

Discriminatory Filtering: CIPA's Effect on Our Nation's Youth and Why the Supreme Court Erred in Upholding the Constitutionality of The Children's Internet Protection Act

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I. INTRODUCTION

Most attempts at suppression rest on a denial of the fundamental premise of democracy: that the ordinary citizen, by exercising critical judgment, will accept the good and reject the bad. The censors, public and private, assume that they should determine what is good and what is bad for their fellow citizens.¹

In a country where we are slowly being stripped of our constitutional freedoms through complex government action such as the USA PATRIOT ACT² and Homeland Security regulations,³ it is essential that we retain the basic First Amendment freedoms of disseminating and accessing information.⁴ Recent legislation affecting two large sources of information, the Internet⁵ and public libraries, threatens these essential freedoms. Congress's objective is to filter obscene and indecent material in response to a perceived threat by members of the public, specifically to minors, who are using computer terminals at public libraries and schools to access

1. Joint Statement of American Library Association & Association of American Publishers, *The Freedom to Read Statement* (July 12, 2000), *available at* <http://www.ifla.org/faife/ifstat/alaread.htm> [hereinafter *Freedom to Read Statement*].

2. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. 107-56, 115 Stat. 272, (2001) (codified at scattered sections 18 U.S.C.) (stating "An Act to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.").

3. These regulations include detention of citizens and noncitizens, questioning of immigrants and general threats to liberty, equality, constitutional checks and balances, open government, and the rule of law. ACLU, *Insatiable Appetite: The Government's Demand for New and Unnecessary Powers After September 11*, (2002), *available at* <http://www.aclu.org/Files/OpenFile.cfm?id=10403>.

4. *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) (citing *Curtis Publishing v. Butts*, 388 U.S. 130, 150 (opinion of Harlan, J.)).

The policy of the First Amendment favors dissemination of information and opinion, and [t]he guarantees of freedom of speech and press were not designed to prevent the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential. . . .

Id. (citations omitted).

5. Expression on the Internet is "as diverse as human thought." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). The Internet facilitates "vast democratic forums." *Id.* at 868.

pornographic sites on the Internet. To meet this objective, Congress introduced the Children's Internet Protection Act ("CIPA").⁶ The provisions of CIPA have provoked tension between two competing interests: protecting minors from "cyberpornography" and safeguarding First Amendment rights. The effect of the Act is an overly broad bar limiting access to two of this country's invaluable resources.⁷

The public "library is a mighty resource in the free marketplace of ideas,"⁸ and a "forum for silent speech."⁹ Libraries across the country have endorsed or adopted the Library Bill of Rights,¹⁰ the Freedom to Read Statement,¹¹ and other policies protecting First Amendment rights.¹² Because of the stringent new policies required under CIPA, libraries are now unable to retain their historically liberal dissemination of resources. In justifying these policies, the Supreme Court erroneously applied a rational basis standard of review, which neglected to recognize the Act's inability to safeguard First Amendment freedoms.

Internet access is available free of charge at virtually each of the 16,000 public libraries across the country.¹³ The Internet is growing at a rate close to 50 percent annually and connects millions of computers in more than 250 countries.¹⁴ Over 14 million people in the United States use their public libraries for Internet access.¹⁵ In fact, "[a]s numerous government studies have demonstrated, the 'digital divide' persists, and

6. Children's Internet Protection Act, Pub. L. No 106-554, 114 Stat. 2763 (codified at 47 U.S.C. § 254 (2001)).

7. "The Web is thus comparable, from the readers' viewpoint, to . . . a vast library including millions of readily available and indexed publications. . . ." *Reno*, 521 U.S. at 853. The Supreme Court emphasized in *Reno* that the Internet is entitled to the highest level of First Amendment protection. *Id.* at 870.

8. *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) (citation omitted).

9. *Id.* at 583 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)).

10. American Library Association, Library Bill of Rights, (Jan. 23, 1996), available at <http://www.ala.org/ala/oif/statementspols/statementsif/librarybillofrights.pdf> (illustrating the basic policies that guide library services).

11. See Freedom to Read Statement, *supra* note 1.

12. The First Amendment encompasses not only the right to speak but also the right to receive information. See, e.g., *Reno*, 521 U.S. at 874 (invalidating the statute because it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.").

13. Plaintiff's Joint Proposed Findings of Fact at para. 74, *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002) (on file with the Federal Communications Law Journal) [hereinafter Findings of Fact].

14. Rebecca L. Covell, *Problems with Government Regulation of the Internet: Adjusting the Court's Level of First Amendment Scrutiny*, 42 ARIZ. L. REV. 777, 790 (2000).

15. Findings of Fact, *supra* note 13, para. 84.

many groups, including minorities, low-income persons, the less-educated, and the unemployed, are far less likely to have home Internet access.”¹⁶ While CIPA considerably limits Internet access for our nation’s youth,¹⁷ the problem is compounded for the socio-economically disadvantaged. For the substantial portion of America’s population that cannot afford a computer or home Internet access, public schools and libraries provide the only means of accessing such technology.¹⁸ Therefore, while wealthier Americans are able to access the full range of resources that the Internet offers on their home computers, the economically disadvantaged are limited to the restricted Internet access available in their local public libraries.

There are at least 8,058,044,651 Web pages on the Internet.¹⁹ An estimated 934 million people use the Internet worldwide, and approximately 185.55 million of these individuals are American (about 64 percent of the U.S. population).²⁰ Adult Internet sites account for approximately 2.1 percent of the World Wide Web.²¹ Children and teenagers are using the Internet more than any other age group. In fact, more than 25 million children in the United States from ages two through seventeen are using the Internet.²² This number represents three times the number of children who were online in 1997 and the number is expected to increase to 44 million by 2005.²³ These statistics support the supposition that the effects of CIPA will disproportionately affect our nation’s youth.

This Note argues that the Supreme Court erred by reversing the

16. Plaintiff’s Joint Post-Trial Brief at 6, *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002), available at <http://www.ala.org/ala/washoff/WOissues/civilliberties/washcipa/litigation/postcipabrief.pdf> [hereinafter Post-Trial Brief].

17. See discussion *infra* Part III.

18. Findings of Fact, *supra* note 13, at paras. 86–91. “As of 2000, nearly 50% of public libraries received e-rate discounts, and approximately 70% of libraries serving the poorest communities receive those discounts.” *Id.* para. 462. Similarly, “over 18% of public libraries receive LSTA or other federal grants, and more than 25% of libraries serving the poorest communities receive such grants.” *Id.* para. 482.

19. See Google.com, at <http://www.google.com> (information accurate as of Mar. 22, 2005).

20. See ClickZ Network, *Population Explosion!*, Feb. 8, 2005, at http://www.clickz.com/stats/sectors/geographics/article.php/5911_151151. The Computer Industry Almanac projects that there will be 1.35 billion Internet users by 2007. *Id.*

21. See Daniel Orr & Josephine Ferrigno-Stack, *Childproofing On The World Wide Web: A Survey Of Adult Webservers*, 41 JURIMETRICS J. 465 (2001). See also ConsumerReports.org, *Digital Chaperones for Kids*, Mar. 2001, at http://www.consumerreports.org/main/content/display_report.jsp?FOLDER%3C%3Efolder_id=348251&bmUID=1108606297561 (last visited Mar. 22, 2005).

22. Michael Pastore, ClickZ Network, *40 Percent of American’s Kids Online*, June 8, 2000, at http://www.clickz.com/stats/sectors/demographics/article.php/5901_390941.

23. *Id.*

district court's decision and upholding the constitutionality of CIPA. As a result of the Supreme Court's decision, our nation's youth will have restricted access to constitutionally protected information. In order to sustain constitutional scrutiny, the Court improperly relied on a provision of the Act permitting adults to request that library filters be disabled upon request. Moreover, the Court did not fully consider the negative effect that CIPA will have on our youth, particularly as it relates to their ability to access information via the Internet. Part II of this Note provides background on CIPA and the litigation surrounding it. The decisions of both the district court and the United States Supreme Court in *American Library Association v. United States*²⁴ and *United States v. American Library Association*²⁵ are analyzed in detail. Part III explains what an Internet filter is and how filters work in the context of CIPA. Part IV identifies the burdens that libraries face as a consequence of CIPA. Part V recognizes several less-restrictive alternatives to the implementation of CIPA. Part VI expounds upon the substantial effect that CIPA will have on today's youth. Ultimately, Part VII of this Note argues that CIPA simply does not accomplish what it was designed to do and thus has proved to be unwise legislation.

II. LEGAL HISTORY OF THE CHILDREN'S INTERNET PROTECTION ACT

A. *What is CIPA?*

Congress implemented CIPA on April 20, 2001, and it represents one in a series of congressional attempts to regulate Internet pornography.²⁶

24. 201 F. Supp. 2d 401 (E.D. Pa. 2002).

25. 539 U.S. 194 (2003).

26. See The Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended at 18 U.S.C. §1465, 47 U.S.C. §§ 223, 230 (2001)).

Whoever . . . by means of a telecommunications device knowingly . . . makes, creates, or solicits, and initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age . . . shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

Id. § 502.

The Supreme Court struck down two CDA provisions under the First Amendment and the only provision that survived was the ban on the knowing transmission of obscene messages, because obscene speech enjoys no First Amendment protection. See *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (seeking to enjoin the enforcement of the CDA on the grounds that it was unconstitutional). See *Child Online Protection Act ("COPA")*, 47 U.S.C. § 231 (2001) (applying only to material on the World Wide Web and limiting the prohibition to communications made for commercial purposes and restricted only material

Unlike Congress's previous attempts at regulation, which focused primarily on Web site operators, CIPA focuses on Internet users.

Under the E-rate²⁷ and Library Service and Technology Act of 1996 ("LSTA")²⁸ programs, schools and libraries can apply for government-funded discounts on telecommunications and Internet access.²⁹ In order to participate in the federal E-rate and LSTA funding, schools and public libraries were obligated to comply. Under CIPA, schools and libraries with Internet access are required to certify to the FCC that they are "enforcing a policy of Internet safety."³⁰ These Internet-safety policies require the use of filters to protect against access to visual depictions that are obscene³¹ or harmful to minors.³² Congress used its spending power to coerce public libraries and schools to submit to such standards.

The Constitution gives Congress the authority to "lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."³³ To ensure compliance, CIPA conditioned the receipt of Internet funding on the fulfillment of CIPA filtering obligations.³⁴ Shortly after CIPA's

that is harmful to minors). COPA is currently being reviewed for its constitutionality. *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003), *cert. granted*, 124 S.Ct. 399, *Ashcroft v. ACLU*, 124 S. Ct. 399 (U.S. Oct. 14, 2003), *Ashcroft v. ACLU*, 124 S.Ct. 2783 (U.S. June 29, 2004) *aff'd and remanded*. Additionally, the Child Pornography Prevention Act expanded the definition of child pornography to include not only visual depictions that involve the use of real minors engaging in sexually explicit conduct (virtual child pornography), but also classifies child pornography images created or modified to appear that a minor is engaging in sexually explicit conduct. *See The Child Pornography Prevention Act*, 18 U.S.C. §2251 (2001).

27. *See* 47 C.F.R. §§ 54.501–54.502 (2003). "[T]he E-rate program established by the Telecommunications Act of 1996 entitles libraries to buy Internet access at a discount. In the year ending June 30, 2002, libraries received \$58.5 million in such discounts." *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003) (citations omitted).

28. *See* 20 U.S.C. § 9101 (2001). LSTA funds state library administrative agencies that, in turn, support a variety of local library services, including the provision of public Internet access. "In fiscal year 2002, Congress appropriated more than \$149 million in LSTA grants." *Am. Library Ass'n*, 539 U.S. at 199 (citation omitted).

29. "Both [LSTA and e-rate discounts] have significantly contributed to the increased availability of Internet access in public libraries, especially in low-income communities." Paul M. Smith & Daniel Mach, *Major Shifts in First Amendment Doctrine Narrowly Averted*, COMM. LAWYER, Fall 2003, at 1.

30. Children's Internet Protection Act, 47 U.S.C. § 254 (2001).

31. *See* 47 U.S.C. §§ 254(h)(5)(B)(i), (5)(C)(i), (6)(B)(i), (6)(C)(i) (2001). CIPA defines obscene by incorporating 18 U.S.C. § 1460 and defines child pornography by incorporating 18 U.S.C. § 2256, 47 U.S.C. §§ 254(h)(7)(E) & (h)(7)(F).

32. Harmful to minors is defined by the *Miller* standard. *See* discussion *infra* Part II.A.2 for a detailed description of the *Miller* standard. Accordingly, minors are individuals under the age of seventeen. 47 U.S.C. § 231(e)(7) (2001).

33. U.S. CONST. art. I, § 8, cl. 1.

34. Any library or school that does not certify itself according to FCC requirements is

implementation, a group of Web site publishers, library patrons, and libraries filed suit against the United States, attempting to enjoin the enforcement of CIPA.³⁵ The plaintiffs argued that the filtering requirement was overbroad and that it unconstitutionally infringed on patrons' First Amendment rights.

1. What is a Filter and How Does It Work?

A filter is a "device or material for suppressing or minimizing waves or oscillations of certain frequencies."³⁶ Filtering software is intended to: (1) block access to Internet sites listed in an internal database of the product; (2) block access to Internet sites listed in a database maintained external to the product itself; (3) block access to Internet sites which carry certain ratings assigned to those sites by a third party, or which are unrated under such a system; (4) scan the contents of Internet sites which a user seeks to view; and (5) block access based on the occurrence of certain words or phrases on those sites.³⁷

Generally, software filters use an algorithm to test the appropriateness of Internet material. First, sites are filtered based on IP addresses or domain names. This process is based on predefined lists of appropriate and inappropriate sites. However, relying on these lists is ineffective. Due to the continuous addition of new Internet sites and the constant updates made to existing sites, predefined lists quickly become outdated.³⁸ Additionally, such screening does not prevent spam email or real-time communication. Youth, especially, use many Internet functions that do not involve the World Wide Web.³⁹ Email, chat rooms, instant messaging, and newsgroups are all means whereby minors may be exposed to indecent or obscene materials.⁴⁰ Moreover, all Internet filters both overblock (incorrectly block

disqualified from receiving federal funding until they are able to verify compliance. 47 U.S.C. § 254.

35. *Am. Library Ass'n. v. United States*, 201 F. Supp. 2d 401, 407 (E.D. Pa. 2002), *rev'd*, 539 U.S. 194 (2003).

36. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 468 (11th ed. 2003). *See also* *Am. Library Ass'n*, 201 F. Supp. 2d at 427-50.

37. Adam Horowitz, *The Constitutionality of the Children's Internet Protection Act*, 13 ST. THOMAS L. REV. 425, 430-33 (2000).

38. *Id.* at 432.

39. Mitchell P. Goldstein, *Congress and the Courts Battle Over the First Amendment: Can the Law Really Protect Children From Pornography on the Internet?*, 21 J. MARSHALL J. COMPUTER & INFO. L. 141, 197-98 (2003).

40. According to Goldstein, the Commission considered the following in its October 20, 2000 report:

numerous protective technologies and methods, including filtering and blocking services; labeling and rating systems; age verification efforts; the possibility of a new top-level domain for harmful to minors material; 'green' spaces containing

a substantial amount of speech),⁴¹ and underblock (fail to block a substantial amount of speech) Internet resources.⁴²

The FCC recognizes that although there is a wide variety of Internet filtering technology currently available, none of it is flawless.⁴³ Furthermore, neither the FCC nor CIPA mandates that public libraries use a particular Internet filter or that the chosen filter be completely effective.⁴⁴ The fact that the FCC and CIPA acknowledge the imperfection of current filtering technology only compounds the problem of requiring the use of such filters. With such a wide range of available filters—all of which work in different manners and will result in the filtering of explicit materials in different ways—the fact that the FCC has left libraries to decide which filters to use is curious. Distribution of federal E-rate grants is motivated by the government's interest in preventing children from accessing obscene materials online, but the FCC cannot ensure that the particular filtering software that libraries choose is actually fulfilling this objective. The FCC clearly has better knowledge of filtering technologies than individual libraries and should therefore implement a uniform system. With a uniform system, libraries would learn how to better tailor the system to fit their needs. Because there are so many diverse filtering systems to choose from, lack of specific regulation only compounds the principal problem of filtering inaccuracies.

a. *Disabling Filters*

Experts from both sides of the filtering debate have documented many

only child-appropriate materials; Internet monitoring and time-limiting technologies; acceptable use policies and family contracts; online resources providing access to protective technologies and methods; and options for increased prosecution against illegal online material.

Id. at 198. See also COMMISSION ON CHILD ONLINE PROTECTION, REPORT TO CONGRESS (2000), available at <http://www.copacommission.org/report/COPAreport.pdf> [hereinafter COPA REPORT]. See generally YOUTH, PORNOGRAPHY, AND THE INTERNET (Dick Thornburgh & Herbert S. Lin eds., 2002), available at <http://www.nap.edu/openbook/0309082749/html>.

41. Overblocked Internet sites are sites that do not contain obscenity, child pornography, or material harmful to a minor, but have been erroneously blocked by a library's Internet filter. See, e.g., Jennifer Zwick, *Casting a Net Over the Net: Attempts to Protect Children in CyberSpace*, 10 SETON HALL CONST. L.J. 1133 (2000). When the filtering software blocks a site because of the presence of the word "breast," it blocks sites containing information about breast cancer and chicken breast recipes, in addition to inappropriate sites containing nudity. *Id.* at 1148.

42. Russell B. Weekes, *Cyber-Zoning a Mature Domain: The Solution to Preventing Inadvertent Access to Sexually Explicit Content on the Internet?*, 8 VA. J.L. & TECH. 4, 20 (2003), available at http://www.vjolt.net/vol8/issue1/v8i1_a04-Weekes.pdf.

43. Federal-State Joint Board on Universal Service and Children's Internet Protection Act, *Report and Order*, 16 F.C.C.R. 8182, paras. 34-36 (2001) [hereinafter *CIPA Report*].

44. *Id.* para. 35.

Web sites that were incorrectly blocked by CIPA's filtering software.⁴⁵ However, the Supreme Court dodged the issue of inaccurate filtering systems by permitting the library to disable filters "to enable access for bona fide research or other lawful purposes."⁴⁶ Under the E-rate program, disabling is permitted "during use by an adult,"⁴⁷ and under the LSTA program, disabling is permissible for anyone.⁴⁸ The Supreme Court's decision assumes that disabling filters is easily accomplished. Specifically, CIPA states that, "[a]n administrator, supervisor, or other person authorized by the certifying authority . . . may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose."⁴⁹ However, since the implementation of CIPA, many librarians have reported that the disabling process is time consuming and difficult to implement and manage.⁵⁰ In fact, CIPA applies even to staff computers, forcing librarians to disable the filters on their own

45. The following are examples of Web sites that school and library personnel, students, and experts found to be inaccessible due to overblocking filters. Experts from both sides stipulated to these sites. A page containing a report on "Male Sex Work & AIDS in Canada," Findings of Fact, *supra* note 13, para. 220; <http://www.kittyporn.com> is "a parody site featuring pictures of kittens," *Id.* para. 221; "a promotional site for the movie, The Opposite of Sex," *Id.*; "a page from Salon.com, a popular online magazine," *Id.* para. 222; <http://www.afraidtoask.com/index.html> which is "the homepage of one of the plaintiffs' Web sites, which offers information on personal health issues," *Id.* para. 224; "a Web site featuring links to informational and educational Web sites about menstruation," *Id.* para. 231; <http://www.bi.org>, "a site serving the bisexual community," *Id.* para. 233; <http://www.cancerfr.wkmc.com>, "the Web site for the Willis-Knighton Cancer Center in Shreveport, Louisiana," *Id.* para. 234; <http://www.barcelonareview.com>, "an online journal of international contemporary fiction and poetry," *Id.* para. 236; <http://www.girlsplace.com>, "a site devoted to providing news, health and recreational information to girls," *Id.* para. 237; <http://www.muchlove.org>, "the Web site for a Southern California animal rescue organization," *Id.* para. 239; <http://www.condomania.com> "a site on teen sexual health," *Id.* para. 241; <http://www.bored.com>, "a page on a Web site devoted to providing links to the most interesting sites on the Web," *Id.* para. 247; <http://www.altheweb.com>, "which provides a brief biography of former Vice President Gore," *Id.* para. 249; <http://sportsillustrated.cnn.com>, *Id.* para. 251; and <http://www.goodbyemag.com/nov97>, "the November-December 1997 issue of the Goodbye Magazine, an online magazine devoted to obituaries," *Id.* para. 257; <http://www.goaskalice.com>, "Columbia University's Health Question and Answer Internet Service"; <http://www.lakewood-lancers.org/index.htm>, "alumni listing for Lakewood High School in Lakewood, California," *Id.* para. 259; and <http://www.hembros.com/index.htm>, "a page describing the book Piano Playing and Songwriting in 3 lessons," *Id.* para. 258. See also Post-Trial Brief, *supra* note 16, at 47.

46. *United States v. Am. Library Ass'n*, 539 U.S. 194, 201 (2003) (quoting 20 U.S.C. § 9134(f)(3) (2001) and 47 U.S.C. § 254(h)(6)(D) (2001)).

47. 47 U.S.C. § 254(h)(6)(D).

48. 20 U.S.C. § 9134.

49. 47 U.S.C. § 254(h)(5)(D).

50. See generally American Library Association, Questions and Answers on the Children's Internet Protection Legislation, at <http://www.ala.org/ala/washoff/WOissues/civilliberties/washcipa/qanda/q.htm> (last visited Mar. 25, 2005).

computers should they want to perform a complete search of the World Wide Web.⁵¹ The district court, in its preliminary statement found that “unblocking may take days, and may be unavailable, especially in branch libraries, which are often less well staffed.”⁵²

CIPA’s language raises many questions as to how library administrators should interpret its provisions. For example, the statute states that a library may unblock for “bona fide research.”⁵³ The statute fails to define specifically what this ambiguous language signifies. Without specifically defined guidelines to adhere to these conditions, libraries will make decisions on case-by-case determinations, which could lend to random results. Do the provisions require an administrator to disable the filter? Can library administrators disable filters in a group of computers and limit those computers for use by adults only? What is “bona fide research”? Moreover, requiring a patron to ask a librarian to disable filters will be burdensome and may even be embarrassing. In the aggregate, it may deter patrons from making such a request when seeking information on personal matters such as sexual health, sexual identity, or medical needs.⁵⁴

2. Obscenity

In order to understand CIPA, it is essential to understand that obscene speech is not protected by the Constitution.⁵⁵ There is no constitutional right to view or distribute obscene materials.⁵⁶ In *Miller v. California* the Supreme Court defined obscenity as “works which depict or describe sexual conduct . . . which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”⁵⁷

Content that fits the *Miller* definition of obscenity is not protected by the First Amendment and can legally be prohibited. This Note will use the term obscenity to refer to content prohibited by *Miller*.

3. Government Interest in the Well-Being of Youth

The Supreme Court has established an “independent interest in the

51. See *CIPA Report, supra* note 43, para. 30.

52. *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 411 (E.D. Pa. 2002), *rev’d*, 539 U.S. 194 (2003).

53. 20 U.S.C. § 9134(f)(3) (2001).

54. *Am. Library Assn.*, 201 F. Supp. 2d at 411.

55. See generally *Roth v. United States*, 354 U.S. 476 (1957).

56. *Id.*

57. 413 U.S. 15, 24-25 (1973).

well-being of [America's] youth.”⁵⁸ The Court in *Ginsberg v. New York* held that the government can prohibit “the sale to minors . . . of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults.”⁵⁹ Still, there is a limit to the government’s regulation of this type of indecent material. In the past, when addressing First Amendment issues in cases involving sexually explicit materials, the Court held that regardless of the government’s interest in protecting children, “[t]he level of discourse [among adults] cannot be limited to that which would be suitable for a sandbox.”⁶⁰ The government may not “reduce the adult population . . . to reading only what is fit for children.”⁶¹ On its face, restricting obscene material to protect youth appears to be an obvious and constitutionally valid choice. The problem is that CIPA restricts materials that do not fit the *Miller* definition of obscenity, thus restricting adults and minors from accessing legitimate material.⁶²

4. Levels of Scrutiny

When engaging in a First Amendment analysis courts must determine which level of scrutiny to apply to the action in question. This categorization is based on whether the government action distinguishes speech on the basis of content or on the basis of the time, place, and manner.⁶³ Government action distinguished on the basis of content invokes the Court’s highest level of scrutiny: strict scrutiny. The government must demonstrate a compelling interest coupled with narrowly or carefully tailored means of serving that interest.⁶⁴ Time, place, and manner restrictions on speech, however, invoke a lower level of scrutiny. The government must demonstrate that it has not unreasonably foreclosed other routes of making the same communications and that has a substantial

58. *Ginsberg v. New York*, 390 U.S. 629, 640 (1968).

59. *Id.* at 631.

60. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (striking down a federal statute forbidding the unsolicited mailing to homes of information regarding contraception). *See also Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989).

61. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

62. “It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults.” *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (citation omitted). Furthermore, restricting adult access to what is appropriate for juveniles is “not reasonably restricted to the evil with which it is said to deal.” *Butler*, 352 U.S. at 383.

63. *See, e.g., Reno*, 521 U.S. at 867-70 (deciding whether the CDA could best be characterized as a content-based restriction on speech or a “time, place, and manner” restriction before deciding which level of First Amendment scrutiny should be applied to the CDA).

64. *See id.* at 879; *Sable*, 492 U.S. at 126; *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

interest in taking action.⁶⁵

B. The District Court's Decision in the American Library Association v. United States

In 2002, the Eastern District of Pennsylvania held CIPA to be unconstitutionally overbroad because “given the crudeness of filtering technology, any technology protection measure mandated by CIPA will necessarily block access to a substantial amount of speech whose suppression serves no legitimate government interest.”⁶⁶ More specifically, the court determined that CIPA’s content-based restrictions were subject to strict scrutiny.⁶⁷ The court then considered whether the libraries’ use of filters to protect library patrons constituted a legitimate state interest.⁶⁸ The court held that public libraries’ use of filtering software was not narrowly tailored to actually prevent the dissemination of the material that CIPA proscribes.⁶⁹ Furthermore, the court viewed the Internet as a public forum, analogizing Internet access in public libraries to “public fora” such as sidewalks and parks because it promotes First Amendment values in an analogous approach.⁷⁰ Moreover, the court concluded that there were less restrictive use policies that libraries could implement rather than applying CIPA’s over-inclusive filtering system.⁷¹

65. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

66. *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401, 489 (E.D. Pa. 2002), *rev’d*, 539 U.S. 194 (2003).

67. *See id.* at 462-470.

Application of strict scrutiny to public libraries’ use of software filters, in our view, finds further support in the extent to which public libraries’ provision of Internet access promotes First Amendment values in an analogous manner to traditional public fora, such as sidewalks and parks, in which content-based restrictions on speech are always subject to strict scrutiny.

Id. at 466.

68. *Id.* at 472. “The government’s compelling interest in protecting the well-being of its youth justifies laws that criminalize not only the distribution to minors of material that is harmful to minors, but also the possession and distribution of child pornography.” *Id.* (citations omitted).

69. *Id.* at 479.

Although the strength of different libraries’ interests in blocking certain forms of speech may vary from library to library, depending on the frequency and severity of problems experienced by each particular library, we conclude, based on our findings of fact, that any public library’s use of a filtering product mandated by CIPA will necessarily fail to be narrowly tailored to address the library’s legitimate interests. Because it is impossible for a public library to comply with CIPA without blocking substantial amounts of speech whose suppression serves no legitimate state interest, we therefore hold that CIPA is facially invalid. . . .

Id.

70. *Id.* at 409.

71. *Id.* at 410.

In large part, the district court based its decision on the inability of today's filtering technology to accurately achieve Congress's objective: to filter obscene and indecent material. Specifically, the court stated:

No presently conceivable technology can make the judgments necessary to determine whether a visual depiction fits the legal definitions of obscenity, child pornography, or harmful to minors. Given the state of the art in filtering and image recognition technology, and the rapidly changing and expanding nature of the Web, we find that filtering products' shortcomings will not be solved through a technical solution in the foreseeable future.⁷²

The court concluded that even with filters, librarians would still have to apply a "tap-on-the-shoulder method of enforcement,"⁷³ given the "filters' inevitable underblocking."⁷⁴

C. *The Supreme Court's Decision in United States v. American Library Association*

On June 20, 2002, the government appealed the district court's verdict.⁷⁵ On June 23, 2002, the Supreme Court reversed the district court's decision and upheld the constitutionality of CIPA.⁷⁶ In a 6-3 ruling the Court held that CIPA did not violate the First Amendment because public libraries do not offer Internet access "to create a public forum for Web publishers . . . [but] to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."⁷⁷ Although six justices voted to uphold CIPA, only three justices actually joined the plurality opinion. Justices Scalia, Thomas, and O'Connor joined Chief Justice Rehnquist's plurality opinion. Justices Breyer⁷⁸ and Kennedy⁷⁹ concurred in the judgment, but each wrote a separate opinion specifically addressing the importance of CIPA's disabling provision. Justices Souter, Ginsberg, and Stevens joined in dissent, voting to affirm the district court.⁸⁰

72. *Id.* at 449.

73. *Id.* at 482.

74. *Id.*

75. *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003).

76. *Id.*

77. *Id.* at 206 (citations omitted).

78. Justice Breyer stated that "[T]he Act allows libraries to permit any adult patron access to an 'overblocked' Web site; the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, 'Please disable the entire filter.'" *Id.* at 219 (Breyer, J., concurring).

79. Justice Kennedy concluded that, "If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case." *Id.* at 214 (Kennedy, J., concurring).

80. Justice Souter, joined by Justice Ginsberg, explained in dissent that "local librarians

The Supreme Court held that libraries were not public fora and analogized the decision to allow or not allow Internet access to the decision a library makes regarding which books to purchase for its shelves.⁸¹ Consequently, the Court held that rational basis, rather than strict scrutiny, was the proper standard of review. With respect to the highly debated filters and their tendency to overblock constitutionally-protected speech, Chief Justice Rehnquist emphasized that CIPA permits librarians to disable a filter “without significant delay on an adult user’s request” and that “protecting young library users from material inappropriate for minors” outweighs any temporary inconvenience to adults.⁸² While Chief Justice Rehnquist emphasizes the disabling provisions as the cure to the First Amendment arguments, he fails to call attention to the fact that CIPA allows, but does not require, librarians to disable Internet filtering software.⁸³ Moreover, there are no procedures in place to guide librarians as to the proper situations under which disabling a filter is appropriate. Therefore, the disabling provision will inevitably be applied unequally to patrons.⁸⁴ In fact, the FCC actually refused to elaborate on the disabling provisions implemented in CIPA by stating:

We decline to promulgate rules mandating how entities should

might be able to indulge the unblocking requests of adult patrons to the point of taking the curse off the statute for all practical purposes.” *Id.* at 232 (Souter, J., dissenting).

81. In analogous situations, courts have invalidated policies that require patrons to request access to sensitive materials. *See, e.g.,* *Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 2d 530, 551 n.23 (N.D. Tex. 2000) (striking down a library policy requiring relocation of purported inappropriate children’s books to the adult section of the library, explaining that, “because the only children’s books located in the adult sections of the Library will be those removed under the [policy], the [policy] attaches an unconstitutional stigma to the receipt of fully-protected expressive materials.”). *See also* *Mainstream Loudoun v. Bd. of Trustees of Loudoun County Library*, 2 F. Supp. 2d 783, 797 (E.D. Va. 1998) (holding unconstitutional the unblocking procedure in library Internet filtering policy because it “forces adult patrons to petition the Government for access to otherwise protected speech. . .”).

82. *Am. Library Ass’n*, 539 U.S. at 196.

83. *See* 20 U.S.C. § 9134(f)(3); 47 U.S.C. § 254(h)(6)(D) (providing that an “authority may disable the technology protection measure,” not that it must) (emphasis added).

84. The provision thus falls under an unfavorable category of statutes that “vests unbridled discretion in a government official over whether to permit or deny expressive activity.” *City of Lakewood v. Plain Dealer Publ’g*, 486 U.S. 750, 755 (1988). “The First Amendment prohibits the vesting of such unbridled discretion in a government official.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992). *See also* *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (“[T]he danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum’s use.”); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1968) (noting “the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.” (citations omitted)).

implement these provisions. Federally-imposed rules directing school and library staff when to disable technology protection measures would likely be overbroad and imprecise, potentially chilling speech, or otherwise confusing schools and libraries about the requirements of the statute. We leave such determination to the local communities, whom we believe to be most knowledgeable about the varying⁸⁵ circumstances of schools or libraries within those communities.

In dissent, Justice Souter wrote, “The proper analogy . . . is either to buying a book and then keeping it from adults lacking an acceptable purpose, or to buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for all adults.”⁸⁶ The mere fact that library patrons have the right to ask librarians to disable the filter does not mean that they will exercise this right or even that the right to ask is constitutional. The FCC order implementing CIPA does not require unblocking upon request, leaving such determinations to the discretion of local communities.⁸⁷ Furthermore, minors are not permitted to request that filters be disabled. “[T]he disabling provisions *exacerbate* the constitutional infirmities of the law by imposing an unconstitutional stigma and chilling effect on requesting library patrons.”⁸⁸ The government’s conditions mandate overkill by even refusing to allow library staff access to unblocked computer terminals.⁸⁹

Moreover, Justice Souter stated that CIPA could have restricted children to filtered terminals while requiring that unblocked terminals for adults be located in a separate area, and the statute could also have provided for “no questions asked” unblocking for adult patrons. “The statute could, in other words, have protected children without blocking access for adults or subjecting adults to anything more than minimal inconvenience, just the way (the record shows) many librarians had been dealing with obscenity and indecency before imposition of the federal

85. *CIPA Report*, *supra* note 43, para. 53.

86. *Am. Library Ass’n*, 539 U.S. at 237 (Souter & Ginsburg, JJ., dissenting).

87. *Id.* at 232. *See also CIPA Report*, *supra* note 43, para. 53.

88. Post-Trial Brief, *supra* note 16, at 19.

[T]he Supreme Court has recognized the severe chilling effect of forcing citizens to publicly and openly request access [to information]. . . . *See, e.g.*, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 754 (1996) (noting that “written notice” requirement for access to “patently offensive” cable channels “will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the ‘patently offensive channel’”); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (striking the requirement that recipients of Communist literature notify the Post Office that they wish to receive those materials.)

Id.

89. *CIPA Report*, *supra* note 43, para. 30.

conditions.”⁹⁰ Justice Stevens added that:

It is as though the statute required a significant part of every library’s reading materials to be kept in unmarked, locked rooms or cabinets, which could be opened only in response to specific requests. Some curious readers would in time obtain access to the hidden materials, but many would not.⁹¹

Not only did the Supreme Court disregard the amount of constitutionally-protected speech that is overblocked through the filtering system, it did not consider equally effective, less-restrictive alternatives. Justice Souter disagreed with the plurality’s conclusion that libraries themselves could impose content-based restrictions on materials accessible to adults without violating the First Amendment. He argues that legitimate library selection decisions cannot be equated with blocking content available to adult patrons, contending that such censorship should be subjected to strict judicial scrutiny. He stated that “[t]he difference between choices to keep out and choices to throw out is thus enormous.”⁹²

III. THE REAL CONSEQUENCES OF CIPA

A. *Implementation of CIPA*

The July 18, 2003 implementation of the Supreme Court’s decision to uphold CIPA resulted in unfavorable consequences for public libraries and schools around the country. Paul Smith, an attorney representing the American Library Association (“ALA”) stated, “We’re disappointed that the Court said this one-size fits-all answer is the way to handle the problem of sexual content on the internet.”⁹³ For example, Chicago Public Libraries (“CPL”) announced that they would spend an estimated \$200,000 in the year 2003 to install the requisite filtering programs so that it could preserve its annual \$500,000 E-rate subsidies.⁹⁴ CPL’s commissioner stated, “Sadly, this will take money away from the purchase of books or salaries.”⁹⁵ Cities across the United States are being faced with the difficult decision of whether to forego unfiltered computer stations for E-rate federal subsidies, or lose their annual federal funding to retain their filter-free computer stations. Some cities, like Chicago, did not have a choice due to funding

90. Am. Library Ass’n. 539 U.S. at 234 (Souter & Ginsburg, JJ., dissenting).

91. *Id.* at 224-25 (Stevens, J., dissenting).

92. *Id.* at 242.

93. Associated Press, *Libraries Lose on Porn Filtering*, CBSNEWS.COM, June 23, 2003, at <http://election.cbsnews.com/stories/2003/06/23/supremecourt/main559919.shtml>.

94. American Library Association, *Libraries to Revisit Their Bottom Lines*, AM. LIBRARIES, Aug. 2003, at 13.

95. *Id.*

constraints.⁹⁶ Community members in Fairfield County, Ohio lashed out against a librarian who was wavering on the decision of whether to forgo federal funding for unfiltered computer access for patrons or submit to CIPA's requirements.⁹⁷ Pro-CIPA community members glossed over the potential loss of information resulting from the filters and accused the library of "encouraging children to access pornography."⁹⁸

In many states, CIPA has become a political issue. Lawmakers in Colorado, Delaware, Oregon, and Washington plan to introduce bills in order to generate additional funding for new filtering software.⁹⁹ Many libraries will not have the choice of whether to implement CIPA's filter mandates or forego federal funding. Accordingly, CIPA discriminates against libraries in low-income communities. These libraries would not survive without federal assistance to subsidize their Internet-related technology costs.¹⁰⁰ The FCC implemented a July 1, 2004 deadline for all libraries wanting E-rate discounts to certify that they are "filtering Internet access and they have 'implemented a procedure for unblocking the filter' at an adult's request."¹⁰¹

IV. LESS RESTRICTIVE ALTERNATIVES

A. *What is a Less-Restrictive Alternative?*

If there is an equally efficacious, less-restrictive means available to the government, the government may not proceed along another route without violating the First Amendment.¹⁰² The government may not affect protected speech more than necessary to accomplish its goals.¹⁰³ The

96. *See id.*

97. *Id.*

98. *Id.* at 14.

99. *Id.*

100. *See id.*

101. American Library Association, *FCC Issues Rules on CIPA Implementation*, AM. LIBRARIES, Sept. 2003, at 12.

102. These policies include preventing:

[A]ccess by minors to inappropriate matter on the Internet. . . . the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications. . . . unauthorized access, including so-called 'hacking', and other unlawful activities by minors online . . . unauthorized disclosure, use, and dissemination of personal identification information regarding minors . . . measures designed to restrict minors' access to materials harmful to minors.

47 U.S.C. § 254(l)(1)(A) (2001).

103. *See United States v. Playboy Entm't Group*, 529 U.S. 803 (2000) (holding unconstitutional under the First Amendment a statute requiring operators of adult cable channels to either implement changes that would alleviate the issue of "signal bleed" of

principle First Amendment concern is whether the action chills speech to a degree intolerable to the First Amendment.¹⁰⁴ Therefore, the question is whether these less-restrictive alternatives have less of a chilling effect on speech than CIPA.¹⁰⁵ At trial, plaintiffs established numerous less-restrictive means to further the government's interest. For example:

[T]he *optional* use of blocking software; policies under which parents decide whether their children will use terminals with blocking software; the use of blocking software only for younger children [either restricted to children's areas or through age identification policies]; enforcement of local Internet use policies; training in Internet usage; steering patrons to sites selected by librarians; installation of privacy screens or recessed monitors; and the segregation of unblocked computers or placing unblocked computers in well-trafficked areas.¹⁰⁶

These alternatives, in addition to casual monitoring by library staff, all present viable options to further the government interest.

The bottom line is that Congress was fully aware of the First Amendment concerns presented by filtering software when it passed CIPA.¹⁰⁷ In fact, a panel was appointed by Congress to "identify technological or other methods that . . . will help reduce access by minors

adult programming altogether, a fairly expensive undertaking, or to limit programming to the hours of 10:00 p.m. to 6:00 a.m. due to the availability of a less restrictive, equally efficacious means); *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121-22 (1991) (holding unconstitutional under the First Amendment a law hindering the ability of one who has committed a crime to write about the commission of that crime and thereby make a profit for being overinclusive and, therefore, insufficiently narrowly tailored); *Elrod v. Burns*, 427 U.S. 347, 369-70 (1976) (holding that patronage dismissals of government employees violated the First Amendment because they generally were not the least restrictive means of accomplishing the compelling government ends of encouraging government efficiency due to the availability of other equally efficacious, less-restrictive means, such as the limitation of such dismissals to policymaking positions only).

104. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244-51 (2002) (striking down, on First Amendment grounds, a federal law banning images which appear to feature minors in a pornographic context when, in actuality, no minors were involved in the creation of the images, due to the chilling effect such a prohibition might have on otherwise protected speech); *Dombrowski v. Pfister*, 380 U.S. 479, 493-96 (1965) (striking down an anticommunism statute criminalizing failure to register on behalf of those who were members of what the statute termed "subversive organizations," citing concerns for the chilling effect the statute had on protected rights of expression and association).

105. "Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities 'simply by averting [our] eyes.'" *Playboy*, 529 U.S. at 813 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

106. *Response of Appellees Multnomah County Public Library at 13, United States v. Am. Library Ass'n*, 539 U.S. 194 (2003), available at http://supreme.lp.findlaw.com/supreme_court/briefs/02-361/02-361.resp.mcpl.pdf.

107. *See The Communications Decency Act of 1996*, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended at 18 U.S.C. §1465, 47 U.S.C. §§ 223, 230 (2001)).

to material that is harmful to minors on the Internet.”¹⁰⁸ The panel concluded that filtering technology “raises First Amendment concerns because of its potential to be over-inclusive in blocking content. Concerns are increased because the extent of blocking is often unclear and not disclosed. . . .”¹⁰⁹ Furthermore, the legislation containing CIPA also contained the Neighborhood Children’s Protection Act (“NCIPA”),¹¹⁰ which unlike CIPA applies only to minors and requires libraries and schools to hold a public hearing, adopt, implement Internet safety policies.¹¹¹

In *Sable Communications of California, Inc. v. Federal Communications Commission*, the Court declared unconstitutional a statute banning all indecent commercial telephone communications.¹¹² The Court found that the government could not justify a total ban on communication that is harmful to minors, but not obscene, by arguing that only a total ban could completely prevent children from accessing indecent messages. The Court held that without evidence that less restrictive measures had been tested over time, the government had not carried its burden of proving that they would not be sufficiently effective. In implementing CIPA, the Court is doing precisely what it determined it could not do in *Sable*—justify an overly-broad ban on Internet accessibility.

B. United States v. Playboy Entertainment Group, Inc.

One alternative is that the Court look to the decision in *United States v. Playboy Entertainment Group, Inc.*,¹¹³ when considering the use of Internet filters to protect children from explicit material.¹¹⁴ In an attempt to alleviate situations where children were viewing sexual images from signal bleed¹¹⁵ on cable channels, Congress passed Section 505 of the

108. COPA REPORT, *supra* note 40, at 46.

109. *Id.* at 19-20.

110. K-12 schools and libraries and public libraries receiving certain E-rate discounts are further mandated by the NCIPA to adopt and enforce an Internet Safety Policy that addresses harmful or inappropriate online activities. NCIPA was passed as part of CIPA. Consolidated Appropriations Act 2001, Pub. L. No. 106-554, 114 Stat. 2763 (codified at scattered sections).

111. *Id.* (enacting large appropriations measures). Although CIPA underwent litigation, the provisions in the public law for NCIPA were not challenged.

112. 492 U.S. 115 (1989).

113. 529 U.S. 803 (2000).

114. See Shaun Richardson, *What the Supreme Court Could Learn About the Child Online Protection Act by Reading Playboy*, 12 WM. & MARY BILL RTS. J. 243 (2003).

115. “Scrambling could be imprecise, however; and either or both audio and visual portions of the scrambled programs might be heard or seen, a phenomenon known as ‘signal bleed.’” *Playboy*, 529 U.S. at 806 (2000).

Telecommunications Act of 1996.¹¹⁶ This Act forced adult cable channels to either fully scramble their programming for nonsubscribers (very expensive) or limit programming to the late evening and early morning hours when children were least likely to be watching television. Most channels chose the latter of these two options, which resulted in “a significant restriction of communication.”¹¹⁷

Playboy challenged the law as a violation of First Amendment rights by claiming that a less restrictive and equally effective means of remedying the problem was available in Section 504 of the Telecommunications Act of 1996,¹¹⁸ requiring all cable television providers to “fully scramble or otherwise fully block” any channel upon customer request and free of charge.¹¹⁹ The Court held that Section 504 coupled with effective notice of its existence and function was an equally effective and less restrictive means for the government to protect the interest of children.¹²⁰ The Court in this case should have looked to the resolution in *Playboy* rather than the restrictive means implemented under CIPA. Passing the type of legislation seen in the *Playboy* case empowers parents to remedy the problem on their own.

C. Filtering Improvements

In the alternative, if our courts decide that filtering is the way of the future, it is imperative that improvements be made in the filtering technology. “CIPA thus takes a meat ax approach to an area that requires far more sensitive tools.”¹²¹ The Supreme Court emphasized this point stating, “[t]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost.”¹²² The filtering process has proved to be both over and underinclusive. If Congress is going to continue to stress the importance of filtering obscene material, they must make the appropriate steps to ensure that filters actually fulfill this interest. One possible avenue of improvement is to require that all adult websites register their Web address with a central database. Congress could then create a master list that would be supplied to all filtering

116. 47 U.S.C. § 561 (2001).

117. *Playboy*, 529 U.S. at 809.

118. 47 U.S.C. § 560.

119. *Playboy*, 529 U.S. at 809-10 (quoting Section 504 of the Telecommunications Act of 1996).

120. *Id.* at 823-26 (stating that “[t]he Government also failed to prove § 504 with adequate notice would be an ineffective alternative to § 505.”).

121. Post-Trial Brief, *supra* note 16, at 18.

122. *Playboy*, 529 U.S. at 817 (citation omitted).

manufacturers. To ensure registration, Congress could impose both criminal and civil penalties in order to enforce Web site legislation.¹²³

V. CIPA AND ITS EFFECTS ON OUR YOUTH

Although the focus of the litigation surrounding CIPA centered on its application to public libraries, it was generally assumed that if the Supreme Court struck down CIPA for public libraries on First Amendment grounds, a similar challenge would be mounted in connection with public schools.¹²⁴ Moreover, according to the United States Census Bureau, only four in ten students had Internet access at home in 2000.¹²⁵ Therefore, school and public library computers historically provide the primary means for children to access the Internet.

Minors are generally afforded the same First Amendment right to receive information as all adults in this country.¹²⁶ However, courts have held that the First Amendment permits the government to prohibit distributing materials to minors that, although not obscene to adults, are obscene with respect to minors.¹²⁷ This prohibition was justified by the government's compelling interest in safeguarding the well-being of children.¹²⁸ Still, restrictions must meet a strict scrutiny standard when imposing content-based restrictions.¹²⁹

123. The Texas legislature has enforced similar legislation. "A person is liable to the state for a civil penalty of \$2,000 for each day on which the person provides an interactive computer service for a fee but fails to provide a link to software or a service as required by Section 35.103. The aggregate civil penalty may not exceed \$60,000." 1997 Tex. H.B. 1300 § 35.103.

124. See generally American Library Association, CIPA, available at <http://www.ala.org/ala/washoff/WOissues/civilliberties/cipaweb/cipa.htm> (last visited Mar. 25, 2005).

125. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HOME COMPUTERS AND INTERNET USE IN THE UNITED STATES: AUGUST 2000 2 (2001).

126. See *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867-68 (1982); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975) ("In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors."); Post-Trial Brief, *supra* note 16, at 46.

127. *Ginsburg v. New York*, 390 U.S. 629, 636-37 (1968) (upholding a New York statute prohibiting the sale of obscene materials to minors regardless of whether the statute could constitutionally prohibit the sale of the same materials to adults).

128. *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (asserting that a state's interest in protecting a child's well being, particularly from sexual exploitation and abuse, "constitutes a government objective of surpassing importance.").

129. See discussion *supra* Part III.A.3 of this Note for a more detailed description of strict scrutiny. See also *Erznoznik*, 422 U.S. at 213-14 (stating that "[s]peech that is neither obscene as to youth nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.").

One of public schools' vital roles is "exposing young minds to the clash of ideologies in the free marketplace of ideas,"¹³⁰ in addition to protecting children from exposure to harmful materials and instilling community values. It is ironic that students may have access to information on their home computers that CIPA bars access to while they are at school. Therefore, one result of CIPA may be the creation of a class of students who cannot view certain materials, because they lack any access to computers outside of school. Accordingly, these students may have an equal protection argument, although given the importance of the public school's interest in shielding children from harmful materials over the Internet, it is unlikely that such a challenge would be successful.¹³¹ Still, it is important to note that CIPA may create a class of students, who unlike their peers, are unable to access educational materials based solely on their economic status.

In an effort to protect minor's First Amendment rights, the ALA adopted a *Statement on Labeling*.¹³² The statement adopted a policy against any restrictions on access to library materials by minors. In supporting this statement, the ALA opposed all limitations to restricted reading rooms, and closed collections asserting that "only the parent . . . may restrict his children . . . and only his children – from access to library materials and services."¹³³ Overblocking mistakes substantially affect the information that minors are able to access via the Internet. Furthermore, blocking technology is not sophisticated enough to distinguish between a five-year-old user and a sixteen-year-old user.¹³⁴ Obviously, there is a substantial difference in what society considers appropriate for a five-year-old as opposed to a sixteen-year-old.¹³⁵ Furthermore, unlike adults, minors are unable to invoke the libraries' disabling provisions.¹³⁶ Therefore, a high school student attempting to access information on sexual health for a

130. Seyfried v. Walton, 668 F.2d 214, 219 (3rd Cir. 1981).

131. Kelly Rodden, *The Children's Internet Protection Act in Public Schools: The Government Stepping on Parents' Toes?* 71 *FORDHAM L. REV.* 2141, 2145 (2003).

132. See American Library Association, Labels and Rating System, at <http://www.ala.org/Template.cfm?Section=Interpretations&Template=/ContentManagement/ContentDisplay.cfm&ContentID=8657> (last visited Mar. 25, 2005).

133. American Library Association, *Intellectual Freedom Manual*, at <http://www.ala.org/ala/oif/iftoolkits/ifmanual/intellectual.htm#chapters>.

134. Under CIPA, a minor is anyone who has not attained the age of seventeen. Adults, therefore, include everyone seventeen-years-old and older. 47 U.S.C. 231(a)(7) (2001).

135. Many Web sites are blocked and considered to be sexually explicit when in reality the sites are sources of information on sensitive topics such as sexual health and sexual identity. See Post-Trial Brief, *supra* note 16, at 47.

136. 47 U.S.C. § 254(h)(5)(D) (authorities "may disable the technology protection measure concerned, during use by an adult . . .").

school paper cannot ask a librarian to disable the filter. In fact, the library cannot even disable the filter with the explicit consent of the minor's parents.¹³⁷

In a 2001 study, nearly half of the minors polled had experienced being blocked from sites that were nonpornographic.¹³⁸ Among the topics disproportionately blocked were sites on sexual health such as HIV, other STDs, birth control, cancer, and sites on sexual orientation.¹³⁹ Some children may be intentionally searching for sexually explicit material, but the question remains whether the government interest in protecting minors from exposure to obscene material outweighs the interest in protecting their First Amendment rights.¹⁴⁰

The notion that children cannot access pertinent information via the Internet in schools and libraries due to CIPA defeats the Internet's role as a means to disseminate confidential and highly sensitive personal information. Furthermore, the underblocking that occurs as a result of ineffective filtering systems provides both Congress, and more importantly parents, with a false sense of security. "[N]o single technology or method

137. See 20 U.S.C. § 9134(f)(3) (2001); 47 U.S.C. § 254(h)(6)(D) (2001).

138. Kaiser Family Foundation, *Generation Rx.com: How Young People Use the Internet for Health Information*, Dec. 2001, at <http://www.kff.org/entmedia/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13718>. For example, filtering software incorrectly blocks sites such as "lesbian.org, lesbian.com, sexrespect.com, and condomania.com, a site on teen sexual health, and a site discussion entitled 'The Bible and the Homosexual.'" Post-Trial Brief, *supra* note 16, at 14.

139. See *id.* at 12.

140. See generally *id.* See also Christopher G. Newell, *The Internet School Filtering Act: The Next Possible Challenge in the Development of Free Speech and the Internet*, 28 J.L. & EDUC. 129, 137 (1999). For example, over a two-year period, a pro-censorship organization identified only 196 incidents of children viewing obscene material at public libraries even though 344 million children visit libraries each year. Elisabeth Werby, National Coalition Against Censorship, *The Cyber-Library: Legal and Policy Issues Facing Public Libraries in the High-Tech Era*, at II.B.1, at <http://www.nacac.org/issues/cyberlibrary.html> (last visited Mar. 25, 2005). Recently, the Crimes Against Children Research Center conducted interviews of 1501 children between the ages of ten and seventeen concerning unwanted sexual solicitation, approach, and exposure to pictures while online. See David Finkelhor et al., Crimes Against Children Research Center, *Online Victimization: A Report on the Nation's Youth* (2000), available at http://www.unh.edu/ccrc/pdf/Victimization_Online_Survey.pdf. According to the report, 376 of the children had at least one unwanted exposure to sexual pictures during the previous year. *Id.* at Table 2-1. In some cases, the child experienced more than one incident leading to a total of 393 reported episodes. *Id.* Of those reported cases, only 15 percent occurred at school, and 3 percent occurred at a library. *Id.* Thus, of the 1501 children interviewed, only 4.6 percent reported unwanted exposure to sexual material in the institutions covered by the Children's Internet Protection Act. See generally *id.* The study does not indicate how many times students accessed the Internet, defining usage as "using the Internet at least once a month for the past six months on a computer at home, school, a library . . . or some other place." *Id.* at 41. Thus, the actual percentage of incidents may be substantially lower. *Id.*

will effectively protect children from harmful materials online. Rather, . . . a combination of public education, consumer empowerment technologies and methods, increased enforcement of existing laws, and industry action are needed to address this concern.”¹⁴¹ Thus, Congress should take the initiative to research, identify, and develop the most effective means to protect minors without restricting their access to constitutionally protected and socially essential materials.

There are other, more constitutionally sound means by which we can protect our nation’s youth from obscene online materials. *Youth, Pornography, and the Internet*, a report published by the National Research Council and commissioned by Congress, calls for a comprehensive solution, focusing on the role education can play in teaching children how to navigate safely on the Internet.¹⁴² The report concludes that though “technology and public policy have important roles to play, social and educational strategies . . . [are] central to promoting children’s safe Internet use.”¹⁴³

VI. CONCLUSION

Protecting our nation’s youth from obscene material via the Internet is a legitimate government concern. However, a careful analysis of what means are most appropriate and effective to address this issue is needed. By implementing CIPA, Congress and the Supreme Court have curtailed one problem, but created another. The Supreme Court has undermined the First Amendment rights of adults and minors alike in order to enforce an ineffective, Internet-filtering system. Not only will CIPA prevent adults and youth from accessing pertinent information on health, sexuality, and general news, it will also continue to allow the infiltration of obscene Web sites on library computer screens throughout the country. Today’s technology is not yet equipped with the ability to appropriately filter for specific information, and until effective filtering systems are created, it is unreasonable to enforce legislation that promises an unattainable end.

141. COPA REPORT, *supra* note 40, at 9.

142. NATIONAL RESEARCH COUNCIL, *YOUTH, PORNOGRAPHY, AND THE INTERNET* (Dick Thornburgh & Herbert S. Lin, eds. 2002) at 366, available at <http://www.nap.edu/books/0309082749/html/>.

143. *Id.* at 388.