www.nysl.nysed.gov/rcols/tst-li.htm (May 19, 1999) (wherein New York's Deputy Director of the Office of Library Services notes that "Library service is generally considered a local responsibility in the United States. . . . In New York State about 10% of library funding comes from the State and less than 2% from the federal government.").

[44] *See Am. Library Ass'n*, 123 S. Ct. at 551 (noting probable jurisdiction).

[45] *See id.*

The district court ultimately determined that the standard by which it was supposed to evaluate filtering's effectiveness or these technology protection measures that the statute requires is strict scrutiny.[46] In doing so, the court considered the public libraries' connections to the Internet to be a public forum—a limited public forum but a public forum nonetheless, and for various reasons the court found strict scrutiny applied.[47]

But the district court acknowledged that it would not apply strict scrutiny to a library's traditional collection development decisions.[48] That is, public libraries—all libraries—have finite budgets. They cannot buy or store every book, magazine, print, or video that is created in the world, so they have to make decisions about what to acquire, and indeed what to retain. So in the district court's view, the library must necessarily make a choice as to whether to purchase, for example, books on gardening or books on golf.[49]

At a later point, the district court wrote that with its "last $100" a library could decide to buy "the complete works of Shakespeare" rather than "the complete works of John Grisham"[50]—although in the public library area it is usually the other way around. The district court found that that kind of decision was subject to rational basis review and did not really pose a First Amendment problem.[51]

But when we look at library collection development decisions, common sense tells us that public librarians often make all sorts of decisions about what books to acquire on the basis of their content.

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[46] *See Am. Library Ass'n*, 201 F. Supp. 2d at 470 (The "Internet . . . presents unique possibilities for promoting First Amendment values . . . [which,] in the context of the provision of Internet access in public libraries, justify the application of heightened scrutiny to content-based restrictions that might be subject to only rational review in other contexts . . . .").

[47] *See id.* at 457 ("We are satisfied that when the government provides Internet access in a public library, it has created a designated public forum.").

[48] *See id.* at 462 ("[W]e agree with the government that generally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational review.").

[49] *See id.* at 408–09.

[50] *Id.* at 462.

[51] *See id.*

The librarian can decide that a certain book is not as good as another book, or that it is just plain wrong. Nothing in the First Amendment requires a library to buy a book on alchemy or extrasensory perception or that would demean persons because of their race or ethnicity or religion. A librarian may choose to acquire such a book, but the First Amendment would not require the library to do so.

That traditional judgment is exercised where sexually explicit materials are concerned. In the record in the case, the district court acknowledged that very few public libraries collect the graphic sexually explicit materials, such as XXX-rated videos or *Hustler* magazine.[52] The district court noted that, according to the OCLC database, which is a database of 48,000 libraries worldwide, only 400 in the database, of all types of libraries everywhere in the database, wherever they are located, even outside the country, only 400 were listed as carrying a subscription to *Playboy* magazine and only eight to *Hustler*.[53] So clearly, with regard to this what I would call the off-line collection, the traditional print magazine collection, there is this kind of entirely appropriate content-based judgment going on.

The rules should be no different, it seems to me, where the connection to the Internet is concerned. A library connects to the Internet for the same reasons that it buys traditional materials, in order to expand its collection. The fact that the library by connecting to the Internet thereby has the potential to connect to all of the Internet does not mean it has to connect to all of the Internet.

The fact is there are a limited number of terminals, there is a limited amount of time, even with regard to an Internet connection. Many libraries, if you go to the public library, may have a sign-up sheet saying thirty minutes for time at the computer. There may be a line of people waiting.[54]

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[52] *See id.* at 420.

[53] *See id.* at 420 n.4.

[54] The district court observed that:

> Nearly every librarian who testified at trial stated that patrons' demand for Internet access exceeds the library's supply of Internet terminals. Under such circumstances, every time library patrons visit a Web site, they deny other patrons waiting to use the terminal access to other Web sites. Just as the

The record showed that libraries had dealt with that kind of scarcity by, among other things, for example, excluding game playing or banning email or access to chat rooms, in order to presumably promote the most efficient use of terminals.[55] Someone who is waiting to do research on a medical condition, for example, is not going to be particularly happy if they are not able to get to that computer before closing time because there is some other patron who is engaged in extended email conversation, or is looking up a fantasy football league, or whatever it might be.

The district court's assumption was that the First Amendment prohibits a library from making any kind of restriction on Internet access.[56] But just as the library can exercise traditional collection judgment with regard to regular printed materials, it should be able to do so with regard to sexually explicit materials on the Internet.

So when you look at what CIPA does, it encourages libraries to exercise their judgment in a particular way—in other words, to employ a technology protection device that would exclude child pornography and obscenity, which are unprotected by the First Amendment, and harmful-to-minors material so far as minors are concerned.

The district court would have said that the libraries did not have an ability to exercise that judgment to exclude that speech, and so therefore the statute is unconstitutional because it is paying libraries, in essence, to do something unconstitutional.

That meant, by the way, that the seven percent of libraries that the district court found already employed filtering even before the CIPA, were doing something that was presumably violating the First Amendment.[57]

> scarcity of a library's budget and shelf space constrains a library's ability to provide its patrons with unrestricted access to print materials, the scarcity of time at Internet terminals constrains libraries' ability to provide patrons with unrestricted Internet access . . . .

Id. at 465 n.25.

[55] *See id.* at 422 (noting that the Fulton County Public Library "restricts access to the Web sites of dating services" and the Tacoma Public Library "does not allow patrons to use the library's Internet terminals for personal email, for online chat, or for playing games").

[56] *See id.* at 411.

[57] *See id.* at 406.

The district court also stated that filtering was a problem because it involved connecting to the Internet and then excluding various things.[58] In contrast, in the district court's view, with a traditional library collection, a book comes in, you look at the book, you see whether the book is okay, and then you either acquire it or not.[59]

But that is not actually how things work even in the traditional world. There are plenty of instances in which a librarian does not review a book before it has been acquired. Indeed librarians cannot physically read or review all the materials that come into the library before the fact. Librarians have necessarily relied on bibliographies and finding aids and book reviews—many of the same kinds of things you might rely on in deciding whether to buy a book in a bookstore.[60]

But public libraries also employ what are called approval plans, in which a library signs up with a publisher or a wholesaler and says, look, give us everything that comes in that you think is the kind of stuff we collect. They might even give them some specific instructions about the kinds of things they collect. And if they have a problem with what comes in after they have looked at it, they will send the material back.[61]

They might, for example, say John Grisham is absolute gold. If he writes another book, we are taking whatever it is. And they do not have to read the next Grisham in order to determine that it is appropriate for the library. In fact, that book might never be touched by human hands until the patron first takes it out.

By the same token, a library that receives a bequest of 5,000 books, say, even if they had the space on the shelves for it, is not required to keep all those 5,000 books in its collection just because they are free and they have space. The librarian can go through the

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[58] *See id.* at 421.

[59] *See id.*

[60] *See id.* (noting that "many librarians use selection aids, such as review journals and bibliographies, as a guide to the quality of potential acquisitions").

[61] *See id.* (referring to the "use of third-party vendors or approval plans to acquire print and video resources" and explaining that in "such arrangements third party vendors provide materials based on the library's description of its collection development criteria").

books and decide which ones they want to take and, for example, not to take the ones that may be sexually explicit.

The important point is that the library in all such cases exercises judgment. The district court seemed to suggest that the First Amendment prevented the library from having any judgment in this area.[62] But in fact this kind of judgment has traditionally been employed by librarians to further First Amendment purposes.

Libraries are not just warehouses, they are places of guidance. Libraries collect books so that you can go to the best book for your purposes in the quickest way. Librarians can make the judgment that there are certain types of books, certain kinds of books, that do not further their purposes as well as other kinds of books.

That is the main point, maybe the most interesting point, and to a large extent a non-legal point. In the end, the *American Library* case may turn as much on a perception of matters outside legal doctrine as it does on the nuances of the legal concepts that are at issue.

PROFESSOR REIDENBERG: Thank you. Very interesting presentation.

In the comments that Ann and Jake have suggested to us, it sounds like the case is turning in part on the quality of the technology, and on the court's understanding of what the technology was and how it functioned. At the district level, the court did not see connecting to the Internet as analogous to the acquisitions decisions that a librarian traditionally makes.[63] All of

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[62] *See id.* at 464–65.

> While the First Amendment permits the government to exercise editorial discretion in singling out particularly favored speech for subsidization or inclusion in a state-covered forum, we believe that where the state provides access to a 'vast democratic forum' . . . and then selectively excludes from the forum certain speech on the basis of its content, such exclusions are subject to strict scrutiny.

Id.

[63] *See id.* at 462. The court found that the "central difference" between the use of Internet filters and the editorial discretion exercised in choosing books for the library's collection is that

> by providing patrons with even filtered Internet access, the library permits patrons to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers without attempting to restrict patrons'

a sudden, the library did not need to make acquisition decisions anymore.

If the technology blocked a couple of sites inaccurately because the technology was not that refined, then it is the law that is wrong, rather than the technology that needs to be fixed.

We may hear more about this relationship between the law's dictates and the technology's capability coming from our next speaker.

He is Lee Tien, the Senior Staff Attorney at the Electronic Frontier Foundation (EFF).[64] He specializes in the law and policy of free speech and privacy. He served his undergraduate time at Stanford and then at Boalt, where he received his law degree. He has published on and litigated cases involving free speech and Internet speech.

MR. TIEN: Thank you very much.

My talk today is going to be only obliquely related to the previous speakers' presentations.

When I looked at this subject, I thought: There isn't a whole hell of a lot that I could say about censorware or filtering that Ann and Jake couldn't talk about. So I am going to take a different approach to the issue of the Internet and speech.

Eventually, this PowerPoint presentation will come up, but I will go ahead and start, rather than wait until it does.

I have titled this talk *Sex, Science, Harm, and the Internet.* I chose this very general idea to think about the different kinds of harms that are associated with speech and our conceptions of or assumptions about those harms.

Let's start with the censorware example. You've got a kind of harm there. In the white paper that EFF did for the National

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access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable.

Id.

[64] The Electronic Frontier Foundation [EFF] is a donor-supported membership organization dedicated to protecting digital rights. *See* http://www.eff.org (last visited Apr. 9, 2003).

Academy of Sciences,[65] we argued that one of the bases for censorware or for blocking software is the notion that sexual images are "toxic material," that simple exposure to sexual images was in itself harmful.[66] This is one of the basic paradigms of First Amendment harm.

[Slide] Voila! Thank you.

Here, for instance, is a quote from the American Family Online page, which sums up this idea of toxicity.[67] So we have this idea of exposure as harm.

[Slide] As we know from looking at the censorware cases, censorware blocks a lot of other material. Here are some examples that were called out in the CIPA decision.[68]

I think it is no surprise that when Ann constructed this case, she made some very careful choices about who the plaintiffs would be. Among these web and patron plaintiffs were people who were either focused on disseminating or accessing scientific information, such as about breast cancer, reconstructive breast surgery, that sort of thing. So in this particular area, at least, we see a notion that the scientific value of information acts almost as a trump, that is, there is a high value to scientific speech.

[Slide] But in the First Amendment area, that is not the way that science is uniformly looked at and exposure is not the only kind of harm we deal with.

In the area of national security harm, harm is not due to "toxic" exposure. It is a different kind of harm. For instance, simply publishing the sailing dates of transports or the number and

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[65] EFF's white paper was submitted as part of a congressionally commissioned study on *Tools and Strategies for Protecting Kids from Pornography and Their Applicability to Other Inappropriate Internet Content* performed by the National Research Council, a division of the National Academy of Sciences. The study was eventually published as YOUTH, PORNOGRAPHY, AND THE INTERNET (Dick Thornburgh & Herbert S. Lin eds., 2002), *available at* http://bob.nap.edu/html/youth_internet.

[66] *Id.*

[67] "CAUTION . . . Pornography is dangerous, and viewing it (even for a moment) can set off a terrible chain of events." American Family Online, *Help Desk*, *at* http://www.afo.net/help/filter.htm (last visited Apr. 9, 2003).

[68] Examples included information about breast cancer, sexually transmitted diseases, and health/medical information about sex. *See Am. Library Ass'n*, 201 F. Supp. 2d at 446–47.

location of troops does not necessarily cause harm to those exposed.[69] The problem is that it reveals information that someone might use to prevent something from happening.

Similarly, in the *Bernstein* case,[70] which involved scientific "exports" (publication) of encryption software, the government was not claiming that encryption software was like a virus, that it would directly cause harm, that the speech itself would in some way be harmful; rather, the claim was that someone could use encryption overseas in a way that was detrimental to the U.S. interest.[71]

Now, the government argued that software was not really speech. EFF argued that there was a very strong communicative aspect to programs. So there again, we used the notion of science as high-value speech to frame the publication of source code, helped by the fact that our client, Professor Bernstein, was first a graduate student and then a professor.[72]

[Slide] But now let's turn to some of the other types of harm. Another example, economic harm, is exemplified by the DMCA.[73] Copyright law has always restricted some speech in order to protect the economic interests of copyright holders. The DMCA was enacted to strengthen that protection. Now, the anti-circumvention provisions of the DMCA,[74] which are at issue in the *Edelman*[75] case and also in a case that EFF litigated last year, the *Felten*[76] case, raise some serious questions of restrictions on scientific speech.

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[69] *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) (finding that "no one would question but that a government might prevent . . . publication of the sailing dates of transports or the number and location of troops").

[70] Bernstein v. U.S. Dep't of Justice, 176 F.3d 1132 (9th Cir. 1999), *withdrawn, reh'g granted*, 192 F.3d 1308 (9th Cir. 1999).

[71] *See Near*, 283 U.S. at 716.

[72] *See Bernstein*, 176 F.3d at 1135.

[73] *See* 17 U.S.C. § 1201(a) (2000).

[74] *See id.* §§ 1201–1205.

[75] Complaint for Declaratory and Injunctive Relief, Edelman v. N2H2, Inc. (D. Mass. filed July 25, 2002) (No. 02-CV-11503), http://archive.aclu.org/court/edelman.pdf.

[76] Felten v. Recording Indus. Ass'n of Am., No. CV-01-2669 (D.N.J. dismissed Nov. 28, 2001). *See* EFF, *Frequently Asked Questions About* Felten & USENIX v. RIAA *Legal Case*, *at* http://www.eff.org/IP/DMCA/Felten_v_RIAA/faq_felten.html (last visited Apr. 9, 2003) (giving background information about *Felten*).

The technology anti-trafficking provisions not only make it unlawful to disseminate technologies of circumvention, but they also have very limited exceptions that actually curtail existing law permitting reverse-engineering, such as under the *Sega v. Accolade* fair use decision.[77]

So one of the questions we had in the *Felten* case, which we hoped would be elucidated, was whether the Section 1201 provisions against technology should be read to include scientific papers like that published by Professor Felten.[78]

Now, Professor Felten's paper was based on something called the SDMI Challenge.[79] He and his research team looked at how various watermarking and other related technologies of the music industry could be defeated or beaten. This was part of a contest where the recording industry actually invited people to go ahead and do this kind of research, so there was no issue as to the legality of the research team's investigations. On the other hand, there were questions as to whether or not he could publish the team's research results.

This case was ultimately dismissed on justiciability grounds, largely because the recording industry, which had originally threatened Professor Felten and his research team with a lawsuit if they published the paper, ended up agreeing to permit the publication of the paper.[80] And so the threat was, as far as the district court was concerned, withdrawn.[81]

[Slide] Now the last set of examples I want to examine has to do with science and the post-9/11 era. We are seeing, obviously, a lot of restrictions on scientific speech. This is not a topic that has

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[77] Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992).

[78] *See Felten*, No. CV-01-2669.

[79] The Secure Digital Music Initiative [SDMI] challenge was a contest set up by the recording industry under the auspices of the Recording Industry Association of America [RIAA], which asked "hackers" to circumvent a number of digital music security technologies. *See* Cassandra Imfeld, *Playing Fair with Fair Use? The Digital Millennium Copyright Act's Impact on Encryption Researchers and Academicians*, 8 COMM. L. & POL'Y 111, 136–38 (2003).

[80] *See* Transcript of Motions Before Honorable Garrett E. Brown, United States District Court Judge, Nov. 28, 2001, *Felten* (No. No. CV-01-2669), http://www.eff.org/IP/DMCA/Felten_v_RIAA/20011128_hearing_transcript.pdf.

[81] *See id.*

gotten a lot of public press, although certainly the *New York Times* has been covering this.[82] But there is simply a lot of activity going on in the higher levels of government and in academia that all revolve around the question of how much of this stuff that you ordinarily published in scientific journals really needs to be out there[83]

MIT, for instance, has gone on record saying (in essence) that they have been approached by many government contracting officers to include provisions in R&D funding contracts that would give government officials the power to decide that certain information in the research was sensitive and could not be disclosed. They are not going to accept that.[84]

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[82] *See, e.g.*, William J. Broad, *U.S. Is Tightening Rules on Keeping Scientific Secrets*, N.Y. TIMES, Feb. 17, 2002, § 1, at 1.

[83] *See* Sheryl Gay Stolberg & Judith Miller, *Many Worry About Germ Attack*, N.Y. TIMES, Sept. 9, 2002, at A16 (noting that "a deep philosophical divide has emerged between scientists and intelligence officials over whether to withhold scientific information in the name of national security").

[84] *See Conducting Research During the War on Terrorism: Balancing Openness and Security: Hearing Before the House Comm. on Science*, H.R. REP. NO. 107-809 (2002) (testimony of Sheila Widnall, Institute Professor and Professor of Aeronautics and Astronautics, Massachusetts Institute of Technology). Dr. Widnall explained that MIT recommended

> because there is no consistent understanding or definition of what would constitute 'sensitive' information, MIT should continue its policy of not agreeing to any sponsor's contractual request that research results generated during the course of a program be reviewed for the inadvertent disclosure of 'sensitive' information. Increasingly, MIT has seen the attempt by government contracting officials to include a requirement that research results be reviewed, prior to publication, for the potential disclosure of 'sensitive' information. Such a request implies potential restrictions on the manner in which research results are handled and disseminated, and may also restrict the personnel who have access to this material. The difficulty with this approach is that the term 'sensitive' has not been defined, and the obligations of the Institute and the individuals involved have not been clarified nor bounded. This situation opens the Institute and its faculty, students, and staff to potential arbitrary dictates from individual government contract monitors-however well intended. To date, MIT has refused, in all cases, to accept this restriction in any of its government contracts.

Sheila Widnall, *Testimony Before the House Committee on Science*, House Committee on Science Hearings, *at* www.house.gov/science/hearings/full02/oct10/widnall.htm (Oct. 10, 2002).

This question of scientific openness and national security is not new. After the *Corson Report*[85] during the Reagan Administration, a simple principle was articulated—that research will either be classified, in which case it is going to be done very, very tightly; or it is going to be open, unclassified. The thought was we needed a bright line, because having an in-between line of "sensitive but unclassified" would make it very hard for scientists to do their work.

The University of Illinois-Chicago recently held a conference that included a panel featuring Abigail Salyers, past president of the American Society of Microbiology (ASM), and she confirmed that there has been an incredible amount of pressure from the government, as to what should or should not be able to publish in an open peer-reviewed scientific journal.[86] The pressure has also been internal, because these scientists think very much about the public interest and about the scientific ethics of what they do.[87] There is definitely a great deal of concern about there being too much interference with the scientific process.[88]

[Slide] I bring up these examples because I think that they tie in with the general questions of what is science and what kinds of harms are we really going to focus on in the First Amendment area.

The normal speech rules would tend to say that you cannot restrict this kind of speech. The *Pentagon Papers* standard for prior restraints,[89] the *Brandenburg* advocacy test,[90] *Florida Star*,[91]

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[85] NAT'L ACADEMY OF SCIENCES ET AL., SCIENTIFIC COMMUNICATION AND NATIONAL SECURITY (1982), *available at* http://www.nap.edu/books/0309033322/html/.

[86] *See* Diana Jean Schemo, *Scientists Discuss Balance of Research and Security*, N.Y. TIMES, Jan. 10, 2003, at A12.

[87] *See id.*

[88] *See id.*

[89] N.Y. Times Co. v. United States, 403 U.S. 713, 730 (1971) (Stewart, J., concurring) (arguing that the newspaper could not be enjoined from publishing highly sensitive and possibly unlawfully obtained government documents unless disclosure "will surely result in direct, immediate, and irreparable damage to our Nation or its people").

[90] Brandenberg v. Ohio, 395 U.S. 444, 444–47 (1969) (finding advocacy of unlawful conduct is protected speech unless "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action").

and other related cases[92] say that information once in the public domain cannot be restricted.

[Slide] But today we have a very different kind of ethos, at least in some circles, which is that the science is going to be misused.[93] I think it is important to see here that one reason why we have this concern about speech and harm is the presence of the Internet.

[Slide] Now, the problem that the Internet poses for all of this is that you no longer have the sort of presumption of limited dissemination that we had in the old days.

[Slide] We see this problem in the privacy area as well. We were happy to allow all sorts of information to be treated as public records because it was locked up in a dusty file cabinet somewhere.[94] Now that public records are being put online, we are starting to reevaluate. whether we should we do that. Did we really mean to say that this—maybe a Social Security number, some other information—ought to be public? The Internet is causing us to redefine what a public record is.

What I want to suggest is that we are seeing in the area of First Amendment law the Internet having the potential to redefine what

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[91] Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989) (finding First Amendment prevents sanction for publishing truthful, lawfully acquired information of public significance, absent a state interest of the highest order).

[92] *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 528 (2001) (finding "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order").

[93] *See* Ronald M. Atlas, *Bioterrorism: The ASM Response*, ASM News, *at* http://www.asmusa.org/pasrc/feature1.htm (last modified June 10, 2002) ("[B]ioethicist Arthur Caplan from the University of Pennsylvania is widely quoted as saying, 'We have to get away from the ethos that knowledge is good, knowledge should be publicly available, that information will liberate us. . . . Information will kill us in the techno-terrorist age, and I think it's nuts to put that stuff on Web sites.'"). *See also* United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979) (holding that publication of how to build a hydrogen bomb could be used against the United States by its enemies in a nuclear war and, therefore, restraint on publication is valid).

[94] *See, e.g.*, U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989) ("[P]lainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.").

is permissible within the *Brandenburg*[95] framework. *Brandenburg*'s relevance here, as a doctrinal matter, lies in its setting a minimum standard for punishing speech based on its "tendency" to cause harmful action by a reader or listener.[96]

[Slide] Now, as for advocacy and abstract teaching, if you are familiar with the old cases—*Noto*[97] and *Yates*,[98] involving the Smith Act and Communist membership—these are concepts that the Supreme Court came up with to try to distinguish between what was permissible and what was not. It was ultimately all subsumed into *Brandenburg*.[99]

William Wiecek wrote a very nice article in the *Supreme Court Review* about a year ago talking about the legal foundations of American anti-Communism.[100] Wiecek argues that part of what made the anti-Communist hysteria so powerful was that the U.S.S.R. and its creation of the Comintern[101] put into place something that policymakers in the United States and in other countries could look at as a covert network, an apparatus devoted to the spreading of bad information.[102]

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95 395 U.S. at 444.

96 *See* Marc Rohr, *Grand Illusion?*, 38 WILLAMETTE L. REV. 1, 19 (2002) ("[B]y logical implication [*Brandenburg*] creates a threshold that must be satisfied in every instance in which governmentally controlled sanctions are sought to be placed upon the exercise of speech perceived as likely to inspire illegal or dangerous behavior on the part of a listener, regardless of the intent of the speaker.").

97 Noto v. United States, 367 U.S. 290, 297–98 (1961) ("[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action").

98 Yates v. United States, 354 U.S. 298, 324–25 (1957) (distinguishing advocacy of action from advocacy of belief).

99 395 U.S. at 444.

100 William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375.

101 The U.S.S.R. organized the Comintern (Communist International) in 1919 to spread communism all over the world. *See id.* at 388.

102 As Justice Frankfurter wrote in a December 1942 letter to Justice Murphy, "the Soviet Government fashioned the Comintern—the Third International—as the instrument of the political export business of the Soviet and the Communist Party. In each country there was a branch office of this international export business of the Soviet Government. And those who were running the branch business in the various countries were, in fact, political instruments of the Soviet regime." *Id.* at 430.

[Slide] This quote from *Dennis* I think exemplifies the point: "[t]he existence of the conspiracy . . . creates the danger. . . . If the ingredients of the reaction are present, we cannot bind the government to wait until the catalyst is added."[103]

Now, what I want to suggest is that in our time you don't need the U.S.S.R. and the Comintern. The Internet itself ends up being sort of the unstated substitute—or the stated substitute—for a conspiracy or a network, because information flows everywhere, to everyone.

[Slide] So we have a number of shifts in the assessment of harm. People are beginning to argue in the law review literature that technical information does not really have very much expressive value.[104] I think we see a downgrading of science.

[Slide] There have been a number of articles criticizing the *Brandenburg* decision in recent years, and they end up saying things like, we should consider the gravity of the harm, etc., etc.[105] I understand where these proposals are coming from, but they promote ad hoc balancing and do not provide the kind of protection for speech that the *Brandenburg* test does.

[Slide] One of the problems of these tests is that they focus strictly on a quantitative or sort of an actual risk of harm. In the *Brandenburg* situation, you are not necessarily talking about a speaker who intends a bad result. So when you eliminate or dilute

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[103] Dennis v. United States, 341 U.S. 494 (1951). *See also* United States v. Dennis, 183 F.2d 201, 213 (2d Cir. 1950) ("Any border fray, any diplomatic incident, any difference in construction of the *modus vivendi*—such as the Berlin blockade we have just mentioned—might prove a spark in the tinder-box, and lead to war. We do not understand how one could ask for a more probable danger, unless we must wait till the actual eve of hostilities.").

[104] *See* Valeria M. Fogleman & James Etienne Victor, *The Critical Technologies Approach: Controlling Scientific Communication for the National Security*, 4 BYU J. PUB. L. 293, 373 (1990); S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond* Brandenburg, 41 WM. & MARY L. REV. 1159 (2000).

[105] *See, e.g.*, David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the* Brandenburg *Test*, 29 GA. L. REV. 1, 14 (1994); Cass Sunstein, *Is Violent Speech a Right?*, 6 AM. PROSPECT 22, 34 (1995) ("*Brandenburg* made a great deal of sense for the somewhat vague speech in question . . . where relatively few people were in earshot" but "when messages advocating murderous violence flow to large numbers of people, the calculus changes.").

an intent requirement, then you are essentially attributing the foreseeable consequences of what others may do with speech to the speaker.

[Slide] I think we also have associated with the rise of the Internet a changing notion of the public. Traditionally, in First Amendment law, the public has been viewed as a whole.

One of the things we see in the censorware area is, at the very least, an audience segregation between the minors and everyone else. But the terrorism situation, I think, is turning it into something even more dangerous. The public is now seen as an aggregate or a composite of many different parts, multiple audiences, and we are beginning to see our job, or people are beginning to see the job, as how do we keep those audiences segregated—how do we speak to one set but not the other. In a scientific context, that turns into a "need to know" mentality.

[Slide] And you actually see that in the DMCA. There are exceptions, for instance, for encryption research[106] and for reverse-engineering.[107] But within those exceptions there are also restrictions on who you can give the information to.[108] The idea is not that, if you can do the research, then you can publish the information openly. There is instead the idea that it should only be disseminated to, say, bona fide encryption researchers, although the Act does not specify how you know who those are.[109]

[Slide] So here is the general recap. What I worry about is that under the pressure of these many different areas, and I'm not

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[106] *See* 17 U.S.C. § 1201(g) (2000).

[107] *See id.* § 1201(f).

[108] *See id.* § 1201(f)(3) (limiting the scope of dissemination for information gained through exempted acts); *id.* § 1201(g)(3)(A) (noting that the applicability of encryption research exemption depends on "whether the information derived from the encryption research was disseminated, and if so, whether it was disseminated in a manner reasonably calculated to advance the state of knowledge or development of encryption technology, versus whether it was disseminated in a manner that facilitates infringement under this title or a violation of applicable law other than this section, including a violation of privacy or breach of security").

[109] *See id.* § 1201(g)(3)(B) (stating that the applicability of encryption research exemption depends on "whether the person is engaged in a legitimate course of study, is employed, or is appropriately trained or experienced, in the field of encryption technology").

saying that they are all coming from the same place—whether it is from intellectual property, whether it is from concern about sexual imagery, whether it is concern about national security or economic harm—the sort of pressure is to take *Brandenburg* back to something that looks a lot like the *Dennis* test.[110]

[Slide] I will stop with a quote from Justice Jackson in *Korematsu*,[111] which sums up my feeling about where we seem to be heading in free speech law: "The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[112]

We understand why a lot of these different interest groups want to restrict scientific publication, why they want to impose liability on speakers for what their hearers may do. But, even though they do not intend it, there is a real danger of that kind of principle becoming ensconced in First Amendment jurisprudence.

Thank you.

PROFESSOR REIDENBERG: Thank you, Lee, for a fascinating broadening of the problem. Essentially you are talking about dual-use data and dual-use audiences and the kinds of First Amendment problems those now pose for us.

I think we will move right to Chuck Sims, who we heard on the last panel, so I will abbreviate the introduction. I will just point out that in this field he has litigated challenges to content-based restrictions on cable television programming in the Supreme Court case *Denver Area Educational Television Consortium v. Federal*

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[110] Dennis v. United States, 341 U.S. 494, 510 (1951) ("In each case courts must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.").

[111] Korematsu v. United States, 323 U.S. 214 (1944).

[112] *Id.* at 247 (Jackson, J., dissenting) ("A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution.").

Communications Commission,[113] and he was also involved in the First Amendment challenge[114] to New York's Son of Sam law.[115]

MR. SIMS: And I was co-counsel with Ann, although not co-trial counsel, in the library filtering case.[116] Jake Lewis seems like a very nice guy, and I am sure I would feel better about his censorship decisions, even his library discretionary decisions, than John Ashcroft's. But I think that he tells a tale which is essentially *Hamlet*[117] without the ghost, which wouldn't be a very interesting play. The version of the CIPA you got, the version of why the Court ought to come out one way or why the case ought to come out one way, is missing so much that you can't really understand what is going on. And, more importantly, it bears really no relationship to what is really going on in terms of what Congress is attempting to do and what is happening out there.

So let me begin not with the doctrine, because the doctrinal move by the government in these cases is to take the money, take the federal funding, and try to use that as an opportunity, as an occasion to accomplish what everybody, I think, agrees cannot be accomplished directly. That is, the Supreme Court would quickly strike down an effort to tell every library in the country that they had to employ one of these four companies to install filters to accomplish all this on the Internet.

The argument is made, and it is made here and it is made in other contexts—and Lee actually raised an interesting point that I want to come to also—the argument is made that even though the government could not do this directly to every library, as long as there is a funding stream it can attach these conditions to the funding stream.

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[113] 518 U.S. 727 (1996) (holding that a Federal Communications Commission order implementing the Cable Television Consumer Protection and Competition Act contained two provisions that violated the First Amendment, and upholding a third provision).

[114] *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991) (holding that the law violates the First Amendment and is not narrowly tailored to achieve the government's goals).

[115] N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

[116] Am. Library Ass'n v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002), *prob. juris. noted,* 123 S. Ct. 551 (2002).

[117] WILLIAM SHAKESPEARE, HAMLET (Harold Jenkins ed., 1982) (Second Quarto ed. 1604).

That is fundamentally worrisome. And in areas like this, where huge percentages of libraries, for example, get and need federal funding and become used to federal funding, unless the Supreme Court backs away from that kind of argument, we will in fact have what would be impermissible direct regulation, and it will be indistinguishable in effect.

Let me start with just a few of what I think are indisputable facts and then get to some of the doctrinal points.

I think it is undisputed that as a result of the CIPA we will have blocking—that is, speech on the Internet by Ann's and my clients and others which would be directed out to the public and which some members of the public would want to see, will not in fact get to some members of the public that will want to see it. That is to say, there will in fact be women in public libraries who will want to learn certain things about breast cancer, [118] or who will want to learn about a Republican candidate's position on Internet censorship.[119]

One of the great plaintiffs in this case is a Republic candidate who, two or four years ago, was campaigning, among other things, on the basis that Congress needs to clean up the Internet, and then he found out that his own campaign web site was blocked.[120]

Planned Parenthood's sites are blocked in various places.[121] All sorts of breast cancer awareness things.[122]

So the first fact is that there will be blocking of speech from willing speakers to willing listeners as a result of this law.

Second, the impact would happen notwithstanding the fact that nobody at that local public library wants that to happen. So that this image of the defense, which is essentially the virtues of

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[118] *See Am. Library Ass'n*, 201 F. Supp. 2d at 406 (noting that one library patron used library Internet access to research breast cancer and reconstructive surgery).

[119] *See id.* at 416 (discussing Jeffrey Pollock, a Republican candidate from Oregon, who sought election in 2000 and 2002).

[120] *See id.*

[121] *See id.* (discussing Planned Parenthood and the sorts of information that it provides over the Internet).

[122] *See id.* at 427 (discussing one library patron's embarrassment if he had to request that breast cancer web sites be "unlocked" so that he might research treatment and surgery options for his mother when she was diagnosed with the disease).

nineteenth century small-town librarian's connoisseurship and collectorship is a picture which doesn't bear much relationship to the reality. The reality is not that Mary Smith librarian is deciding this would be bad for Johnny and Susie. The reality is that one of these four filtering companies has a program that results in information about a Republican Congressman not being available and information about Planet Out not being available.

The prime mover, the initial cause here, is not the local librarian exercising the kind of judgment she makes about which books to buy. The prime mover is the Congress of the United States, which wants to clean up the Internet.

The third indisputable fact, I think, is that this censorship—and I call it censorship because it blocks willing speakers from reaching willing listeners—happens without any judicial review, without any public participation whatsoever.

There is a whole very interesting line of cases developed in the late 1950s through the 1960s which are sometimes referred to as the First Amendment due process cases.[123] They are the cases where, after the Court had figured out doctrinally that it would consider obscenity outside of the First Amendment, it was left with the problem that obscene speech may not be speech.[124] But mistakes get made and judgments have to be made. How will we reliably and safely, consistent with liberty, make sure that the right decisions get made?

The judgment was that policemen—even judges—cannot simply announce "this is unprotected." They have to take it step by step. There need to be careful procedures which do not result in censorship, with hearings and opportunities to be heard, until the judicial decision gets made. So that, although government is allowed to get obscene speech off the streets, off the bookshelves, out of the bookstores, we will not have overly censored or

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[123] *See generally* Henry P. Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 551 (1970) (remarking that First Amendment due process cases demonstrate that First Amendment rights are fragile and processes affecting those rights must be carefully scrutinized).

[124] *See, e.g.*, Roth v. United States, 354 U.S. 476, 490 (1957) (defining obscenity as whether, to the average person, applying contemporary community standards, the material taken as a whole appeals to prurient interests).

overbroad blocking before decisions are made in the way that they ought to be made—that is, by judges.

The way this statute works comprehensively is to trash all of that body of law, so that the result is the federal government conditions the acceptance of these funding streams on the installation of filters.[125] If a public library system has ten computers funded in part by the federal government, and others it purchased outright, all of their computers are covered.[126] The argument is made by the government—rejected so far, and I think it will be by the Court—that because you have accepted any portion of this money, you have to follow our rules, even though you otherwise would not have with respect to all of your computers.

It seems to me that the analytical underpinnings of this argument would permit right now the kind of censorship at MIT that Lee was talking about. That is, the government could make the argument—could enact a statute under this view—that any institution which receives any federal funding shall have all writings by professors reviewed by government security experts and only published if they approve.

The argument that funding is an excuse for control, and control well beyond the extent of the funding, is fundamentally inconsistent, it seems to me, with the system of freedom of expression that we have.

The fact is that in the Court's decisions in the collection cases—the principal case was the case involving a kid named Steven Pico, who was represented by the ACLU when I was there—the Court had to leave, and properly I suggest did leave, discretion in the hands of school libraries about what books to buy, because there was no other choice.[127] Given limited budgets, the fact is librarians inevitably have to pick and choose what to buy,

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[125] *See* 47 U.S.C. § 254(h)(6) (2000).

[126] *See id.*

[127] *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 869–71 (1982) (holding that, while the school board may have some discretion to remove books, such removal may be called into question if motivated by the desire to suppress certain ideas). "Our Constitution does not permit the official suppression of *ideas*." *Id.* at 871.

and in those decisions the Court saw that strict scrutiny was an impossible standard to apply.

But where the Internet is simply connecting a computer and you have the whole world available to you, if decisions are going to get made about keeping certain things off, they ought not to be made by the federal government for the whole country, and they certainly ought not to be—effectively, by the design of the statute—delegated to private companies that have criteria for control that they are not obligated to talk about.

Astonishingly, in the course of litigating this case, a federal court in California, I think it was, which got the discovery dispute involving this third-party censoring library-filtering company, held that that filtering company had trade secrets and they were entitled not to provide meaningful discovery to the plaintiff's lawyers in this case.[128] That it seems to me is fundamentally wrong. It was a terrible decision. It is inconsistent with what I understand the law to be.

It does seem to me that at the end of the day, if there is going to be censorship, and if the censorship is going to be the result of decisions made by private companies, courts, one way or the other, are going to allow people challenging these kinds of decisions to get into what is happening out there and why what is happening is happening.

I do think that the fundamental issue here really is the issue about whether government funding, which is a larger and larger share of everybody's lives—and there are government streams of moneys that go to universities, that go to schools, that go all over the society—whether those will become an occasion for the kind of direct regulation that is otherwise not permissible. I do not think so.

Thank you.

PROFESSOR REIDENBERG: Thank you.

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[128] *See* Multnomah County Pub. Library v. United States, No. 01-CV-1560 (S.D. Cal. filed Aug. 29, 2001).

I think what I would like to do is start to see if any of the panelists have reaction to things that were said. We will just go down the line.

MR. LEWIS: I guess I should say a couple of things about the points that Charles made.

The paradigm of the First Amendment is a willing speaker being able to communicate with willing listeners. But this case involves a library. If I write a book, I am a willing speaker, and there may well be—I mean, strange as it may seem—there might be somebody in a library who might want to take out that book, but I do not have any right to have the librarian acquire that book.

You cannot take the library out of the equation and what the library does. There is inevitably a selection process going on. Just calling it censorship does not make it unconstitutional.

The problem with saying that all federal funding raises these kind of conditions that are impermissible because they are indirect regulation, is it prevents then the federal government from imposing any kind of conditions on its funding if somebody can come up with any kind of First Amendment impact of it. The federal government, obviously—any government—has the appropriate ability within constitutional constraints to make sure that its money is spent the way it wants it to be spent.[129] Otherwise it is not going to spend the money.

There was a lot missing from my presentation, and partly that was my editorial judgment, not unlike that of a librarian, about which issues to focus on.

But one of the things that should not be lost sight of is the congressional motivation. Detailed in the district court opinion is the fact that libraries, even before CIPA, have been struggling with this problem of unlimited Internet access and what kinds of constraints to put on Internet access.[130]

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[129] *See generally* South Dakota v. Dole, 483 U.S. 203, 206–10 (1987) (discussing Congress's right to further policies through funding, but noting the limits to Congress's right).

[130] *See* Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 422–23 (E.D. Pa. 2002) (explaining the importance of Internet access and public libraries), *prob. juris. noted*, 123 S. Ct. 551 (2002).

There was the example of the Greenville, South Carolina, library that had a serious problem of people misusing their web surfing on sexually explicit sites, pulling all sorts of tricks, like leaving the site up for the next person who sits down at the terminal and it pops up with a scene that they were not really themselves planning to surf on.[131] There were some examples, anecdotal to be sure, of children that had been exposed to sexually explicitly materials—somebody calling some kid over and saying, "Hey, kid, look at this."[132]

The fact is that there is a problem. Even the district court here found there is a huge amount of pornography on the web.[133] Unless there is some kind of filtering or some kind of method of restricting access a library is going to encounter the problems that arise with library use of the Internet that librarians, even apart from any federal funding, traditionally have had to deal with.

So Congress was concerned that its funds were up to that point unrestricted. Congress was concerned about this problem of pornography on the web and protecting children from the web. It looked at its funding and thought it may actually be exacerbating this problem. We want libraries to be connected to the Internet, we want that whole host of information that they get there, but we really want to try and make an effort so that the bad doesn't come swooping in with the good and that parents have to worry about their children being exposed to online material that might be harmful to them.

The district court talked about a lot of other methods that libraries could employ.[134] But the primary one was just the old traditional notion of the librarian coming over and tapping you on the shoulder, "What are you looking at? That doesn't comport with our Internet use policy. You will have to go off or we'll have

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[131] *See id.* at 423 (discussing, generally, how some patrons may unwittingly be exposed to sexual or pornographic images).

[132] *See id.*

[133] *See id.* at 419 ("There is a vast amount of sexually explicit material via the Internet and the Web.").

[134] *See id.* at 426, 480–81 (outlining less intrusive means that libraries may employ to monitor Internet use).

to suspend your library privileges."[135] When we go back to the technology and the difficulty of seeing how effective or how refined filtering can be—well, the traditional method, the tap on the shoulder, can oftentimes be much less refined. In a sense, filtering software was a way of trying to regularize these kinds of decisions.

The other thing is—not to get into the details of the filtering—but the filtering software can be tweaked in various ways. The statute itself allows for disabling—a web site can be unblocked if it turns out that there is a site that somebody thinks is not covered by the statute.[136]

It is by no means clear to me that even if one were to put everything aside, that one would prefer a regime where librarians have to march up and down the rows and tap people on the shoulder when they are surfing a site that is not appropriate for their Internet use policy, as opposed to persons for the most part having a web surfing experience that is private from the librarian and every once in awhile something pops up that may be blocked—might only come once in a blue moon or never.

PROFESSOR REIDENBERG: Ann?

MS. BEESON: Yes, just briefly.

First of all, just in terms of Jake's latest comment about the librarian versus the filter and which regime we prefer, I think he is comparing apples to oranges a little bit.

Just to give a very concrete example, it seems highly unlikely to me that any librarian anywhere in the country would go up to a patron who is looking at a site about Buddhist nuns and tell them that they should not be looking at it.

The point is that the filters do not just block access to sexually explicit sites. They block access to a whole range of sites that do not come anywhere close to the line. And just to be clear, when we were talking about the 4,000 sites that we put into evidence,

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[135] *See id.*

[136] *See* 47 U.S.C. § 254(h)(6)(D) (2000); *Am. Library Ass'n*, 201 F. Supp. 2d at 426 ("The librarians who testified at trial whose libraries use Internet filtering software all provide methods by which their patrons may ask the library to unblock specific Web sites or pages.").

those were those kind of sites we were talking about. They were not breast cancer sites. They were not sites targeted to the lesbian and gay community. They were sites that could not, under anyone's definition of pornography, even conceivably be considered improper in a public library. And that is the kind of stuff that we are, of course, primarily worried about that is going to happen under a filtering regime.

I also want to say, because I don't think it has been brought up yet and this continues to be a problem with every single attempt by Congress to try to restrict the availability of sexually explicit material over the Internet, they continue to act as if their primary concern is protecting minors. All of the discussion is around the protection of minors.

All of the legislation has, unquestionably, on its face, burdened the ability of adults to obtain access to speech that is clearly protected for them.

And so I think we need to be very careful in talking about what the harm is and what we all agree should be fixed. Even if we could all agree that something should be done about unwitting exposure of children to sexually explicit material, that is not what these statutes are doing. What they are doing is throwing out the baby with the bath water and preventing adults from also viewing this material.

And also, on the question of other alternatives, there are other ways for parents to exercise their discretion and their role as parents in preventing their children from obtaining unwanted material.

First of all, there was a lot of evidence at trial put in that librarians are not by any means ignoring this problem.[137] They are very concerned about this notion that their community could potentially be harmed in their library. They have gone to great lengths to come up with ways to deal with it that do not infringe on speech, which include Internet use policies, and exercising their

[137] *See Am. Library Ass'n*, 201 F. Supp. 2d at 423–24 (discussing how librarians monitor Internet use).

traditional role to prevent disruptive behavior in the library, which is a very different thing from speech.[138]

So when you are talking about this example that the government loves to trot out about the guy who asks the little girl to come over and look at a porn site—I mean, give me a break. There are rules, and they have been there ever since the beginning of librarianship in this country.

MR. LEWIS: You like the Buddhist nun example.

MS. BEESON: I know, I know. We all trot out our best examples. It's true.

A lot of these alternatives that librarians have come up with are educational. They are training parents, training kids, on how to use the Internet so they do not unwittingly come across harmful material.

Here is where we talk about real library selection. When you talk about library selection in the context of the Internet, librarians are doing it in much more of the same way they did in the print world, by choosing the best sites. Now you can sign on in the kids' section of the library and what you get are the 100 best sites for kids that the librarians have reviewed and looked at. That is a great way to start your kid off on the Internet. It does not exclude people from going elsewhere, but it does keep the librarian's role in selecting the best sites for the kids.

And finally, just one last point in terms of these other alternatives. In 1998, Congress commissioned a study by the National Research Council to look into various ways to address the problem of pornography on the Internet.[139] The head of the National Research Council's report commission was a former Attorney General, Dick Thornburgh. They wrote a 400-page book, which I urge anyone interested in this issue to read, which documents an incredible range of alternatives that we all have for addressing this problem that do not involve mandatory penalties or funding restrictions as restrictive of speech as this statute is.[140]

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[138] *See id.*

[139] *See* NAT'L RESEARCH COUNCIL, YOUTH, PORNOGRAPHY AND THE INTERNET (Dick Thornburgh & Herbert S. Lin eds., 2002).

[140] *See id.*

MR. TIEN: Yes. There is a real difference, I think, between, as Chuck put it, this ideal of the library and the librarians making their decisions and Congress imposing a particular strategy across all libraries.

At the EFF we think too much exposure in the libraries of kids to pornography is a problem. But the answer is not to say, we're just going to block it. The answer is, as Ann was talking about, education. There are many, many ways that it could be done.

In one of the papers that we did for this National Research Council Report[141] we pointed out that the problem with systematic laws and with censorware—and I underscore the word "systematic"—is that you don't know what is going to be blocked.

One of the things that we have tried to show, and that I think was shown in the CIPA case,[142] was that these are not just random accidents, that there are specific technical reasons why certain sorts of things are blocked.[143] When you block by text, you are going to have systematic overblocking related to the presence of certain key words. There is a virtual hosting problem, where because one domain is under a lot of other domains and if they want to block that domain, they would simply have to block all of the others that go with it. There are systematic technical reasons why censorware is always going to overblock.

Now, some people will say maybe the technology will get better and better and better. Well, I think that is really highly unlikely. On the one hand, there are technical problems with it of the kind I just mentioned. And then, second, at the end of the day what we are asking the software to do is to make judgments, legal judgments, about what is harmful to minors or what is obscene. I think it is going to be very, very difficult for any piece of software to make judgments either about the value of a work, which is one of the problems, and also to make an accurate judgment about contemporary community standards, which is another element of it. If you can't make those judgments, you are not going to have anything that is even close to constitutionally sensitive.

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[141] *See id.*

[142] *See Am. Library Ass'n*, 201 F. Supp. 2d at 401.

[143] *See id.* at 427–50.

Maybe artificial intelligence will get there, but if it does, we will be in such a different world that they wouldn't need lawyers in the first place.

PROFESSOR REIDENBERG: Would it really be such a different world? I mean, we look to individuals to make those judgments, but we don't trust those. We send it to the courts to decide whether the individual is right. Why would it be any different sending the technical artificial intelligence decisions to a court to determine whether the program kicked out the right site or the wrong site?

MR. TIEN: What I mean by the world being different is that everything in the world would be different. I mean society itself would be completely different if we had computers capable of making human judgments of that sort. I think we should not fall into the trap of believing that we can think about that kind of advance in technology and hold the rest of society constant. So I do not want to speculate as to what anything is going to be like with that level of intelligence in a computer.

PROFESSOR REIDENBERG: You are assuming the level of human intelligence making the decision is at a high degree right now. It sounds to me like you are suggesting that the computer has to do it at least equivalently or rather better than the human. I am not sure that is the right threshold.

MR. TIEN: I would say that it would have to do it as well as a human.

PROFESSOR REIDENBERG: It raises some interesting questions. I think this came up from Chuck's emphasizing the fact that there are only four companies—I think he mentioned that at least two or three times—that do the filtering and we don't know how they are doing the filtering. Well, wouldn't the solution simply be higher transparency requirements in how the filtering is done? And if the obligation is there for the libraries receiving federal funds to purchase filtering programs, then presumably a marketplace would emerge with a substantially greater number of companies out there offering products for sale to libraries.

What would be your response to that?

MR. SIMS: Well, part of the answer is what Ann indicated, that it is not a happenstance that these products don't work. There are fundamental reasons why they cannot work, at least for the foreseeable future. I am not sure what the Supreme Court would do if there was anything like that that could with 100 percent reliability distinguish what we all think of as commercial porn from everything else.

I would think that the Supreme Court is going to be fundamentally affected by the fact that the facts are nowhere near that. The rule has been that where First Amendment interests are at stake, precision of regulation is the touchstone.

Jake wants to talk about percentages and talk about how things are getting better and better. But, as I understand the First Amendment, if one web site of Planned Parenthood, of a Republican Congressman or of David Hume or anybody else, which is protected speech and not harmful, is going to get blocked, that is going to be the end of the case.

MR. LEWIS: No, not this case, because in a facial challenge the one doesn't get you there. Now, as applied challenge—and I think that was Joel's point, that you always have a second round on this stuff.

If there was a specific person who asks a librarian to unblock a site, and the librarian says "no way," well, then you've got another lawsuit for those particular facts.

PROFESSOR REIDENBERG: Why do we assume that is the standard—that if there is a single web site out there that gets blocked, that is the standard we should be looking at? Sort of ball-parking some of these numbers—

MR. SIMS: Because the First Amendment says Congress shall pass no law restricting the freedom of speech,[144] and if there are willing speakers and there are willing listeners and the government is intervening and blocking them from getting together, that violates the First Amendment.[145]

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[144] U.S. CONST. amend. I.

[145] *See, e.g.*, United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000); Reno v. ACLU, 521 U.S. 844 (1997); Sable Comm. of Cal., Inc. v. Fed. Communications Comm'n, 492 U.S. 115 (1989).

PROFESSOR REIDENBERG: Well, in this case the government is simply saying, you can't spend taxpayers' money for people to look at pornography in a public library.

MR. SIMS: But then the government could just as well say any university that gets any federal funding in its physics department must submit everything written by the physics faculty to government review. The Court will not uphold such a statute. The fact of government funding will not, in the end, I think, be deemed to be sufficient to support regulation that would be impermissible if done directly.

MS. BEESON: Let me just jump in and say something in response to your question about transparency. That is, we do believe that, obviously, having a transparent list would help, of course, because it would mean that at least you could review and improve the products. Contrary to what the companies may believe, we are actually not trying to put them out of business.

In fact, a little irony here—I'm sure Jake thinks it's ironic, at least—we put forth the availability of filters as a voluntary option for parents to use in arguing that filters are one possible less-restrictive alternative to criminal penalties for restriction of free speech, like are at issue in the first two attempts by Congress to address this problem.[146]

So we are not trying to say that there should not be filters out there. We are trying to say that they should not be mandated by the federal government and that they should be as good as they can possibly be, and therefore the list should be transparent.

Transparency would not solve all the problems, because of course it would only help after the fact. It would only mean that once someone happened to discover that a site on the list was improperly categorized, they might get it fixed, and therefore further blocking might not happen. But up until that time, it is almost certain that the original user would get blocked. That is a

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[146] *See* 47 U.S.C. §§ 223, 231 (2000). Two provisions of the CDA relating to the protection of minors from harmful material on the Internet were declared facially overbroad and in violation of the First Amendment. *See* Reno v. ACLU, 521 U.S. 844 (1997).

prior restraint on speech and we think it violates the First Amendment.

MR. LEWIS: I guess now that the words "prior restraint" have been spoken—

MS. BEESON: I know. I was waiting.

MR. LEWIS: This is a library. By that logic, it really is—I mean, there are a lot of problems that come out, and interesting questions, outside the library context, but this case happens to be a library case.

The thing that I have had trouble understanding is a prior restraint argument in the library, where you have to go up to the librarian and ask to borrow a book, for the most part. You can take it off the shelf, if the book happens to be on the shelf. In a closed stack library, like the New York Library's main branch, for every book, ninety-nine percent of the books, you have to go and ask permission to borrow the book. If there is a prior restraint in all of this, then there is a prior restraint in practically everything that a librarian does.

The transparency point is kind of interesting because the selection process—and I have tried to get myself up to speed on exactly what book selection principles are and collection development philosophy and things like that—that process is entirely nontransparent. I would say that the principles are stated at such a level of generality that they do not provide you with any real information about how a particular selection decision is going to be made.

But, interestingly enough, as I understand the software, while you do not have a list of the sites ex ante, you can plug a website in and immediately get an answer about whether that site would be blocked or not.[147] So there is at least transparency to that extent.

I guess there are two points I would make. First, in this First Amendment area, going back to the title of the discussion, there is a position that the First Amendment permits no regulation of

[147] *See Am. Library Ass'n*, 201 F. Supp. 2d at 430 (referring to the ability to enter URLs into "the 'URL checker' that most filtering software companies provide on their Web sites").

speech at all. While I suppose that is a possible reading of the First Amendment, it has never been one that the Court has adopted. If it was adopted to the extent that I think many would argue on the other side of these cases, it would simply paralyze government action to address this kind of problem, because it would just act as sort of a trump card, where you raise it and all discussion stops.

But there are many cases in which the government is able to regulate speech if it has a sufficiently compelling interest, even when strict scrutiny is involved and the regulation is narrowly tailored.[148] Here I don't think strict scrutiny is applicable, because if strict scrutiny is applicable to this kind of action, then it is applicable even to Ann's example of the best web sites. Somebody could say, "Well, what are you putting that up for? Those aren't my best web sites. Where did you come up with those best web sites? You mean because of the content of the speech?"

The other thing I would say on these discussions, because it is interesting, is there also seems to be a view that the Internet is another world, that we are not of this world when we go into the Internet. I think this library case is an example—it is not the only example, but one example—of a situation in which it really sort of depends on how you view what happens when you connect to the Internet. Do you somehow, like in a "Star Trek" episode, go into hyperspace somewhere and come out in another dimension? Or is the Internet connection really simply an aspect of this world that we live in? If it is, then maybe many of the same rules that would govern the offline world should govern the online world.

MR. TIEN: Can I say something real quick? This last point is one of the points that I was trying to make in my presentation. I have been listening to you talk about continually sort of mapping—you say, "It's a library, it's a library, it's just the same thing." And yet, in many other areas, such as when people say the Internet is a vehicle for piracy, the world has changed, we've got to do something different, so there is real instability.

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[148] *See, e.g.*, Sable Communications of Calif., Inc. v. Fed. Communications Comm'n, 492 U.S. 115, 126 (1989) ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

And when you look at it from the larger perspective, there is a complete incoherency in the way the Internet gets played. Basically it gets spun in whatever direction people want to spin it. If the government wants to spin it as something that they want to regulate, they say this is just like real space and we should use the same rules. But if, on the other hand, they say the Internet is a big threat, then they will spin it as something unprecedented, we never had this sort of problem before because of the Internet. That just doesn't make sense to me.

MS. BEESON: If I could make just one quick comment—

PROFESSOR REIDENBERG: And then we will go to questions from the floor.

MS. BEESON: I really think that there is a fundamental misunderstanding here between the notion of selection and prohibition. I mean, just to be really clear, when a librarian decides to house a particular book on the shelf in the physical collection, there is nothing in that decision that prevents the patron from obtaining a book that does not happen to be on the shelf. In fact—and the record shows this quite clearly—the very purpose of librarianship is to go out of their way through any means possible to get the patron exactly what they want, and they do this even if the book isn't on the shelf. They put in requests for inter-library loans. There are a number of different ways the librarian will try to get the information to the patron, even if it is not sitting on the shelf.[149]

Similarly, of course, when a library decides to come up with a list of selected web sites, they aren't preventing patrons from accessing sites that are not on their list. They are just providing a kind of value-added service of saying, we think these are the best sites in case you want to start here first, but we will help you get other ones if they are not here.

So I really think that there is a misunderstanding here in what Jake is saying about the listing and it being analogous to filtering.

MR. LEWIS: But if I try to borrow or get a subscription to *Hustler* magazine, the facts show that I've got eight out of 48,000

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[149] *See Am. Library Ass'n*, 201 F. Supp. 2d at 420–21.

libraries that I can possibly go to. There is a limit to what the librarians are going to do, and there has always been a limit to the boundaries under which they find the right book for the right person.

PROFESSOR REIDEENBERG: You are also shifting the point of inquiry, because if what the blocking program at the library does is it says you can't visit this site but the librarian can unblock the site on request, that is much like the book wasn't there on the shelf and I go to inter-library loan to get a copy.

MS. BEESON: The problem, of course, is in the inter-library loan context there is nothing which has made a judgment that this is bad speech—I mean, nothing whatsoever, because there are no value judgments on what is sitting on the library shelf. Whereas under this system—

PROFESSOR REIDENBERG: There is the value judgment of whether the librarian chose to stock it.

MS. BEESON: What the CIPA literally says is, you are blocked because this site has been categorized as pornography.[150] I mean, how many patrons do you think are going to go up to their librarian and say, I want to have access to the Buddhist nun site because it has been blocked? Maybe that one person would.

MR. LEWIS: Just to make it clear, the CIPA doesn't say anything about how the message gets put. It just says if there is a technological protection measure—and actually that, in terms of tweaking the software, if your problem is only with what pops up, to just say, "This web site has been preliminarily categorized as subject to the CIPA. Please see your librarian."

MS. BEESON: As being illegal for you to look at in this library.

PROFESSOR REIDENBERG: Does CIPA even require that you identify the blocked site as being categorized that way?

MR. LEWIS: No, no. It could say "access blocked."

PROFESSOR REIDENBERG: "Please see the librarian."

MR. LEWIS: Yes, "please see the librarian."

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[150] 47 U.S.C. § 254(h)(6).

MR. SIMS: But under the law as it works now, people do not know what they have not seen.

MR. LEWIS: That's not true. I think it tells—as I understand it, you search for a site, when you know what site, and you click on a site.

MR. SIMS: If you are searching for breast cancer, for example, there may be twenty sites that you do not see. There is nothing in the law that requires the filtering company to deliver to you the information that you have been precluded by the private parties from seeing something you have asked for.

MR. LEWIS: You have gotten finally to the point at which in the record—my command is not infallible, but I do know from the record that even if you aren't informed up-front, the librarian has that information.[151]

MR. SIMS: Jake, let me ask you a question. Do you think that the Court will necessarily want to consider or feel obligated to consider this statute, which is really the federal government stepping into maybe 80 or 90 percent of the nation's libraries, as if it were exactly the same case as if Ann were challenging a library in Mobile, Alabama, which had done the same thing?

MR. LEWIS: Yes. I don't know whether they are going to want to, but that is one of the arguments we are making.

MR. SIMS: I understand. I think it is a very interesting federalism kind of issue. When a fundamentalist parent in Nebraska wants to take a ten-year-old to New York City, they can't have a clean New York City. They can only come to New York City by being willing to subject themselves to newsstands that have breasts hanging out all over the place.

MR. LEWIS: But the interesting part about the district court decision here—and this is actually one of the interesting things about how the litigation went—there was an argument, and there still is an argument, that the librarians should just be free to make whatever decisions they want, free of governmental interference or a thumb on the scale from funding.

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[151] *See Am. Library Ass'n*, 201 F. Supp. 2d at 426–27, 430.

But the way the district court resolved the issue, they essentially took that judgment out of even the librarian's hand by saying that this content-based kind of selection, at least insofar as the Internet is concerned, is a violation of First Amendment.[152] It prevents the librarian back in the Midwest from making that kind of determination either. It is not a question of just cleaning up New York. Nobody can clean up everything, wherever you are.

MS. BEESON: That is a complete overstatement. First of all, we are only challenging—

MR. LEWIS: Simplification.

MS. BEESON: Yes, simplification.

We are only challenging the filters as they apply in public libraries, first of all, so this whole other issue about schools we haven't even gotten into.

MR. LEWIS: I didn't mean to open that up.

PROFESSOR REIDENBERG: The CIPA also requires that any school receiving funding under EAA or qualifying for discount pricing for Internet access must have filtering in the school computer systems that are connected to the Internet.[153] You have tactfully avoided touching that part.

MR. LEWIS: Ann is absolutely right. She did not challenge that part.

MS. BEESON: In this case.

MR. LEWIS: This case does not involve the schools.

MS. BEESON: This case does not involve that.

MR. LEWIS: The other shoe.

MS. BEESON: The point is the one that I made before, which is that a number of libraries who are our clients in the case already do have filters in the libraries for parents who want to use them. It is just a voluntary option. The filter is there. Sometimes it is even a default. The filter is there in the kids' section of the library. They are addressing the problem.

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[152] *See id.* at 495.

[153] 47 U.S.C. § 254(h)(5).

MR. LEWIS: But the library cannot go further and make it mandatory.

MS. BEESON: For adults, that's right, they cannot.

MR. LEWIS: That is actually one of the interesting aspects of the case. The district court, not just the CIPA, has cut back on the librarians' ability to make their own independent judgments.

MR. SIMS: But Ann would have done that eventually anyway.

MR. LEWIS: She would have tried, that's for sure.

MR. TIEN: But is that really—I mean, I am obviously not as familiar with the case as you are, but when you look at the rationale that is used by the courts for holding the law unconstitutional, many of those reasons simply do not apply to the case of a librarian making a judgment in the library about content decisions.

MR. LEWIS: That is the interesting thing. The Court did downplay this approval plan option.[154] But as far as I can see, approval plans, which are the kind of thing where you go to the publisher and say, give us your monthly list and we will send back the stuff, that is precisely what a filter does, except that the librarian acts as the filter for the purposes of the wholesaler. It does seem to me that there is a better match.

But I agree with you that this case, in part, turns upon how the courts are going to look at that mapping of what I would call the "real world" and the Internet.

I am not sure there is an incoherence, to respond to Lee on his point. It is true that people point out that the Internet poses more serious problems in certain circumstances than the real world, but the framework for analyzing those problems, I think, is often overstated, that somehow a different framework needs to apply. To my mind, the regular framework, the framework we would apply to this same type of problem of a lesser magnitude, would also apply to addressing that problem in the Internet context.

PROFESSOR REIDENBERG: Let's see if we can take audience questions now.

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[154] *See Am. Library Ass'n*, 201 F. Supp. 2d at 421.

Does anyone in the audience have a question to pose to the panel?

MS. BEESON: Thank you for staying this late on a Friday afternoon.

QUESTIONER (Wendy Seltzer): Thanks. My question is for Chuck, who I think is a terrific advocate and I am very pleased to have him on our side of this case.

MR. TIEN: You always want Chuck on your side.

PROFESSOR REIDENBERG: Wendy Seltzer from the Berkman Center speaking.

QUESTIONER: But I am puzzled by what seems to be a disconnect between the position here and the position in the DVD case,[155] where we found ourselves on opposite sides. There you have a technology that is preventing people from accessing and making First Amendment-protected fair use of media. You talked about First Amendment due process when the policeman is declaring something obscene without judicial intervention. You talked about delegation of control to the filtering companies.

To me it looks very similar to what the DMCA asks us to do to technological protection measures, delegating the control to them and relying on those to tell us what is or is not permitted use of media.

MR. SIMS: I must say I don't think there is any inconsistency at all.

MS. BEESON: You are just afraid to answer the question with me sitting up here, Chuck. Come on.

MR. SIMS: No. Not speaking for any clients here, it was perfectly clear to me that the *Felten* case was totally concocted, as the district court found,[156] and because there was never any

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[155] Mr. Sims was an attorney for the plaintiffs in *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (2000), which found defendants violated the anti-circumvention provision of the DMCA by posting their DeCSS program on the web.

[156] Felten v. Recording Indus. Ass'n of Am., No. CV-01-2669 (D.N.J. dismissed Nov. 28, 2001). *See* EFF, *Frequently Asked Questions About* Felten & USENIX v. RIAA *Legal Case*, *at* http://www.eff.org/IP/DMCA/Felten_v_RIAA/faq_felten.html (last visited Apr. 9, 2003) (giving background information about *Felten*).

genuine apprehension that he should have had, and nobody could read the DMCA and think that the speech he was going to give in Las Vegas, or wherever it was, was going to violate the DMCA. He should have just gone ahead, as he eventually did, and give the Goddamn speech.

In the same way, without asking Ann to violate a client confidence, in her initial comments she sort of portrayed this picture, as I recall it, of little Ben Edelman coming up to her and saying, "Boy, I'm really afraid about the DMCA. Could you bring a lawsuit so that I can do my research?"

In the real world, as I assume that it happened, and as I would imagine it happened with Ben Edelman—whose parents, after all, didn't ask a federal court if they could demonstrate against the civil rights laws, they just went ahead and did it—in the real world he could have gone ahead and just done this work. It would have been fabulous. It would have helped a lot of people. He should not have worried about any of these legal problems, which are not genuine legal problems, and he should have gone ahead and done his research and nobody would have sued him.

So without having the DMCA in front of me, I cannot go through the whole list of exemptions that I think would have applied to his work, but I think that this lawsuit is feigned, is not serious. Whether or not the Court will end up deciding it, I cannot tell. But it is pretty clear to me that he could have just gone ahead and done this research without worrying about it.

QUESTIONER (Wendy Seltzer): We still can't take movie clips off a DVD without violating the DMCA.[157]

MR. SIMS: There are no movies that I am aware of that people can't make extraordinarily extensive fair use of, regardless of whether they are on DVDs or not. I mean, as I have said in various contexts, when I was a kid, before there were videocassettes, we all had fair use rights to deal with movies. There was a fair use right

[157] *See* 17 U.S.C. § 1201 (2000) (prohibiting the circumvention of technological measures undertaken to protect a copyrighted work).

with respect to *Gone With the Wind.*[158] But your fair use had to live in a world in which MGM only released this movie every five years and they didn't release copies of it so that people could put them in their homes. It didn't mean that there was a First Amendment violation. It didn't mean that the First Amendment was violated.

People can make fair use of every movie out there, whether or not it is on a DVD.[159] Can they also get an undecrypted copy and put it on their own computer? No. Why? Because Congress decided that the harm that would come from that was greater than the benefits.[160] That is the kind of judgment Congress makes.

MS. BEESON: Just to be clear on the *Edelman* case about the current posture on whether or not he is sufficiently threatened, and to distinguish it a little bit from the *Felten* case, in the *Felten* case, after the EFF filed the lawsuit on Felten's behalf, the recording industry pretty much rolled over with respect to the specific research at issue. They wrote a letter promising not to sue for this particular paper Felten wanted to present.[161]

In the *Edelman* case, we filed the complaint.[162] We would love to get a letter like that from N2H2 that says, "You know what? We think your research is hunky-dory. Go ahead and go with it. We won't sue you."

Instead, they do not do that at all. They file this public document which says that they do believe that if he does—and also in their motion to dismiss that they filed—they catalogued the specific harms they will suffer if Edelman does this research.[163] They say that their rights have been violated and that they will go

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[158] *See* SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (finding the fictional work *The Wind Done Gone* protected under 17 U.S.C. § 107 as parody and, therefore, a fair use of decedent's work *Gone with the Wind*).

[159] *See* 17 U.S.C. § 107 (providing certain exceptions for the use of copyrighted material that will not be considered infringement).

[160] *See* DMCA, Pub. L. No. 105-304, 112 Stat. 2860 (1988) (codified as amended at 17 U.S.C. §§ 512, 1201–1205, 1301–1322 and 28 U.S.C. § 4001).

[161] *See* Jennifer 8. Lee, *Delayed Report on Encryption Flaws to Be Presented*, N.Y. TIMES, Aug. 15, 2001, at C6.

[162] Complaint for Declaratory and Injunctive Relief, Edelman v. N2H2, Inc. (D. Mass. filed July 25, 2002) (No. 02-CV-11503), http://archive.aclu.org/court/edelman.pdf.

[163] N2H2, Inc., *supra* note 35.

forward.[164] This is a very different situation and it seems clear to me that Felten does have standing to get relief in the court.

MR. TIEN: And if I could add a point about the *Felten* situation, we did not get into that case until after the letter came.

MR. SIMS: But you stayed in the case and tried to get a decision on the merits out of the judge well after you were told "no problem."

MR. TIEN: Yes. We were told that there was no problem as to the particular paper. The problem was that there were other people on the team who were doing other kinds of research.

But my point is that there was a real threat from the RIAA and from the other private defendant at the outset which generated a tremendous amount of controversy within the conference organizers in Pittsburgh.[165]

MR. SIMS: It would take a lot to persuade me that Ben Edelman was afraid to do this research without Ann bringing and winning this lawsuit.

MS. BEESON: You just don't know how careful he is with his money. This was the guy who made three times as much money as I did last year. He does not want to have to give up some of that money to N2H2 because they get a judgment against him. He just doesn't. And he should not have to. That is the whole nature of the First Amendment. Chuck, you know that. He should not have to do that.

MR. SIMS: And the ACLU would have been there to defend him every step of the way.

PROFESSOR REIDENBERG: Other questions from the floor?

QUESTIONER: I would like to just say—and then ask a question—that it is a sad commentary for me that we, in the name of children, in the name of God, sometimes perpetrate some really terrible things. We want to protect children, and in the efforts to

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[164] *See id.*

[165] Letter from Matthew J. Oppenheim, Sr. Vice Pres., RIAA, to Prof. Edward Felten, Dep't of Computer Science (Apr. 9, 2001), http://www.eff.org/Legal/Cases/Felten_v_RIAA/20010409_riaa_sdmi_letter.html.

do so we throw out our civil liberties and our history of freedom of speech.

I think in America we have a terrible sex problem, and maybe the Congress people have knee-jerk reactions, so that when we get legislation which tries to solve a problem of thought control, trying to control the thoughts of our children, etc., and when we see it doesn't work, we don't drop it, we just continue going on with it. That is a very sad thing to me. It is like *1984*[166] all over again.

I don't know how the government and those people who are trying to push this kind of a system that filters everything—it is just really a sad commentary of where we are. We are throwing the baby out with the bath water by all means, but we are going much further. I think we really hurt America, hurt Americans, when we think that way.

MR. SIMS: Well, there is actually a little ground for optimism. There has been a series of these cases since the late 1980s. Jake told me today, which I hadn't known, that he had litigated most of them.

The fact is that the free speech side wins in the U.S. Supreme Court virtually all of them, including one called *Playboy v. United States*[167] that I wouldn't have given you very much money for the day it was filed.

MS. BEESON: Yes. If anybody is trying to handicap this, I don't think I have ever not won a case that has gone to the Supreme Court on this.

MR. SIMS: Whether Jake is deliberately throwing—

MS. BEESON: It just goes to show you that we are right.

MR. LEWIS: Or the cases they make me take.

MR. SIMS: Whether Jake is throwing them or whether the Supreme Court is doing the right thing, I don't know.

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[166] GEORGE ORWELL, 1984 (1948).

[167] 529 U.S. 803 (2000) (holding that the Telecommunications Act of 1996, 47 U.S.C. § 561 (2000), violated the First Amendment by restricting transmission of cable television channels primarily dedicated to sexually oriented programming).

QUESTIONER: Well, Mr. Sims, I will just say that I am very heartened to hear that, and I understand that. But I am not looking forward with great relish to the new composition of our Supreme Court and where they will take us down the road.

MR. LEWIS: I would like to say one thing. I mean, the fact is—you know, glass half-empty or glass half-full, or whatever.

To look at the other side of the coin, it is quite clear in this area that Congress has remained very concerned about it. You are absolutely right that there have been a number of lawsuits in the Supreme Court that have struck down statutes that have approached this problem from a number of different areas, and Congress has not given up.[168]

I guess I would view that as being because these are conscientious efforts and people have thought long and hard, and the courts have made them think long and hard, that they still consider there to be a serious problem that they do not want to give up on.

The question obviously in these cases—and they do get litigated, and Ann is perfectly happy, I'm sure, to litigate the next six statutes—

MS. BEESON: That's because we keep winning.

MR. LEWIS: But you shouldn't discount the fact that there is a significant amount of support in Congress, and presumably outside of Congress—

PROFESSOR REIDENBERG: In the public.

MR. LEWIS: —that something should be done. I think the Supreme Court's remand in the latest case, the COPA case,[169] suggests that even the Court is not willing to sort of give up or throw up its hands and say, "Nothing can be done," although the

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[168] *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997); Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Communications Comm'n, 518 U.S. 727 (1996); Sable Communications of Cal., Inc. v. Fed. Communications Comm'n, 492 U.S. 115 (1989).

[169] *See* Ashcroft v. ACLU, 535 U.S. 564 (2002) (finding that the COPA's reference to contemporary community standards in defining what was harmful to minors did not alone render the COPA unconstitutionally overbroad under the First Amendment).

First Amendment does impose a very high standard before the Court can regulate speech.

It would be extraordinary to say that Congress cannot address a problem like this, where many people in Congress are of the view that there remains a serious problem.

PROFESSOR REIDENBERG: I think it is not just Congress, but it is in the country. The Congress is reflecting the view of the country as a whole. This is one area where, unlike what we heard earlier in the debate over intellectual property rights with significant economic interests that were at stake, I don't think you see a well-funded anti-porn industry running to Congress for protection.

These are more like grassroots-oriented organizations. They are not organizations that have commercial economic interests at stake for Congress to be regulating in this area. I mean, it is not the Trade Association of Software Filter Manufacturers that is running to Congress and saying, be sure you mandate that public libraries buy my product. It is not that kind of regulation.

I think there is really a very strong current, and reflected in your earlier remark about the composition of the Court. If this current is that deep in the United States and if the Court is consistently refusing to allow Congress to regulate in this area, we should not be surprised to see changes in the composition of the kind of judges that are going to be appointed to the Court.

We will take one more question up in the back and then we'll break.

QUESTIONER: My name is Matt Halloran and I'm a student here at Fordham.

Assuming that this is something that we are dedicated to stopping, which is a whole other argument—I find it laughable to think that fuzzy things like parental education are going to stop kids from looking at pornography on the Internet. I was wondering, to that extent, how both sides would feel about calling the government's bluff on this being for kids and just using children-dedicated computers with filters on them?

MS. BEESON: Yes. It is an interesting question you raise, because there are really two different interests, and I think the government is not always so clear in distinguishing these two things. I think they are different.

One is—and this is the one that I think absolutely can be solved by education—one is to prevent children from accidentally encountering harmful material on the Internet. That has been shown already—we have the record to prove it—to be addressed in some ways by much better ways, by searching strategies and all of that. The filters do not help that problem at all, because no matter how much the filters block, there is still a huge amount of sexually explicit material available that they are just as likely in fact to stumble across.

The second problem, of course, is the primarily slightly older children that I think we would probably all agree are affirmatively trying to find that material. I, frankly, think that is a very different issue.

To the extent that you are talking about teen-agers, I think teen-agers do have the right to locate and find material about sex. They just do. They are becoming sexual beings themselves. I don't think, myself—and speaking for the ACLU, we really don't think—that there should be so much of a difference between the rights of teen-agers and the rights of adults to obtain access to very purposefully sexually explicit material.

So I just do not think there is much of an interest left after that.

MR. LEWIS: When I was a kid, there was no federal grant for me to buy *Playboy* magazine, and to some extent—

MS. BEESON: Poor Jake.

MR. LEWIS: I guess if I had been born a little later, a little bit down the road, there might be such a grant program.

But really, you can't take the federal funding out of the equation. The problem with filtering computers in the children's section is, obviously, particularly for the teen-agers, they will just move over to the adult computers that do not have the filters on them.

This statute, even though it is entitled the Children's Internet Protection Act, obviously does seek to restrict funding of unprotected pornography, obscenity, and child pornography for adults as well.

MR. TIEN: I just wanted to underscore Ann's point about the right of minors to receive sexually explicit information. One of the papers included here is a discussion of how, certainly for teenagers, probably from fourteen on, there is a very strong legal argument that they have a right to receive all sorts of information relating to reproductive choice, reproductive sexual health, religious information, about their own sexual orientation and identity, just coming directly out of the Court's abortion cases, which virtually require that minors have an ability to get that kind of information.[170]

MR. LEWIS: But the filters do not—

MS. BEESON: Even against their parents' consent.

MR. LEWIS: The filters can be tweaked so that, as I understand it, you can check it off saying that sex education sites are fine.[171]

PROFESSOR REIDENBERG: I think we have run a little bit over. We will have some announcements from our sponsor, from the *IPLJ*, and then we will conclude.

I would just like to take a moment, though, to thank the panel for doing a wonderful job.

MS. WARD:[172] Good evening. My name is Jaclyn Ward. I am the Editor-in-Chief of the *Fordham Intellectual Property, Media*

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[170] *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 69 (1983); Carey v. Population Services Int'l, 431 U.S. 678, 715 (1977); Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA J. CONST. L. 223 (1999)).

[171] *See* Am. Library Ass'n v. U.S., 201 F. Supp. 2d 401, 428–29 (2002) (describing N2H2's filtering software and explaining that "[w]hen an exception category is enabled, access to any Web site or page via a URL associated with both a category and an exception, for example, both 'Sex' and 'Education,' will be allowed, even if the customer has enabled the product to otherwise block the category 'Sex'"), *prob. juris. noted*, 123 S. Ct. 551 (2002).

[172] Jaclyn B. Ward, Editor-in-Chief, *Fordham Intellectual Property, Media, and Entertainment Law Journal*, Fordham University School of Law. A.B., Harvard College, 1999; J.D. expected, Fordham University School of Law, 2003.

and Entertainment Law Journal. I am so pleased that you all were able to attend.

Before you leave to enjoy cocktails and hors d'oeuvres, I would like to conclude by thanking today's moderators and panelists for their thoughtful, and at times spirited, exchange of ideas.

I would also like to thank all the members of the *Journal* for their support and their time, and I would like to thank our moderators, Professor Hugh Hansen and Professor Joel Reidenberg.

I would also like to especially thank David Perry-Campf. I would like to extend a special acknowledgement to our Symposium Editor, Kathy Bartlett. We are really grateful to have her on our team. I thank her for envisioning this event and for working so hard to ensure its success. Thank you and enjoy the rest of the evening.