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PERMISSIVE PORNOGRAPHY: THE SELECTIVE CENSORSHIP OF THE INTERNET UNDER CIPA

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INTRODUCTION

On June 23, 2003, the Supreme Court ruled that the Children's Internet Protection Act (CIPA)¹ did not violate the First Amendment or impose an unconstitutional condition on public libraries in *United States v. American Library Association*.² This decision overruled the United States District Court for the Eastern District of Pennsylvania's finding that implementation of CIPA created a direct violation of library patrons' First Amendment rights.³ Compliance with CIPA requires libraries that receive certain types of federal funding to subsidize their Internet costs to install Internet filters to control the information accessible on each computer terminal.⁴ While the intentions behind CIPA are good—protecting children and library patrons from exposure to the glut of pornography available online⁵—Internet filter technology has not reached a point in its evolution where mandating its implementation will effect the actual goals of CIPA. Additionally, implementing the filters will potentially block library patrons' access to information in the communities where it is most vital.

Part I of this Note will explore *United States v. American Library Association*.⁶ It will provide an overview of how implementation of CIPA works.

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¹ Pub. L. No. 106-554, §§ 1712, 1721, 114 Stat. 2763 (2000).

² *United States v. American Library Ass'n*, 539 U.S. 194 (2003). This decision was one of five handed down on June 23, 2003. *Grutter v. Bollinger* and *Gratz v. Bollinger*, the cases against the University of Michigan concerning affirmative action, were two of the other cases decided that day. Three days later the court handed down five more decisions, including *Lawrence v. Texas*, which struck down a Texas statute banning homosexual sexual activity. These other cases monopolized much of the national media's attention; otherwise the decision in *United States v. ALA* would most likely have been in the media spotlight.

³ See *American Library Ass'n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

⁴ Pub. L. No. 106-554, §§ 1712, 1721, 114 Stat. 2763 (2000).

⁵ "There are more than 100,000 pornographic Web sites that can be accessed for free and without providing any registration information, and tens of thousands of Web sites contain child pornography." *Am. Library Ass'n*, 201 F. Supp. 2d at 406.

⁶ *Am. Library Ass'n*, 539 U.S. at 194.

A history of CIPA's predecessors, the Communications Decency Act (CDA)⁷ and Child Online Protection Act (COPA),⁸ will be provided. It will also cover the constitutional aspects of the decision. The constitutional issues discussed include the appropriate level of scrutiny, whether public library Internet terminals fall within the scope of a public forum, First Amendment issues and the Spending Clause,⁹ and the authority that provided for the creation of the Act.

Part II will explain the problems resulting from CIPA's technical implementation. It will detail current filter technology and how it works, and point out many of its flaws. The final section of Part II offers suggestions for alternatives to Internet filters.

PART I

A. U.S. v. American Library Association

Congress enacted the Children's Internet Protection Act (CIPA) in December 2000.¹⁰ The Act went into effect on April 21, 2001.¹¹ The practical application of CIPA requires public libraries and schools to install Internet filters on all of their computer terminals or forego certain types of federal funding.¹²

The plaintiffs included the American Library Association, state library associations, local libraries, and library patrons and their associations and Web publishers.¹³ The gravamen of their complaint was that with current filtering technology limitations, compliance with CIPA resulted in content-based restrictions

⁷ 47 U.S.C. § 223 (2005).

⁸ 47 U.S.C. § 231 (2005).

⁹ U.S. CONST. art. I, § 8.

¹⁰ COMPUTER SCIENCE AND TELECOMMUNICATIONS BOARD, NATIONAL RESEARCH COUNCIL, YOUTH, PORNOGRAPHY, AND THE INTERNET § 4.2.5 (Dick Thornburgh & Herbert S. Lin eds., 2002), available at http://books.nap.edu/html/youth_internet/. This book is the result of a report compiled by the Committee to Study Tools and Strategies for Protecting Kids from Pornography and Their Applicability to Other Inappropriate Internet Content. The Committee functioned under the Computer Science and Telecommunications Board of the National Research Council. *Id.* at i.

¹¹ *Id.* at § 4.2.5.

¹² CENTER FOR DEMOCRACY & TECHNOLOGY, *CIPA*, at <http://www.cdt.org/speech/cipa> (last visited Apr. 6, 2005); *See Am. Library Ass'n*, 201 F. Supp. 2d at 405. "Approximately 10% of the Americans who use the Internet access it at public libraries. And approximately 95% of all public libraries in the United States provide public access to the Internet." *See also infra* Part I.B.

¹³ *Am. Library Ass'n*, 201 F. Supp. 2d at 414-15. Some of the plaintiffs were described in detail in the district court opinion including Afraid to Ask, Inc., one of the Web publisher plaintiffs. The company publishes a website, www.afraidtoask.com, which contains information and graphic images designed to answer questions on sexual health issues. "Based on survey data collected on the site half of the people visiting the site are under 24 years old and a quarter are under 18." The site is blocked by many of the Internet filter market's leading products. *Id.* at 415.

on library patrons' access to constitutionally protected speech.¹⁴ Only sections 1712 and 1721(b) of CIPA were at issue in this case.¹⁵

The legislation was introduced as the most recent attempt to control the availability of pornography on the Internet accessible in public libraries.¹⁶ CIPA was passed by the House of Representatives and the Senate on December 15, 2000 as part of a government funding bill.¹⁷ In March 2001, the American Library Association (ALA) and the American Civil Liberties Union (ACLU) filed suit in the United States District Court for the Eastern District of Pennsylvania.¹⁸ The complaint alleged that CIPA is unconstitutional on its face because it interferes with the First Amendment rights of both libraries and their patrons.¹⁹

During Spring 2002, a three-judge panel in the Eastern District of Pennsylvania conducted an eight-day trial to determine the constitutionality of CIPA.²⁰ The district court found CIPA to be facially unconstitutional²¹ because compliance necessarily implicated violation of the First Amendment:²² "[W]e find that it is currently impossible, given the Internet's size, rate of growth, rate of change, and architecture, and given the state of the art of automated classification systems, to develop a filter that neither underblocks nor overblocks a substantial amount of speech."²³ The district court decision was appealed directly to the United States Supreme Court.²⁴

Chief Justice Rehnquist, joined by Justices O'Connor, Scalia and Thomas, delivered the opinion of the court. The court's analysis focused on whether implementation of the filtering software as required by CIPA under Congress' spending power violated the First Amendment.²⁵ Conditions on government

¹⁴ *Id.* at 407. Although CIPA applies to both schools and libraries, only libraries challenged the Act.

¹⁵ *Id.* at 412. CIPA § 1712 amends the Museum and Library Services Act, 20 U.S.C. § 9134 and affects the LSTA program, discussed *infra*. CIPA § 1721(b) amends the Communications Act of 1934, 47 U.S.C. § 254(h) and affects the E-rate program, discussed *infra*.

¹⁶ Prior to CIPA, there were two legislative attempts at regulating pornography on the Internet, the Communications Decency Act and the Child Online Protection Act. See *infra* Part I.C. Congress was also concerned that government funding programs provided the access to Internet pornography. See *Am. Library Ass'n*, 539 U.S. at 200.

¹⁷ *Congress Passes Filtering Mandates for Schools and Libraries*, CDT POL'Y POST (Ctr. for Democracy and Tech., Wash., D.C.), Dec. 18, 2000 at (1) available at http://www.cdt.org/publications/pp_6.22.shtml.

¹⁸ Press Release, Center for Democracy and Technology, Constitutionality of Internet Filtering Mandate Challenged in Court (Mar. 20, 2001) available at <http://www.cdt.org/press/010320press.shtml>.

¹⁹ *Am. Library Ass'n*, 201 F. Supp. 2d at 407.

²⁰ *Id.* at 407-408. See also *infra* note 42.

²¹ *Am. Library Ass'n*, 201 F. Supp. 2d at 411.

²² *Id.* at 407. "Even if some libraries' use of filters might violate the First Amendment, the government submits that CIPA can be facially invalidated only if it is impossible for any public library to comply with its conditions without violating the First Amendment." *Id.*

²³ *Id.* at 408.

²⁴ The language of CIPA had a built-in provision that allowed for a direct appeal from the three-judge panel in the district court to the United States Supreme Court. *Government Likely to Appeal Ruling to the Supreme Court*, CDT POL'Y POST (Ctr. for Democracy and Tech., Wash., D.C.), June 11, 2002 at (4) available at http://www.cdt.org/publications/pp_8.14.shtml#4.

²⁵ *Am. Library Ass'n*, 539 U.S. at 202.

funding under the Spending Clause are valid so long as they do not induce the recipient to violate any constitutional rights.²⁶ The court found that it did not violate the First Amendment because the federal funding programs affected by CIPA were designed to assist libraries in procuring educational and informational resources.²⁷

Justices Kennedy and Breyer wrote concurring opinions. Justice Kennedy's concurrence was based on the notion that the filters may be disabled and holds that CIPA is only constitutional on its face.²⁸ However, to disable a filter is not as simple as turning off a light switch. Depending on how the filter functions, it may actually be impossible to disable just one machine, or it can take days.²⁹ These issues are acknowledged in Kennedy's concurrence, where he leaves the door open for an as-applied challenge:³⁰

If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case.³¹

Here, the Court only addressed the language of CIPA as it was enacted. There is the potential, however, for an as-applied challenge. This means that an individual who believes his or her constitutional rights were compromised by the filter installation could bring an independent law suit challenging the law. For example, if an adult searching for information on AIDS or cervical cancer found that pertinent websites were blocked, and thus was not able to learn about treatment alternatives through the public library Internet access, he or she would likely have standing to bring suit.

²⁶ *South Dakota v. Dole*, 483 U.S. 203, 208 (1987). In *Dole*, the state of South Dakota challenged the Department of Transportation after a federal statute was enacted requiring a minimum drinking age of 21 to receive federal highway funding. The Supreme Court found this to be a valid exercise of the Spending Clause:

[W]e think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power

Id. at 210-11.

²⁷ *Am. Library Ass'n*, 539 U.S. at 211-12.

²⁸ *Id.* at 215. The fact that Justice Kennedy's opinion relies on a facial challenge leaves CIPA open to future as-applied suits.

²⁹ Interview with Alan Davidson, Associate Director, The Center for Democracy and Technology, in Washington, D.C. (Nov. 14, 2003).

³⁰ *Am. Library Ass'n*, 539 U.S. at 215 (Kennedy, J., concurring).

³¹ *Id.*

B. How CIPA Affects Libraries

Libraries and schools receive Internet access, computer and telecommunications funding discounts through two programs, E-rate and the Library Services and Technology Act (LSTA). Both programs are designed to supply funding for libraries that enable them to offer Internet access to patrons.

The E-rate program, created as part of the Telecommunications Act of 1996, provides for qualifying libraries to purchase Internet access at a discount.³² The program also provides funding to enable schools and libraries in low-income areas to install Internet access.³³ E-rate discounts are enjoyed by approximately 70 percent of libraries in communities with a poverty level of over 40 percent.³⁴

LSTA grants are awarded by the Institute of Museum and Library Services to state libraries for computer system and telecommunications funding.³⁵ CIPA amends 20 U.S.C. § 9134, the portion of the Museum and Library Services Act which affects LSTA grants.³⁶ The E-rate and LSTA programs subject the libraries to different conditions, although both are designed to achieve the same goal of lowering the costs for public institutions to provide Internet access.

The language of CIPA specifically attaches itself to these two programs and amends them by conditioning receipt of the funding on implementation of Internet filters.³⁷ Limits on federal funding are constitutional under the Spending Clause of the Constitution. Refusal to fund a protected activity, such as accessing online information, is not the same as inhibiting the activity or penalizing it.³⁸ The E-rate

³² 47 U.S.C. § 254(h)(1)(B). The E-rate program conditions:

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service . . . provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties.

Am. Library Ass'n, 201 F. Supp. 2d at 411-12 (quoting 47 U.S.C. § 254(h)(1)(B)).

³³ *Am. Library Ass'n*, 201 F. Supp. 2d at 407.

³⁴ *Id.* at 422.

³⁵ 20 U.S.C. § 9101 *et seq.*

³⁶ *Am. Library Ass'n*, 201 F. Supp. 2d at 412. "LSTA grant funds are awarded, *inter alia*, in order to: (1) assist libraries in accessing information through electronic networks, and (2) provide targeted library and information services to persons having difficulty using a library and to underserved and rural communities, including children from families with incomes below the poverty line." *Id.* at 406-7.

³⁷ Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763 (2000).

³⁸ *See Rust v. Sullivan*, 500 U.S. 173, 193-94 (1991). The plaintiffs in *Rust* challenged regulations promulgated by the Department of Health and Human Services restricting Title X-funded projects from providing information on, or endorsing, abortion. The Supreme Court upheld the regulations:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect When the Government appropriates public funds to establish a program it is entitled to define the limits of that program.

and LSTA programs are still in full effect under CIPA—the Act amended their statutory language to withhold the funding should a library opt not to install the filters or install filters which do not comply with the language of the statute.

C. Legislative History

The Communications Decency Act

The Communications Decency Act (CDA) was enacted as part of the Telecommunications Act of 1996 and amended 47 U.S.C. § 223.³⁹ The legislation prohibited the use of an interactive computer service to send or display, in a manner available to those under the age of 18,⁴⁰ any communication that describes or depicts sexual or excretory activities or organs in terms that are patently offensive as measured by contemporary community standards.⁴¹ This was the first attempt at legislating content on the Internet and established the Third Circuit as a particularly technology-friendly jurisdiction.⁴²

In the 1997 case of *Reno v. ACLU*,⁴³ the Supreme Court struck down the CDA for being overbroad and unconstitutionally vague:

Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment. For instance, each of the two parts of the CDA uses a different linguistic form. The first uses the word “indecent,” while the second speaks of material that “in context, depicts or describes, in terms patently offensive as measured by

³⁹ YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 10, § 4.2.3.

⁴⁰ CIPA defines a minor as a person under the age of 17. *Am. Library Ass'n*, 201 F. Supp. 2d at 413 n.2.

⁴¹ YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 10, § 4.2.3. *See also* 47 U.S.C. § 223(d):

(d) Sending or displaying offensive material to persons under 18. Whoever—(1) in interstate or foreign communications knowingly—(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that is obscene or child pornography, regardless of whether the user of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

⁴² Since 1996, many other lawsuits challenging legislation designed to limit the reach of the Internet have been brought within the Third Circuit. It is the jurisdiction of choice for parties seeking to preserve the uninhibited availability of information online.

⁴³ *Reno v. ACLU*, 521 U.S. 844 (1997). *See also* Kiera Meehan, Note, *Installation of Internet Filters in Public Libraries: Protection of Children and Staff vs. the First Amendment*, 12 B.U. PUB. INT. L.J. 483, 486 (2003). Meehan's note focuses on the First Amendment issues implicated with the installation of Internet filters in libraries under CIPA. However, the Note was published in the Spring/Summer issue of the Boston University Public Interest Law Journal prior to the Supreme Court decision of June 23, 2003 focused on in this note. She incorrectly predicted that the ALA would succeed in its challenge against CIPA.

contemporary community standards, sexual or excretory activities or organs.” Given the absence of a definition of either term, this difference in language will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean. Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape would not violate the CDA? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.⁴⁴

In addition, the Court also held that the CDA limited adult access to constitutionally-protected speech.⁴⁵ *Reno v. ACLU* was a case of first impression addressing First Amendment issues on the Internet.⁴⁶ The Court also held that the Internet was entitled to the highest level of First Amendment protection and all future content-based regulation would be subject to strict scrutiny.⁴⁷

The Child Online Protection Act

Congress’ second attempt at legislating pornography on the Internet came in the form of the Child Online Protection Act (COPA) in 1998.⁴⁸ COPA contained language very similar to the CDA,⁴⁹ but made relatively few changes in an attempt to appease the Court. The Supreme Court, once again, struck down the anti-pornography legislation in *Ashcroft v. ACLU* on June 29, 2004.⁵⁰ In the end, the Supreme Court agreed with the court of appeals’ finding that the legislation was

⁴⁴ *Reno*, 521 U.S. at 870 (citations and footnotes omitted).

⁴⁵ YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 10, § 4.2.3. See also *Reno*, 521 U.S. at 874:

[T]he CDA thus presents a greater threat of censoring speech that, in fact, falls outside the statute’s scope. Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. That danger provides further reason for insisting that the statute not be overly broad. The CDA’s burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

⁴⁶ *Reno v. ACLU* was also the first case brought as a result of a change in the way the legislation was written. The CDA included a provision that if it was challenged, the case would be heard before a three-judge panel. Following the success of this provision, it was included in both COPA and CIPA. COPA is still in litigation and the Supreme Court heard oral arguments on Mar. 2, 2004. CIPA’s provision led to an eight-day trial at the district court level including the testimony of 20 witnesses, depositions, stipulations and documents. Interview with Alan Davidson, Associate Director, The Center for Democracy and Technology, in Washington, D.C. (Nov. 14, 2003). See, e.g., *Am. Library Ass’n*, 201 F. Supp. 2d at 408 (discussing the expedited nature of the trial).

⁴⁷ *Meehan*, *supra* note 43, at 486.

⁴⁸ *Id.* at 488.

⁴⁹ *Ashcroft v. ACLU*, 124 S.Ct. 2783 (2004).

⁵⁰ *Id.*

“not narrowly tailored to serve a compelling Government interest, was overbroad, and was not the least restrictive means available for the Government to serve the interest of preventing minors from using the Internet to gain access to materials that are harmful to them.”⁵¹

COPA began its journey through the federal court system in January 1999.⁵² The District Court for the Eastern District of Pennsylvania issued a preliminary injunction against COPA's enforcement in February 1999.⁵³ The following year the Third Circuit Court of Appeals upheld the injunction, but on different grounds.⁵⁴ This led the Supreme Court to review and reverse the decision, but maintain the district court's injunction.⁵⁵ The Third Circuit affirmed the district court's decision again in March 2003, and the Supreme Court granted certiorari once again.⁵⁶

COPA changed the age defined as a minor to 17 from 18.⁵⁷ The Act also applied only to commercial Web sites that were harmful to minors rather than to all communications over the Internet.⁵⁸ Criminal penalties for violations were also included in the language of COPA.⁵⁹

One of the key reasons the CDA was struck down was because of its vague language that failed to establish what constituted obscene material. The legislature unsuccessfully attempted to rectify that in COPA by including a three-pronged test to define sexually explicit material.⁶⁰ The test was taken from *Miller v. California*, a 1973 case where the defendant had mass-mailed adult material.⁶¹ Three guidelines to determine whether material was sexually explicit were:

⁵¹ *Id.* at 2790.

⁵² See Center for Democracy & Technology, Working for Democratic Values in a Digital Age, at www.cdt.org/speech/copa (last visited Mar. 31, 2005). This website tracked the major events in the COPA litigation and provides the full text of many of the documents filed in court.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 10, § 4.2.4. See also 47 U.S.C. § 231(e)(7) (defining a minor as any person under the age of 17).

⁵⁸ 47 U.S.C. § 231(e)(7).

⁵⁹ 47 U.S.C. § 231(a).

(a) Requirement to restrict access. (1) Prohibited conduct. Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than \$ 50,000, imprisoned not more than 6 months, or both. (2) Intentional violations. In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than \$ 50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

Id. See also *supra* note 52.

⁶⁰ 47 U.S.C. § 231(e)(6). The test was found to violate the First Amendment under strict scrutiny analysis in *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003).

⁶¹ *Miller v. California*, 413 U.S. 15, 16 (1973).

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁶²

Based on the extensive legislative history revolving around controlling pornography on the Internet, it seems only a matter of time until legislation is enacted that withstands a legal challenge. Now that CIPA has survived the Supreme Court and is in effect, the question is whether there will be an as-applied challenge. The language and goals of CIPA provide the framework for any future legislation that survives constitutional and as-applied challenges.

D. Constitutional Issues Addressed by the Court

Forum Analysis and Strict Scrutiny

The Supreme Court held that Internet access in a public library does not qualify as a designated public forum.⁶³ Instead of agreeing with the district court’s determination that the Internet terminals are a limited public forum subjecting CIPA to strict scrutiny,⁶⁴ the Court agreed with the Senate’s findings that Internet access is more appropriately viewed as a “technological extension of the book stack.”⁶⁵

In public libraries, for example, the government has limited resources. It cannot buy all books. It must therefore make choices. In making those choices, it inevitably must decide which books are most necessary and most appropriate for the particular collection. This gives the government, in the form of the library board or the librarian, the authority and the responsibility to make decisions based on content that it could not make in

⁶² *Id.* at 24 (citation omitted). The *Miller* test replaced the previous standard of “utterly without redeeming social value” as established in *Memoirs v. Massachusetts*. See *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966).

⁶³ *Am. Library Ass’n*, 539 U.S. at 206. “The doctrines surrounding traditional public forums may not be extended to situations where such history is lacking.” See also *Cornelius v. NAACP Legal Defense & Ed. Fund. Inc.*, 473 U.S. 788, 802 (1985). Public streets and parks are traditional examples of public fora, places open to public gathering and debate.

⁶⁴ *Am. Library Ass’n*, 201 F. Supp. 2d 401. If strict scrutiny was applied, the legislation would need to be “narrowly tailored to further a compelling governmental interest” and the legislation must be the only option; if there is a less restrictive alternative, the legislation fails. *Id.* at 410. “To apply ‘strict scrutiny’ to the ‘selection’ of a library’s collection (whether carried out by public libraries themselves or by other community bodies with a traditional legal right to engage in that function) would unreasonably interfere with the discretion necessary to create, maintain, or select a library’s ‘collection’ . . .” *Am. Library Ass’n*, 539 U.S. at 217.

⁶⁵ S. REP. NO. 106-141, at 7 (1999). The book stack analogy was created to reflect the classic role of librarians in selecting which books and volumes will be available in a particular library. The argument maintains that if librarians are able to control which physical volumes are accessible to library patrons, it should not be controversial for them to control which virtual volumes are accessible. For example, most librarians do not procure pornographic materials for their collections.

more general regulations of public discourse It should be noted that an important reason for granting a public library broad (but not absolute) discretion to decide which books to include in its collection is the fact of limited resources. This fact is not present in the same way in the Internet context. To the contrary, in the Internet context, where filters may be at issue, it will generally cost more to reduce rather than to expand the "collection."⁶⁶

When speakers seek general access to public property, the forum encompasses that property.⁶⁷ In the case of Internet terminals in libraries, however, the Court found that they are not available as a medium for Web publishers to express themselves and communicate with the library patrons.⁶⁸ Rather, the Internet terminals provide access to the Web to enhance the information available in the books in the stacks, to increase the educational resources available to patrons.⁶⁹

There are three categories of fora which determine the appropriate level of scrutiny to apply to content-based speech restrictions on public property.⁷⁰ They are: traditional public fora, designated public fora, and nonpublic fora.⁷¹ The district court determined the correct analysis should focus on the Internet access, rather than the entire library's collection.⁷² The Supreme Court saw no need to differentiate between the two.⁷³

⁶⁶ YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 10, § 4.1.6.

⁶⁷ *Cornelius*, 473 U.S. at 801.

⁶⁸ *Am. Library Ass'n*, 539 U.S. at 206.

⁶⁹ *Id.* at 206-207. However, the district court's opinion is the exact opposite and very persuasive on this point. "In providing even filtered Internet access, public libraries create a public forum open to any speaker around the world to communicate with library patrons via the Internet on a virtually unlimited number of topics." *Am. Library Ass'n*, 201 F. Supp. 2d at 409.

⁷⁰ See *Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library*, 24 F. Supp. 2d 552, 562 (E.D. Va. 1998) (holding that the library's Internet terminals created a limited public forum after balancing the factors of government intent, extent of use, and nature of the forum).

⁷¹ *Am. Library Ass'n*, 201 F. Supp. 2d at 454-55.

Traditional public fora include sidewalks, squares, and public park . . . designated (or limited) public fora, 'consists of public property which the State has opened for use by the public as a place for expressive activity' . . . any content-based restriction on the use of traditional public fora is subject to strict scrutiny, the state is generally permitted, as long as it does not discriminate on the basis of viewpoint, to limit a designated public forum to certain speakers or the discussion of certain subjects . . . Examples of designated fora include university meeting facilities, school board meetings, and municipal theaters . . . nonpublic fora consists of all remaining public property.

Id. (citations omitted).

⁷² *Id.* at 455-56.

⁷³ *Am. Library Ass'n*, 539 U.S. at 205. "[F]orum analysis and heightened judicial scrutiny are incompatible with . . . the discretion that public libraries must have to fulfill their traditional missions. Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them."

The Spending Clause and the First Amendment

Congress' power to enact CIPA, and to condition receipt of federal funding, is grounded in the Spending Clause of the Constitution.⁷⁴ Objectives not viewed as within Article I's explicit language may be achieved through the use of the Spending Clause and conditional grants of federal funds.⁷⁵ Constraints on the Spending Clause were outlined in *South Dakota v. Dole*,⁷⁶ however, the only constraint of concern in this case is whether compliance with CIPA forces libraries that benefit from the LSTA or E-rate programs to violate their patrons' constitutional rights, specifically their First Amendment rights.⁷⁷

*Rust v. Sullivan*⁷⁸ established the Spending Clause guidelines. Conditioned receipt of funding is acceptable as long as the goal of the condition is to ensure the public funds be spent in the manner intended.⁷⁹ Spending Clause provisions which result in the government depriving the public of a benefit will be struck down.⁸⁰

Before the Court could determine whether any First Amendment rights were violated by the filters, they set out to establish whether or not the information being unintentionally blocked by the filters was protected by the First Amendment. The Supreme Court disagreed with the district court's characterization of the Internet terminals in libraries. According to the majority opinion, providing an opportunity for Web publishers to reach the audience of library patrons was not the reason for the Internet access. The Court clarified this perspective in a footnote which said, "public libraries do not install Internet terminals to provide a forum for Web publishers to express themselves, but rather to provide patrons with online material of requisite and appropriate quality."⁸¹

Justice Souter, joined by Justice Ginsberg, dissented and agreed with Justice Stevens, that the blocking requirements of CIPA place an unconstitutional burden on the government's funding.⁸² According to Justice Stevens, the over and underblocking result of the filtering software violates the First Amendment.⁸³

⁷⁴ U.S. CONST. art. I, § 8, cl. 1.

⁷⁵ *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

⁷⁶ *Id.*

⁷⁷ *Am. Library Ass'n*, 201 F. Supp. 2d at 409. See also *Dole*, 483 U.S. at 208. The Supreme Court held in *Dole* that Congress' condition of a minimum drinking age to receive federal highway funding was a valid exercise of the Spending Clause. "[W]e have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds." See also *supra* note 26.

⁷⁸ *Rust v. Sullivan*, 500 U.S. 173 (1991).

⁷⁹ See *supra* note 38.

⁸⁰ *Rust*, 500 U.S. at 196.

⁸¹ *Am. Library Ass'n*, 539 U.S. at 213 n.7.

⁸² *Id.* at 230 (Souter, J. dissenting).

⁸³ *Id.* at 226 (Stevens, J. dissenting).

The issue in this case does not involve governmental attempts to control the speech of views of its employees. It involves the use of its treasury to impose controls on an important medium of expression. In an analogous situation, we specifically held that when 'the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning,' the distorting restriction must be struck down under the First Amendment . . . The question, then, is

Justice Souter additionally points out that if the libraries had independently chosen to implement the filters they would have violated the First Amendment.⁸⁴

Conditioning receipt of the LSTA and E-rate funding on installation of Internet filters was found to be a valid use of the Spending Clause.⁸⁵ The Supreme Court found CIPA to be parallel to the *Rust* precedent; the E-rate and LSTA programs were designed to assist libraries in providing access to educational and informational material and the use of filtering software furthers that goal.⁸⁶

PART II

A. Filter Technology is Problematic for CIPA

Filter Technology: An Introduction

Internet filter software technologies generally function in a uniform way, regardless of the manufacturer. Filter software is either installed on an individual computer or on one computer linked to the activities of a computer network.⁸⁷ When a filter is installed on a computer network, the computer server controls how much of the Internet the other computers on the network can access.⁸⁸

Internet users are unaware of whether or not a particular Web page is blocked until he or she actually tries to access a specific site.

Filtering programs function in a fairly simple way. When an Internet user requests access to a certain Web site or page, either by entering a domain name or IP address into a Web browser, or by clicking on a link, the filtering software checks that domain name or IP address against a previously compiled "control list" that may contain up to hundreds of thousands of URLs. The three companies deposed in this case *Am. Library Ass'n, Inc. v. United States* have control lists containing between 200,000 and 600,000 URLs. These lists determine which URL will be blocked.⁸⁹

The filtering companies separate the control lists into categories.⁹⁰ Customers then select the categories that they would like to have blocked.⁹¹ Some

whether requiring the filtering software on all Internet-accessible computers distorts that medium . . . the over- and underblocking of the software does just that.

Id. at 227-28 (quoting *Legal Service Corporation v. Velazquez*, 531 U.S. 533 (2001)).

⁸⁴ *Am. Library Ass'n*, 539 U.S. at 230 (Souter, J. dissenting).

⁸⁵ *Id.* at 212.

⁸⁶ *Id.* "Especially because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs." *Id.*

⁸⁷ See *Am. Library Ass'n*, 201 F. Supp. 2d at 428.

⁸⁸ See *id.* Public libraries generally purchase and install filters on a network-based system.

⁸⁹ *Id.* These control lists are compiled by the filter software company employees. The companies enter various search terms into Web browsers and scan the URLs that match their search parameters. However, none of the employees at these companies are trained in the legal definitions employed by CIPA and they do not take considerations such as community standards into account. See *id.* at 429.

⁹⁰ *Id.*

filters provide their customers with the option of adding or removing Uniform Resource Locators (URLs), or specific website addresses from the lists on their computers.⁹² When surfers attempt to access sites that have been blocked, a screen appears which informs them that these sites or pages have been blocked by the filtering software.⁹³

Filter Technology Does Not Achieve CIPA's Goals

The fundamental problem with filter technology is that it is text-based. CIPA's language only focuses on "visual depictions," or images on Web sites rather than the textual content.⁹⁴ Therefore, implementation of the filters does not achieve CIPA's goals of limiting the pornography accessed in public libraries at all.⁹⁵ All of the filter companies deposed for the district court trial rely solely on text-based searches when harvesting and categorizing Web sites.⁹⁶

Due to the reliance on automated text analysis and the absence of image recognition technology, a Web page with sexually explicit images and no text cannot be harvested using a search engine. This problem is complicated by the fact that Web site publishers may use image files rather than text to represent words, i.e., they may use a file that computers understand to be a picture, like a photograph of a printed word, rather than regular text, making automated review of their textual content impossible. For example, if the Playboy Web site displays its name using a logo rather

⁹¹ See *Am. Library Ass'n*, 201 F. Supp. 2d at 428. Many filters are designed to block the root URL or the top page of an entire website, thereby depriving users from accessing any information that may be presented on a page within a website with no harmful information. *Id.* at 433. See also *id.* at 434 ("For example, the filtering software companies deposed in this case all categorize the entire Playboy Web site as Adult, Sexually Explicit, or Pornography. They do not differentiate between pages within the site containing sexually explicit images or text, and for example, pages containing no sexually explicit content, such as the text of interviews of celebrities or politicians.").

⁹² *Id.* at 429. This capability can be beneficial in circumstances such as when a librarian discovers that a particular informational site has incorrectly been blocked, as often happens. The librarian would be able to remove that site from the filter and patrons would then be able to access it.

⁹³ *Id.* Not all filtering software informs users when they are unable to access a site that it has been blocked by the filter. Some software tools simply return a "404. File not found" error and the Internet surfer will not know whether the server hosting the site they are trying to access is down, whether the site has been blocked by a filter, or if a filter is even installed on the machine that they are using. Interview with Alan Davidson, Associate Director, The Center for Democracy and Technology, in Washington, D.C. (Nov. 14, 2003).

⁹⁴ 20 U.S.C. § 9134(f)(1)(A)(i) (2005); 47 U.S.C. § 254(h)(6)(B)(i) (2005). Compliance with this statute requires enforcing:

A policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—(I) obscene; (II) child pornography; or (III) harmful to minors; and (ii) is enforcing the operation of such technology protection measure during any use of such computers by minors.

Id.

⁹⁵ See *Am. Library Ass'n*, 201 F. Supp. 2d at 431. See also *supra* note 16, and accompanying text (discussing the goals of CIPA).

⁹⁶ *Am. Library Ass'n*, 201 F. Supp. 2d at 431. Additionally, none of the companies use any sort of image-recognition technology.

than regular text, a search engine would not see or recognize the Playboy name in that logo.⁹⁷

Additionally, the category definitions used by Internet filter software do not contain the same language as the legal definitions of obscenity, child pornography, or material harmful to minors as set forth in CIPA.⁹⁸

Underblocking and overblocking are other problems created by Internet filters and are the ones most at issue in the ALA case.⁹⁹ Underblocking, which results from a variety of technological glitches that interfere with the filtering mechanism used by the software, occurs when the filter does not block a Web site that it should.¹⁰⁰ Examples include new material on the Internet that was not previously categorized and blocked by the filter,¹⁰¹ flaws in the search strings the filter companies rely on, or Web site addresses that have purposefully misspelled names to catch traffic from surfers who have entered an incorrect site name.¹⁰²

Overblocking occurs when the filter blocks a Web site without any offensive material—one which is protected by the First Amendment.¹⁰³ Overblocking can result from a myriad of reasons, including the filter software erring on the side of caution when a Web site is ambiguous, the dynamic nature of the Internet, or when a site that contains both appropriate and inappropriate material is blocked as a whole.¹⁰⁴ One of the plaintiffs in the ALA case provided an excellent example of a minor affected by the overblocking tendencies of Internet filters:

Emmalyn Rood is a sixteen-year-old who uses the Multnomah County Public Library. When she was 13, she used the Internet at the Multnomah County Public Library to research issues relating to her sexual identity. Ms. Rood did not use her home or school computer for this research in part because she wished her searching to be private. Although the library offered patrons the option of using filtering software, Ms. Rood did not use

⁹⁷ *Id.* at 431-32.

⁹⁸ *Id.* at 410. “[N]o presently conceivable technology can make judgments necessary to determine whether a visual depiction fits the legal definitions of obscenity, child pornography, or harmful to minors.” *Id.* at 433.

⁹⁹ The district court discussed the problems with Internet filters:

One failure of critical importance is that the automated systems that filtering companies use to collect Web pages for classification are able to search only text, not images. This is crippling to filtering companies’ ability to collect pages containing ‘visual depictions’ that are obscene, child pornography, or harmful to minors, as CIPA requires. As will appear, we find that it is currently impossible, given the Internet’s size, rate of growth, rate of change, and architecture, and given the state of the art of automated classification systems, to develop a filter that neither underblocks nor overblocks a substantial amount of speech.

Id. at 408.

¹⁰⁰ YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 10, § 12.1.2.

¹⁰¹ 1.5 million new pages are added to the Internet every day, and the contents of existing pages are constantly changing. *Am. Library Ass’n*, 201 F. Supp. 2d at 408.

¹⁰² YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 10, § 12.1.2. One common example of this is www.whitehouse.com, a formerly pornographic site that was blocked by most filters. *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

that option because she had had previous experience with such programs blocking information that was valuable to her, including information relating to gay and lesbian issues.¹⁰⁵

The district court opinion contains multiple plaintiffs' stories to illustrate filter deficiencies.¹⁰⁶ Adolescents and young adults are not necessarily the only ones facing this challenge. The situation faced by Ms. Rood could just as easily have been faced by a parent who suspects their child is having sexual issues and wants to research the topic and learn more. The parent would be blocked from the information by the same flaws in the filters.

There are other problems that result from the ever-changing nature of the Web which decrease the effectiveness of the filters. Not all websites are part of the indexed World Wide Web and accessible through the traditional search methods used by the filter companies. Sites that are part of the so-called "Deep Web" are not scanned by the filters.¹⁰⁷ There is also no reviewing process for previously checked and categorized websites. Instead, the software companies only analyze new sites.¹⁰⁸

Often Web sites are edited and their content changes, or the Web site address is sold. Thus, the information available at a specific Web address may change in nature. For example, the Web site www.whitehouse.com was known for years to be a pornographic site often reached by Internet users seeking to access the White House. The actual Web site for the president and the White House is www.whitehouse.gov.

In February 2004, Dan Parisi,¹⁰⁹ the owner of www.whitehouse.com announced that his Web site was for sale on the condition that the new owners not place pornographic material on the site.¹¹⁰ Bidding for the domain name exceeded

¹⁰⁵ *Am. Library Ass'n*, 201 F. Supp. 2d at 415.

While it is quite simple to design a filter that does not overblock, and equally simple to design one that does not underblock, it is currently impossible, given the Internet's size, rate of growth, rate of change, and architecture, and given the state of the art of automated classification systems, to develop a filter that neither underblocks nor overblocks a substantial amount of speech.

Id. at 437.

¹⁰⁶ *See, e.g. Am. Library Ass'n*, 201 F. Supp. 2d. at 415; *see also id.* at 446-47 (providing numerous examples of sites that have fallen prey to overblocking).

¹⁰⁷ *Id.* at 431. A significant portion of the Web has not been identified, or indexed, by search engines; this portion of the Web is referred to as the "Deep Web." For example, if a library patron received spam e-mail with a link to a small, independent website with pornography (which is the case with much spam), it most likely would not be blocked by the software because many of these sites are undetectable by search engines since they are not linked to previously recognized pages.

¹⁰⁸ *Id.* at 435. This means that sites once considered "safe" and unnecessary for blocking with the filter that add obscene images later on will still pass through the filter.

¹⁰⁹ Dan Parisi established himself in the early days of the Internet as a cybersquatter—someone who registers domain names containing the names of popular brands and labels. He owns over 600 domain names, many of which end in—sucks.com. *See* Amy Standen, *The Saga of Sucks.com*, SALON.COM, June 25, 2001 at <http://dir.salon.com/tech/feature/2001/06/25/sucks/index.html> (last visited Apr. 6, 2005).

¹¹⁰ Bob Tedeschi, *Higher Prices For Domain Names Signal Renewed Optimism*, INT'L HERALD TRIB., Mar. 2, 2004, at 19.

\$2 million, according to Parisi.¹¹¹ The Web site now contains sponsored links to information about a variety of government entities and Washington, D.C. establishments. There is also a disclaimer running across the top of the page stating, "WhiteHouse.com is a private Web site. It is not affiliated with any governmental entity."¹¹² Although the Web site no longer contains pornography, there is a strong likelihood that the filter companies that are slower to edit their filter lists still automatically block access to the site; thus, a student working on a report for school or a family looking for information on a tour of the White House would be blocked from the completely constitutionally protected information they were seeking online.

The goal of CIPA is to prevent government funding from enabling inappropriate access to pornography. The goal of CIPA is certainly not to prevent adolescents and young adults from learning about their federal government. Current filter technology is not achieving the goals of CIPA, it is just creating additional barriers to accessing useful and constitutionally protected information.

The Future of Filters

The evolution of Internet filter technology remains to be seen, but for now it is difficult to conceptualize a solution to the under and overblocking problems.

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.¹¹³

¹¹¹ *Id.*

¹¹² See <http://www.whitehouse.com> (last visited Mar. 31, 2005).

¹¹³ *Am. Library Ass'n*, 201 F. Supp. 2d at 449. See also YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 10, § 4.1.3.

[O]utside the realm of speech that is constitutionally obscene, the government may not prohibit 'indecent' or 'offensive' or 'sexually explicit' or 'profane' speech on the Internet in order to protect children, unless the speech is obscene with respect to minors and government regulation does not unduly interfere with the rights of adults to have access to such material. The challenge is thus to devise mechanisms that reconcile these two powerfully competing interests, where the Court has made clear the strong First Amendment presumption that the government's legitimate interests in protecting children will have to yield to the constitutional interests of adults, to the extent that those interests cannot otherwise be reconciled.

Id.

Keeping children, parents, teachers and librarians educated about safe and appropriate use of the Internet is currently the best Internet filter.¹¹⁴ Education will remain the best method of caution on the Internet until a new approach to controlling pornography on the Internet, while protecting constitutional speech, is devised.

B. Filter Implementation is Problematic for CIPA

Inconsistencies in Implementation

Each library is free to implement its own unblocking procedures, thus it is impossible to determine how effective CIPA actually is and whether it has actually achieved its goal of blocking pornographic websites.¹¹⁵ Justice Stevens, in his dissent, argues that due to these inconsistencies based on local community standards, each library should be entitled to enforce its own individual restrictions on Internet usage.¹¹⁶ Additionally, the amount of computers required to install the software is funding-dependent.¹¹⁷

¹¹⁴ At <http://kids.getnetwise.org/safetyguide/> (last visited Mar. 31, 2005). GetNetWise is a consortium of Internet industry corporations and public interest groups. The organization's website provides information and an extensive tool kit to help children and their families have a safe and educational experience on the Internet.

¹¹⁵ *Am. Library Ass'n*, 539 U.S. at 225 (Stevens, J. dissenting).

Moreover, because the procedures that different libraries are likely to adopt to respond to unblocking requests will no doubt vary, it is impossible to measure the aggregate effect of the statute on patrons' access to blocked sites. Unless we assume that the statute is a mere symbolic gesture, we must conclude that it will create a significant prior restraint on adult access to protected speech.

Id.

¹¹⁶ Stevens elaborates:

Indeed, federal or state mandates in this area are unnecessary and unwise. Locally designed solutions are likely to best meet local circumstances. Local decision makers and library boards, responding to local concerns and the prevalence of the problem in their own libraries, should decide if minors' Internet access requires filters. They are the persons in the best positions to judge local community standards for what is and is not obscene, as required by the *Miller* test. Indeed, one nationwide solution is not needed, as the problems are local and, to some extent, uniquely so. Libraries in rural communities, for instance, have reported much less of a problem than libraries in urban areas. A library in a rural community with only one or two computers with Internet access may find that even the limited filtering advocated here provides little or no additional benefit. Further, by allowing the nation's public libraries to develop their own approaches, they may be able to develop a better understanding of what methods work well and what methods add little or nothing, or are even counter-productive. Imposing a mandatory nationwide solution may well impede developing truly effective approaches that do not violate the First Amendment. The federal and state governments can best assist this effort by providing libraries with sufficient funding to experiment with a variety of constitutionally permissible approaches.

Id. at 224 n.3 (citing Laughlin, *Sex, Lies and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to Internet Pornography in Public Libraries*, 51 *DRAKE L. REV.* 213, 279 (2003)) (internal quotations omitted).

¹¹⁷ *Id.* at 231. See *infra* text accompanying note 121.

Libraries are left with no method of having permanently unblocked computers if even a portion of their computers are funded through E-rate or LSTA.¹¹⁸ This, in effect, provides the government with the power to place restrictions on property the library has purchased with independent funding.¹¹⁹ Library patrons also suffer from the libraries' loss of control over their resources. When librarians are unsure of what is being blocked, the patrons are also uninformed as to what information has been blocked from them. Additionally, in communities where the library provides the sole opportunity for Internet access, patrons are subject to the government restrictions imposed upon the libraries through the E-rate and LSTA programs.

C. Ramifications of Filter Implementation

The Internet is used by over 143 million Americans, 10 percent of whom access it at public libraries.¹²⁰ At the over 9,000 public libraries in the United States,¹²¹ low-income patrons are more likely to take advantage of free available Internet access.¹²² This creates a paradox for CIPA. For the very people whom the library provides the only Internet access, the information available to them is limited through the deficiencies created by filter over and underblocking.¹²³ Low income communities do not have the luxury of foregoing the federal funds, as over two dozen counties nationwide have chosen to do.¹²⁴

A 2002 Kaiser Family Foundation study¹²⁵ found that 70 percent of people between the ages of 15 and 17 used the Internet to research health information.¹²⁶

¹¹⁸ 20 U.S.C. § 9134(f)(1); 47 U.S.C. §§ 254(h)(6)(B) and (C). Stevens observes:

If a library has 10 computers paid for by non-federal funds, and has Internet service for those computers also paid for by non-federal funds, the library may choose not to put filtering software on any of those 10 computers. Or a library may decide to put filtering software on the 5 computers in its children's section. Or a library in an elementary school might choose to put filters on every single one of its 10 computers. But under this statute, if a library attempts to provide Internet service for even *one* computer through an E-rate discount, that library must put filtering software on *all* of its computers with Internet access, not just the one computer with E-rate discount.

Am. Library Ass'n, 539 U.S. at 230-231 (Stevens, J., dissenting).

¹¹⁹ *Id.* at 231 n.7. ("They are challenging a restriction that applies to property that they acquired without federal assistance.")

¹²⁰ *Am. Library Ass'n*, 201 F. Supp. 2d at 405.

¹²¹ *Id.* at 419.

¹²² *Id.* at 422.

¹²³ See *supra* text accompanying note 99. ("Approximately 70% of libraries serving communities with poverty levels in excess of 40% receive E-rate discounts.")

¹²⁴ June Kronholz, *Reader Beware: Patriot Act Riles an Unlikely Group: Nation's Librarians; Fears About Terrorism Clash with Principles of Privacy as Online Searches Surge; FBI: 'Bad Guys' Use Web, Too*, WALL ST. J., Oct. 28, 2003, at A1.

¹²⁵ The Foundation website describes its mission:

The Henry J. Kaiser Family Foundation is a non-profit, private operating foundation focusing on the major health care issues facing the nation. The Foundation is an independent voice and source of facts and analysis for policymakers, the media, the health care community, and the general public. KFF develops and runs its own research and communications programs, often in partnership with outside organizations. The Foundation contracts with a wide range of outside individuals and organizations through

The study tested seven different filtering products at three different levels of restriction: least restrictive, intermediate and most restrictive.¹²⁷ The study tested 3,053 health Web sites and 516 pornography Web sites on all seven filtering products.¹²⁸

Many Internet users at this key age are too embarrassed to ask a doctor for information on sexual health topics, rendering the Internet their only resource.¹²⁹ With the Internet serving as the primary, if not only resource for many teens seeking accurate health information, the findings of the study show how detrimental Internet filters can be. At the most restrictive level of filtering, 24 percent, of all non-pornographic health sites are blocked.¹³⁰ The results for the least restrictive and intermediate level of blocking were not as extreme: 1.4 percent and 5 percent of health sites respectively.¹³¹ However, the researchers discovered that as the filters were configured to the higher levels of restriction, the proportion of pornographic sites blocked does not increase significantly.¹³² What does increase significantly is the proportion of non-pornographic health sites blocked, particularly those which cover topics relating to sexual health.¹³³

This creates an interesting paradox. Whether the Internet filters are set at a lower restriction level, letting more questionable Web sites through, as might be the case in a community with more liberal leanings, or whether the Internet filters are

its programs. Through our policy research and communications programs, we work to provide reliable information in a health system in which the issues are increasingly complex and the nation faces difficult challenges and choices.

At <http://www.kff.org/about/index.cfm> (last visited Mar. 31, 2005).

The study reported here is a large-scale scientific study designed to help determine whether Internet filters are likely to block young people's access to non-pornographic health information. The study simulates young people's online health information searches and measures the impact of seven different filtering products on those searches, looking at both the effectiveness of the filters at blocking pornography and the rate at which they also block non-pornographic health information.

VICTORIA RIDEOUT, ET AL., SEE NO EVIL: HOW INTERNET FILTERS AFFECT THE SEARCH FOR ONLINE HEALTH INFORMATION (The Henry J. Kaiser Family Foundation, Dec. 2002).

¹²⁶ VICTORIA RIDEOUT, ET AL., SEE NO EVIL at 3. "Some of the most common topics searched include sexual health issues such as pregnancy, birth control, HIV/AIDS, or other sexually transmitted diseases (40% have researched one of these subjects); problems with drugs or alcohol (25%); and depression or mental illness (17%)." See also Caroline R. Richardson, *Does Pornography-Blocking Software Block Access to Health Information on the Internet?*, 288:22 JAMA 2887 (2002). This article provides a statistical analysis of the information contained in the Kaiser Family Foundation's report.

¹²⁷ VICTORIA RIDEOUT, ET AL., SEE NO EVIL at 3. The products tested included SmartFilter, 8e6, Websense, CyberPatrol, Symantec, N2H2, and AOL Parental Controls.

¹²⁸ *Id.* at 5.

¹²⁹ *Internet Filters Often Block Sexual Health Information, Study Says*, DAILY REPRODUCTIVE HEALTH REPORT (The Henry J. Kaiser Family Foundation, Menlo Park, CA), Dec. 11, 2002 available at http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=15033 (last visited Mar. 31, 2005). Caroline Richardson, a researcher at the University of Michigan and one of the study's co-authors, said, "A lot of teenagers don't go to their doctors with sexual questions, because they're embarrassed or worried about confidentiality, and the Internet is an important way for them to get those questions answered."

¹³⁰ VICTORIA RIDEOUT, ET AL., SEE NO EVIL at 6.

¹³¹ *Id.*

¹³² *Id.* at 7.

¹³³ *Id.* at 7.

set at a higher restriction level, as might be the case in a more conservative community, the only thing being affected is the right to access constitutionally protected, informative and educational material.

Therefore, 16% of all health sites would be blocked by one filtering product or another, when set at the intermediate level. Across all of the health topics studied, 5% of all health sites were blocked by at least one of the filtering products studied when set at the *least restrictive* configuration, 16% were blocked by at least one filtering product at the *intermediate* configuration, and 63% were blocked by at least one filter in the *most restrictive* configuration.¹³⁴

This result flies in the face of CIPA's goals to restrict pornographic access online. Libraries that install filters and set them at a higher level of restriction may be under the mistaken belief that they are doing a better job of compliance and protecting their patrons when in fact they may be harming the patrons by preventing them from accessing vital health information.

Semantics should not be an issue when accessing information is concerned. This is especially true when discussing a teen attempting to access sexual health information online. However, the study found that word choice plays a key role in the amount of Web sites blocked.

Internet users seeking health information can avoid some blocking by using alternate search terms. Sexual health sites associated with certain search terms—such as “safe sex” or “condoms”—were much more likely to be blocked than sites that resulted from alternate search strings, such as “birth control,” “STD,” or “herpes” (for example, 28% of health sites from the “condom” search were blocked at intermediate blocking levels, compared to 5% of sites from a search on “birth control”).¹³⁵

At that age, it is completely possible that the Internet user may only be familiar with slang terminology. Hence, in the communities where access to sexual health information may be most needed—a low income community with a high rate of teen pregnancy, HIV/AIDS, or early exposure to STDs—the library provides the only resource that does not involve speaking to an adult, and that information is not being disseminated due to the inherent overblocking of Internet filter software.¹³⁶

¹³⁴ *Id.* at 8-9.

¹³⁵ VICTORIA RIDEOUT, ET AL., SEE NO EVIL at 10.

¹³⁶ *Id.* at 13.

The filters do not significantly impede searches for general health information when they are set at low levels of blocking, but they do have a modest impact on searches for sexual health information even at these settings. Filters do interfere with general health searches at higher levels of configuration, and have an especially serious impact on searches for *sexual health* information at these levels, blocking many non-pornographic sites.

By requiring filters, the government is sending the message to library patrons that the information that is available through filters is government supported.¹³⁷ Parents are also misled to believe their children are safe while surfing the Internet at libraries, while the problem which was the foundation of CIPA has not really been solved.

D. Alternatives to Internet Filters

The plaintiffs in *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library* offered a variety of less restrictive alternatives to Internet filters, many of which were already in use by libraries across the country before CIPA was passed.¹³⁸ Some of the proposed alternatives include “designing an acceptable use policy, using privacy screens, using filters that can be turned off for adult use, changing the location of Internet terminals, educating patrons on Internet use, placing time limits on use, and enforcing criminal laws when violations occur.”¹³⁹ This opinion also raises the option of scanning the library Internet use logs, enabling librarians to detect attempts to access illegal material and child pornography and then reporting that to law enforcement.¹⁴⁰

The Supreme Court opinion says that these less intrusive alternatives are irrelevant because it is not a public forum, and in actuality, that these suggested practices could be more intrusive and place an unfair burden on librarians.¹⁴¹

Some of these suggested practices can certainly place an unfair burden on librarians, but any option is better than denying library patrons access to vital health and educational materials in one of the only places they feel comfortable accessing the information. As with all mediums of communication and research, the most important tool is education. A better option than having the librarians stand over patron’s shoulders would be for them to conduct Internet-use training sessions and require patrons to have taken a seminar before having the authority to use the Internet terminals. In addition to the librarians’ responsibility for the

¹³⁷ *Am. Library Ass’n*, 539 U.S. at 229 (Stevens, J., dissenting). “In short, the message conveyed by the use of filtering software is not that all speech except that which is prohibited by CIPA is supported by the Government, but rather that all speech that gets through the software is supported by the Government.” *Id.*

¹³⁸ *Mainstream Loudoun*, 24 F. Supp. 2d at 566. In *Mainstream Loudoun*, a non-profit group representing Loudoun County residents sued the library after it implemented Internet filters. The plaintiffs claimed their First Amendment rights had been denied by the site blocking. See *supra* note 70. See also *Am. Library Ass’n*, 201 F. Supp. 2d at 406 (“seven percent of American public libraries use blocking software for adults.”).

¹³⁹ See *Mainstream Loudoun*, 24 F. Supp. 2d at 566.

¹⁴⁰ *Am. Library Ass’n*, 201 F. Supp. 2d at 480-81.

For example David Biek, Director of Tacoma Public Library’s main branch, testified that in the course of scanning Internet use logs he has found what looked like attempts to access child pornography, notwithstanding the fact that Tacoma uses Websense filtering software. In two cases, he communicated his findings to law enforcement and turned over the logs to law enforcement in response to a subpoena.

Id.

¹⁴¹ *Am. Library Ass’n*, 539 U.S. at 206.

material viewed on the Internet, parents should be educating their children at home on safe Internet use. The combination of parental education, reinforced by the libraries' restrictions, would be a powerful weapon in preventing exposure to pornography.¹⁴²

CONCLUSION

The principles behind CIPA are positive. There is a rampant amount of pornography on the Internet, and children should be protected from it. However, with the current deficiencies in the technology, compelling filter installation is not going to solve this problem, particularly not without a uniform standard for all libraries to follow. The single most important tool to prevent children, teens, and adults from accessing pornography in public libraries is education at home, in school, and in the library setting.

Filters, if ineffective, should not be mandated simply because taking ineffective action is better than not taking action at all. Until filters can at least scan and block images, the time and resources spent complying with CIPA are worthless. As the district court concluded, there is no foreseeable technology that will achieve the goals of CIPA. Regardless of whether CIPA is facially constitutional, if its ends are not being justified by its means, and CIPA prevents access to important information that is readily accessible, it should be invalidated or amended in a manner that promotes the goal of controlling access to pornography on the Internet.

¹⁴² GetNetWise provides a plethora of resources for parental education and prevention. One of the site's resources, an Online Safety Guide, outlines steps parents can take:

Parents need to stay in close touch with their kids as they explore the Internet.

Teachers need to help students use the Internet appropriately and safely.

Community groups, including libraries, after-school programs, and others should help educate the public about safe surfing.

Kids and teens need to learn to take responsibility for their own behavior—with guidance from their families and communities.

It's not at all uncommon for kids to know more about the Internet and computers than their parents or teachers. If that's the case in your home or classroom, don't despair. You can use this as an opportunity to turn the tables by having your child teach you a thing or two about the Internet. Ask her where she likes to go on the Internet and what she thinks you might enjoy on the Net. Get your child to talk with you about what's good and not so good about his Internet experience. Also, no matter how Web-literate your kid is, you should still provide guidance. You can't automate good parenting.

GetNetWise, Online Safety Guide, at <http://kids.getnetwise.org/safetyguide/> (last visited Apr. 9, 2005).