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**Reply-To:** Maine Libraries Discussion List <MELIBS-L@LISTS.MAINE.EDU>  
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**Subject:** Mr. Hansen's Memo to the MLA Council  
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What follows is the text of attorney Chris Hansen's memo to the MLA Executive Council which many on this listserve were not able to receive as an attachment. It provides background material for the ACLU's proposal to the Maine Library Association. jrs

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MEMORANDUM

TO: Maine Library Association FROM: Chris Hansen and Ann Beeson RE: Federal blocking software legislation DATE: November 22, 2000

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As you know, Congress is poised to pass legislation that would require the mandatory use of Internet blocking software by adults and minors at public libraries and schools around the country. We are approaching the Maine Library Association as well as other libraries and library associations to offer representation in the event of a challenge to the constitutionality of the legislation. We believe that the Maine Library Association and the ACLU would make a great team to defeat this latest attempt by Congress to censor the Internet. Specifically, we are offering to represent MLA directly at no cost in a facial challenge to the federal filtering legislation. In addition, the ACLU would assume responsibility for all out-of-pocket expenses. (Of course, if attorneys' fees were ultimately awarded, we would retain those fees.)

The legislation appears likely to pass during the post-election session now scheduled to begin on November 14, 2000. The precise language and scope of the legislation is still changing so it is not possible to identify all of the details about it. However, the broad outlines can be described. The legislation is linked to two forms of federal funds, the LSTA funds and the e-rate discount. If a library or library association accepts either form of federal funds, then it must install technological methods of blocking adults who go on the Internet at the library from accessing obscenity or child pornography. It must install technological methods of blocking minors who go on the Internet at the library from accessing obscenity or child pornography or material that is harmful to minors. At the moment, the legislation only requires blocking of pictures. It does not require blocking of text. The law applies to schools (school libraries, labs, and classrooms) that receive federal funds as well as libraries and perhaps the most difficult strategic decision will be whether to challenge the school portion of the law as well as the library portion.

At the most superficial level, the legislation appears unobjectionable since obscenity and child pornography are not protected by the First Amendment. As you know, however, there is no technology currently available that can distinguish such speech on the Internet from valuable speech that is protected by the First Amendment. Blocking software such as Cyber Patrol, WebSense, and SmartFilter have serious flaws. Manufacturers of such products routinely keep their blocked sites lists secret from librarians and patrons. Blocking software inevitably overblocks (blocks sites that should not be blocked) and

underblocks (fails to block sites that meet the criteria). These flaws are inherent in the technology, not just flaws in particular products.

For all of these reasons, we plan to challenge the law on behalf of library associations, libraries, library patrons, and improperly blocked web sites. We have submitted proposals to ALA as well as you and other libraries to be clients.

The ACLU has successfully litigated more challenges to federal, state and local Internet censorship regulation than any other law firm or public interest legal group. These cases include:

ACLU v. Reno, 521 U.S. 844 (1997), aff'ing 929 F.Supp. 825 (E.D.Pa. 1996) (striking down the federal Communications Decency Act and applying the highest level of First Amendment protection to the Internet)

ACLU v. Reno, 217 F.3d 162 (3rd Cir. 2000), 31 F.Supp.2d 473 (E.D.Pa. 1999) (invalidating the second federal law aimed at criminalizing protected speech on the Internet)

American Library Ass 969 F.Supp. 160 (S.D.N.Y. 1997) (striking down a New York state law prohibiting indecency on the Internet, and holding that the law violated the dormant Commerce Clause because it would impose inconsistent obligations on Internet speakers)

Mainstream Loudoun v. Board of Trustees, 2 F.Supp.2d 783 (E.D.Va. 1998); 24 F. Supp.2d 552 (1998) (invalidating local ordinance that required adults to use blocking software when accessing the Internet at the library)

ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999), 4 F.Supp.2d 1024 (N. Mex. 1998) (holding that New Mexico online "harmful to minors" law violated the Commerce Clause and the First Amendment)

Cyberspace Comm. v. Engler, 5 F.Supp.2d 737 (E.D.Mich. 1999), (6th Cir. 2000) (holding that Michigan online "harmful to minors" law violated the Commerce Clause and the First Amendment)

ACLU v. Miller, 977 F.Supp. 1228 (N.D.Ga. 1997) (striking down Georgia law that would have made it a crime to communicate anonymously or to use certain "links" on the Internet)

We have been involved in many other Internet censorship cases as direct counsel and as amici, representing students disciplined by their schools for online expression, university professors challenging online restrictions that would limit academic freedom, and anonymous online critics in SLAPP suits brought by corporations. We believe that our unique depth of experience in Internet censorship cases would make our representation of ALA both informed and efficient.

In addition to proudly representing ALA, the Freedom to Read Foundation, and other library associations in some of our Internet cases, the ACLU has represented the library community in many other censorship battles. Recently, the ACLU obtained an important victory in Texas against a Wichita Falls law that would have restricted public library access to two children's books about gay parenting.

Ending the required use of blocking software at public libraries is one of the ACLU's highest priorities. Before the Mainstream Loudoun case, we successfully convinced Kern County, California to rescind its policy of mandatory Internet blocking for adults. We were prepared to file two lawsuits last month to challenge mandatory filtering in Anchorage, Alaska and in Gwinnett County, Georgia; those suits are on hold pending the outcome of the federal filtering bill. We have been monitoring mandatory filtering at several additional libraries around the country, with plans for additional lawsuits if necessary.

In addition, we have been working for the past several months with an expert affiliated with the Harvard Berkman Center for Internet and Society. He has developed an innovative technique for exposing the flaws in a variety of different blocking software products. Using that research, we have created a comprehensive database of thousands of valuable web sites verified as blocked in libraries around the country. We believe this research will be crucial in convincing the courts that the federal filtering legislation violates the Constitution.

We also believe that courts must hear directly from librarians about the many alternatives to filtering. For that reason, in Mainstream Loudoun we submitted expert testimony from Joe Janes, Professor of Library Science and creator of the Internet Public Library project. Prof. Janes testified about the special expertise of librarians to train Internet users to find the content they need and avoid unwanted content. We also submitted affidavits from librarians in Virginia communities that chose not to filter, including Sally Reed of Norfolk Public Library, Dick Murphy of the Prince William Public Library Service, and Tom Hehman of the Bedford Public Library.

Finally, one of the key issues in this case will be whether First Amendment restrictions are acceptable as conditions on receipt of federal funds. The ACLU has been involved in all of the major funding cases over the last dozen years. We directly represented clients in *NEA v. Finley* and *Rust v. Sullivan*, and are amici in *Legal Services Corporation v. Velazquez*, a case currently before the Supreme Court. In general, the ACLU files more briefs in the Supreme Court than anyone else with the exception of the Department of Justice. Our reputation in the Court is stellar.

Given our experience, we feel confident that we would provide the Maine Library Association with the very highest level of legal representation in a challenge to the federal filtering bill. As we mentioned, we are talking to other clients about representation in the case (including many of the clients who we had planned to represent in the local filtering cases). We have also contacted a national law firm with experience in Internet censorship litigation to provide pro bono assistance in the suit. We look forward to meeting with you to discuss this matter and answering any questions you might have.

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