

The Baby and the Bathwater Too: A Critique of *American Library Ass'n v. U.S.*

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Abstract

In June 2003, the Supreme Court, in *United States v. American Library Ass'n*, sent tremors through libraries nationwide when it reversed a finding of the United States District Court (USDC) in Philadelphia that held the Child Internet Protection Act (CIPA) was facially violative of the First Amendment rights of library patrons. Under CIPA, all libraries that accepted federal funding to cover the costs of providing Internet access to their patrons were required to install filtering software programs on their computers to prevent patrons from seeing any material that was obscene or “harmful to minors.” The law was not limited to computers used solely by children – computers used by adult patrons, and even staff, were affected. The American Library Association (ALA) had objected to CIPA on the grounds that the broad scope of such filtering programs prevented patrons from exercising their First Amendment right to see materials which were not unlawful, but which the filters prevented them from accessing.

The ALA challenged the constitutionality of CIPA in an action filed in the U.S. District Court for the Eastern District of Pennsylvania. The District Court, aided by extensive evidence developed by expert testimony, and applying a strict scrutiny standard, agreed with the ALA and found that CIPA was, on its face, violative of the First Amendment rights of library patrons. The government, utilizing the right, under the Act, to immediate appeal to the Supreme Court, sought a reversal of the District Court determination. On appeal, the Supreme Court reversed, finding that strict scrutiny was not mandated, and that CIPA, viewed under an intermediate scrutiny standard, was not unconstitutional on its face. The Court left open the possibility that CIPA might still be overly restrictive as applied, meaning that the door was still open for subsequent claims to be brought to modify the scope of the statute.

An analysis of this Supreme Court decision is the focal point of this article. In the first section, I look at the history of Congress’ deeply flawed effort to define and regulate obscenity in the pre-digital age, and the judicial response to those efforts. In Section Two, the migration of this effort into the digital age is examined, as I review Congress’ determined efforts to apply an already flawed standard to the complex universe of cyberspace. Those efforts, found in the Communications and Decency Act (CDA), and the Children’s Online Protection Act (COPA), also ran afoul of the Supreme Court and were limited or invalidated on overbreadth and First Amendment grounds. The lessons learned from these failures give birth to CIPA, and this section includes a summary of its relevant provisions.

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The Third Section of this article focuses on judicial review of CIPA, beginning with the decision in the District Court for the Eastern District of Pennsylvania. The Fourth Section analyzes the Supreme Court’s plurality opinion reversing the District Court and upholding CIPA.

The fifth and final section of the article poses the perennial “what next” question. How will libraries respond to the challenge posed by the over- and under-inclusiveness of the software filters mandated by CIPA, and is it likely that an “as-applied” challenge to the law will modify or ultimately lead to a subsequent review of the validity of the Supreme Court decision?

Introduction

Fog everywhere. Fog up the river, where it flows among green aits and meadows; fog down the river, where it rolls defiled among the tiers of shipping, and the waterside pollutions of a great (and dirty) city...

....

The raw afternoon is rawest, and the dense fog is densest, and the muddy streets are muddiest, near that leaden-headed old obstruction, appropriate ornament for the threshold of a leaden-headed old corporation: Temple Bar. And hard by Temple Bar, in Lincoln’s Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.

....

Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds, this day, in the sight of heaven and earth.¹

With these immortal words, Charles Dickens, in *Bleak House*, uses the metaphor of fog to begin his scathing critique of the ambiguities and uncertainties lurking in the British probate system. The metaphor applies with equal strength to the decades-old efforts of the U.S. legal system to define, and then regulate the distribution of adult-oriented material in popular media. It is an effort rife with uncertain definitions, and its vagueness has cost the parties involved their reputations, businesses, and more.

The most recent efforts to regulate adult-oriented material have focused on the public library system in the United States, and the efforts of that system to provide Internet access to its patrons. After two failed legislative efforts to regulate the exposure of children to explicit sexual material, Congress finally seems to have met with success in the form of the Children’s Internet Protection Act, popularly known as CIPA.²

¹ CHARLES DICKENS, *BLEAK HOUSE* 1-2 (Bantam Classics ed., Penguin Books 1983) (1853).

² 47 U.S.C. § 254 (2005); 20 U.S.C. § 9134 (2005).

I. Background: A History of Fog – Obscenity Decisions in U.S. Jurisprudence

In order to understand the current cases in which Congress and the Supreme Court are attempting to regulate the dissemination of adult oriented material in the online context, we need to dial the time machine back to 1957, when in *Roth v. U.S.*³ the Court first squarely confronted the issue of what “obscenity” is. In my review of these early obscenity cases, I was struck once again by the verity of the statement attributed to George Santayana, that “those who cannot remember the past are condemned to repeat it.”⁴

The defendant in *Roth* had been convicted for mailing an obscene book and obscene circulars and advertising.⁵ Justice Brennan, writing for the Court, noted that this case was the first time that the question of whether obscenity was protected speech under the First Amendment had been squarely presented to the Court; prior cases had suggested that obscenity was not protected speech.⁶

Based on this history, and noting that “the unconditional phrasing of the First Amendment was not intended to protect every utterance”⁷, the Court held that obscenity was not within the area of constitutionally protected speech or press.⁸ Justice Brennan was aware that there was a fine line to be drawn between material that dealt with sexual matters, and material that was obscene. He noted that making this delineation was necessary because of the importance of protecting individuals’ right of free speech in all such matters of public concern.⁹

With these concerns in mind, the Court in *Roth* spelled out a standard for determining whether sexually oriented material was obscene, and therefore devoid of First Amendment protection. The test was “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”¹⁰

³ *Roth v. U.S.*, 354 U.S. 476 (1957).

⁴ George Santayana, *Life of Reason, Reason in Common Sense*, SCRIBNERS (1905) at 284.

⁵ *Roth*, 354 U.S. at 481.

⁶ *Id.* at 481 (citing *Ex parte Jackson*, 96 U.S. 727, 736-37 (1877); *United States v. Chase*, 135 U.S. 255, 261 (1890); *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897); *Winters v. New York*, 333 U.S. 507, 510 (1948); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952), and other citations omitted).

⁷ *Roth.*, 354 U.S. at 483.

⁸ *Id.* at 485. This sweeping pronouncement of the *Roth* majority forms the basis of obscenity law in the United States to this day. It was accompanied, as is illustrated by the dissenting opinions of Justices Harlan, Douglas and Black, with serious concerns over the lack of a clear definition of obscenity, or any agreement as to what community would be empowered to create that definition.

⁹ *Id.* at 487. Justice Brennan wrote eloquently that “[s]ex and obscenity are not synonymous...The portrayal of sex, e.g. in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.” *Id.*

¹⁰ *Id.* at 488. In announcing this test, the Court rejected the early leading standard of obscenity, set forth in *Regina v. Hicklin*, (1868) L.R.3 Q.B. 360, which found material obscene if even an isolated excerpt had a deleterious effect on particularly susceptible persons.

Citing the instructions of the trial court in *Roth*, Justice Brennan adopted the trial judge's definition of the community as follows:

The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community....In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and irreligious—men, women and children.¹¹

Determining what the contemporary community standards were in California (where Roth was tried and convicted) was no easy task. The state at that time comprised a diverse population, with large concentrations of Mexican and Mexican-Americans in the southern portion, and a large population of Chinese, Japanese, and Portuguese citizens in the north. Liberal politics and social mores were found in San Francisco and Los Angeles, and more conservative views were the mainstay of Sacramento and San Diego. It was, however, an era easier to define than contemporary California, since it was a time when commercial air travel was in its early stages, television was a nascent industry, and the border-collapsing invention of the Internet was a distant dream. Looking back from our vantage point in history, it seems more likely that a jury then, as opposed to now, could come up with a formula that it believed was reflective of contemporary community standards. To attempt that effort now, in an era of increased diversity of population and viewpoints, seems an impossibility.

In his dissent in *Roth*, Justice Douglas, joined by Justice Black, voiced concerns about the viability of the “community standard” and about the impact the Court's ruling would have on the First Amendment:

The standard of what offends “the common conscience of the community” conflicts, in my judgment, with the command of the First Amendment that “Congress shall make no law...abridging the freedom of speech, or of the press.” Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?¹²

The *Roth* standard was tested and expanded in the years that followed. Nine years later, the Massachusetts Supreme Judicial Court, acting on its understanding of *Roth* to mean that a patently offensive book that appeals to prurient interest need not be unqualifiedly worthless

¹¹*Roth.*, 354 U.S. at 490 (citing *People v. Alberts*, 292 P. 2d 90 (Cal. App. Super. 1955)).

¹² *Id.* at 511-12, 514. Placing his faith in people's inherent ability to reject meritless material, he concludes: “I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.” *Id.* at 514.

before it can be deemed obscene, found that John Cleland's 1750 novel, *Memoirs of a Woman of Pleasure* (commonly known as Fanny Hill), was obscene.¹³

Writing for a plurality of the Court, Justice Brennan found that the Massachusetts Supreme Judicial Court had misinterpreted the social value criterion of the *Roth* standard. Justice Brennan reiterated that the relevant standard was whether the book was "found to be utterly without redeeming social value."¹⁴ Since the courts below had found that the book possessed a modicum of social value, reversal was required.¹⁵

Faced with the near-impossible task of proving a negative, that a work had to be "utterly without redeeming social value", state court decisions were, in the years following the *Memoirs* decision, routinely appealed to the U.S. Supreme Court, which found itself in the unenviable role of serving as the final board of censorship for the 50 states. One has to feel a bit sorry for the Justices of the Supreme Court, having to review countless alleged obscene works, looking for the scrap of social value that might allow them to pass muster as protected works.

Frustrated by this unworkable standard, the Supreme Court tried again to define obscenity in a way that would provide state courts with a viable standard. This new standard was set forth by Chief Justice Warren Burger in the 1973 decision of *Miller v. California*¹⁶, and consisted of a three-part test that, despite much criticism, remains the standard today.

The *Miller* test imposed the following basic guidelines for the trier of fact:

- (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.¹⁷

Acknowledging the difficulties that courts have faced in attempting to articulate a workable definition of obscenity,¹⁸ Justice Burger asserted that requiring the application of local community standards, defined in the opinion as the standards of a given state,¹⁹ would "provide

¹³ A Book Named "John Cleland's *Memoirs of a Woman of Pleasure*" et. al. v. Attorney General of Massachusetts, 383 U.S. 413 (1966).

¹⁴ *A Book Named*, 383 U.S. at 418.

¹⁵ *Id.* at 420. Justice Brennan then proceeded to muddy the waters by noting that a book that did have some redeeming social value could still be found to be obscene if the circumstances of its production, sale and publicity of the book was such that it was commercially exploited purely for prurient appeal. *Id.* And so the fog gets thicker.

¹⁶ *Miller v. California*, 413 U.S. 15 (1973). This was a five-four decision of the Court. Justices White, Blackmun, Powell and Rehnquist joined the majority. Justice Douglas dissented, and Justice Brennan also wrote a dissenting opinion, which was joined by Justices Stewart and Marshall. *Id.*

¹⁷ *Id.* at 24. Justice Burger explicitly rejected the *Memoirs* requirement that the work be "utterly without redeeming social value." *Id.*

¹⁸ *Id.* at 30.

¹⁹ In this case, Justice Burger notes that the applicable community standard was that of "the State of California." *Id.* at 31. One has to wonder whether the majority of the Justices actually believed that the community standards of such

fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.”²⁰ Justice Burger emphasized that a national standard definition of obscenity was not attainable, citing Justice Warren’s Dissent in *Jacobellis v. Ohio*,²¹ “I believe that there is no provable ‘national standard’ . . . At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one.”²²

In a stinging dissent, Justice Douglas attacked the qualifications of the Court to attempt to formulate a definition of obscenity as unprotected speech.²³ With bluntness tied to considerable eloquence, he wrote:

The Court has worked hard to define obscenity and concededly has failed.

....

We deal with highly emotional, not rational, questions. To many the Song of Solomon is obscene. I do not think we, as judges, were ever given the constitutional power to make definitions of obscenity. If it is to be defined, let the people debate and decide by a constitutional amendment what they want to ban as obscene and what standards they want the legislatures and the courts to apply. Perhaps the people will decide that the path towards a mature, integrated society requires that all ideas competing for acceptance must have no censor. Perhaps they will decide otherwise. Whatever the choice, the courts will have some guidelines. Now we have none except our own predilections.²⁴

Justice Douglas got his wish. With the birth and amazingly swift and widespread acceptance of the Internet and World Wide Web as a medium of communication, the U.S. Congress entered the debate over the definition of obscenity through a series of attempts to regulate explicit sexual material. Those efforts, rather than clarifying the issues, only brought more fog and murkiness to the debate, as illustrated in this next section.

II. Digital Fog – Obscenity Legislation and the Internet

Over the past 125 years, as each new means for the delivery of entertainment media has been developed, from motion pictures to television, from videocassettes to DVDs, enterprising entrepreneurs have seized on the new delivery platforms as an opportunity to market adult-oriented product to an apparently highly interested audience.²⁵ The U.S. Congress, concerned about the negative impact this material has on the moral fabric of society, and particularly concerned with shielding children from that negative impact, has enacted numerous laws

disparate environs as San Francisco and San Diego were considered by the Court as being susceptible to a single agreed-upon standard.

²⁰ *Miller*, 413 U.S. at 27.

²¹ *Jacobellis v. Ohio*, 378 U.S. 184, 200 (1964).

²² *Id.* at 200.

²³ *Miller*, 413 U.S. at 37-47.

²⁴ *Id.* at 37, 46-47.

²⁵ See *infra* p. 21 for a discussion of the extent of explicit sexual material found on the Web.

prohibiting the trafficking in these materials where they can either be obtained by, or involve the use of, children.²⁶

a. The Early Efforts: The CDA and COPA

The ubiquitous nature of the **Internet** and the ease with which children could access the numerous adult-oriented entertainment sites online, galvanized Congress into an effort to shield children from this material. Initial efforts to enact protective measures, however, were frustrated by successful challenges on First Amendment grounds. Examples of these efforts are the Communications Decency Act of 1996 (CDA)²⁷ and the Children’s Online Protection Act of 1998 (COPA).²⁸

The CDA was one of the first of these protective measures passed by Congress on February 1, 1996, in the nascent era of the Internet and the Web. Section 502(d) of the CDA provided, in pertinent part, the following:

(d) 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, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, 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.

(e) In addition to any other defenses available by law:²⁹

The language of the statute, which describes the content circumscribed by the Act, appears borrowed from the Supreme Court’s *Miller* test, in its reference to “patently offensive” content, “as measured by contemporary community standards.”³⁰ Significantly absent, however, is the leavening force of the third prong of the *Miller* test, the question of whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.³¹ It would appear

²⁶ See, e.g., Karl A. Menninger, *Cyberporn: Transmission of Images By Computer As Obscene, Harmful to Minors or Child Pornography*, 61 AM. JUR. 3D *Proof of Facts* § 51 (2005).

²⁷ 47 U.S.C. § 223 (1996).

²⁸ 47 U.S.C. § 231(1998).

²⁹ 47 U.S.C. § 502 (1996), available at http://www.epic.org/free_speech/CDA/cda.html.

³⁰ See, e.g., the discussion of *Miller*, *supra* at 4-6, notes 16-24.

³¹ *Id.*

that when it came to protecting children, Congress felt that sexual or excretory, or organ matters, however artistic or seriously dealt with, still should be banned.³²

No sooner had Congress passed the CDA were there strong calls for its repeal. Eight days after its passage, Senator Patrick Leahy introduced a bill to repeal Section 502.³³ In his Floor Statement on repealing the CDA, Senator Leahy characterized it as “fatally flawed and unconstitutional.”³⁴

Noting the broad sweep of the Act, and the absence of the important leavening aspect of the third prong of the *Miller* test, Senator Leahy sounded a prescient warning about the danger of trying to regulate content on the Internet:

Internet users will have to limit all language used and topics discussed in online discussions accessible to minors to that appropriate for kindergartners, just in case a child clicks onto the discussion. No literary quotes from racy parts of *Catcher in the Rye* or *Ulysses* will be allowed. Certainly, online discussions of safe sex practices, or birth control methods, and of AIDS prevention methods will be suspect. Any user who crosses the vague and undefined line of “indecent” will be subject to two years in jail and fines.

....

A few weeks ago, America Online took the online profile of a Vermonter off the service. Why? Because the Vermonter used what AOL deemed a vulgar, forbidden word. The word -- and I do not want to shock my colleagues -- but the word was “breast.” And the reason this Vermonter was using the word “breast”? She was a survivor of breast cancer. She used the service to exchange the latest information on detection of breast cancer or engage in support to those who are survivors of breast cancer. Of course, eventually, America Online apologized and indicated they would allow the use of the word where appropriate.

....

What strikes some people as “indecent” or “patently offensive” may look very different to other people in another part of the country. Given these differences, a vague ban on patently offensive and indecent communications may make us feel good but threatens to drive off the Internet and computer networks an unimaginable amount of valuable political, artistic, scientific, health and other speech.³⁵

³² The author confesses some puzzlement as to whether there exists a body of content which contains patently offensive descriptions of excretory functions or of bodily organs separate from any sexual context, a concern Congress seems to have felt needed addressing since the language of the Act separates this content from sexual content with an “or”. This preclusion also leaves open to question what a jury would use as a reference point to determine what the contemporary community standard for non-patently offensive descriptions of excretory functions would be.

³³ S. 1567, 104th Cong. § 1 (1996), available at http://www.epic.org/free_speech/CDA/repeal.html.

³⁴ *Communications Decency Act of 1995: Hearing on S.1567 Before the Comm. on Commerce, Sci. & Transp.*, 104th Cong. (1996) (statement of Patrick Leahy, Senator), available at http://www.epic.org/free_speech/CDA/s1657_statement.html.

³⁵ *Id.*

Congress chose not to heed Sen. Leahy's call for repeal and his bill was not passed. However, within weeks of the passage of the CDA, an action by the American Civil Liberties Union was filed in the U.S. District Court for the Eastern District of Pennsylvania, challenging the constitutionality of the CDA on grounds of vagueness and overbreadth.³⁶ The ACLU action was followed by a similar filing from the American Library Association, and the two actions were joined and proceeded thereafter as a single case.³⁷

The District Court, in a unanimous decision supported by three separate statements by the Judges of the Court, struck down the CDA.³⁸ The opinions of the judges all focused on the fact that unlike the *Miller* case, the CDA focused on the term "indecent", as the Court had defined that term in *FCC v. Pacifica Foundation*,³⁹ and *Sable Communications v. FCC*.⁴⁰ The three judges who made up the District Court panel reviewing the case each wrote separate opinions. However, their conclusion that the Act was unconstitutional was unanimous.⁴¹

District Judge Buckwalter found that the word "indecent" in § 223(a)(1)(B) and the phrases "patently offensive" and "in context" in §223(d)(1) were so vague that enforcement of criminal charges based on these sections would violate the "fundamental constitutional principle" of "simple fairness."⁴² Similarly, Chief Judge Sloviter found that the statute "sweeps more broadly than necessary and thereby chills the expression of adults" and that the terms "patently offensive" and "indecent" were "inherently vague."⁴³

The U.S. government appealed the District Court decision, under Section 561 of the CDA's special review provisions, which allowed the government to bypass appellate level review and appeal directly to the U.S. Supreme Court.⁴⁴ The Court, noting probable jurisdiction, accepted the case.⁴⁵ Oral argument was presented on March 19, 1997, and the Court issued its decision on June 26, 1997, in which it affirmed the District Court.⁴⁶

Writing for the majority, Justice Stevens noted that the decision of the Court was based solely on First Amendment overbreadth grounds, and that although the statute's vagueness was relevant to the First Amendment analysis, the Fifth Amendment vagueness claim was not separately addressed by the Court.⁴⁷

³⁶ ACLU v. Reno, 929 F. Supp. 824 (E.D.Pa. 1996).

³⁷ ACLU, 929 F. Supp. at 824.

³⁸ *Id.*

³⁹ 438 U.S. 726 (1976).

⁴⁰ 492 U.S. 115 (1989).

⁴¹ ACLU, 929 F. Supp. at 824.

⁴² *Id.* at 861.

⁴³ *Id.* at 854, 856.

⁴⁴ Reno v. ACLU, 521 U.S. 844 (1997).

⁴⁵ *Id.*

⁴⁶ *Id.* Justice Stevens delivered the opinion of the Court. He was joined by Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Justice O'Connor filed an opinion in which she concurred in part, and dissented in part. Chief Justice Rehnquist joined in Justice O'Connor's opinion. Although not a unanimous opinion, this much agreement on the part of the Court in a decision relating to obscenity law is a rarity.

⁴⁷ *Id.* at 864-68.

Justice Stevens rejected the government’s argument that the CDA was “plainly constitutional” under three prior seminal obscenity decisions, *Ginsberg v. New York*;⁴⁸ *FCC v. Pacifica Foundation*;⁴⁹ and *Renton v. Playtime Theatres, Inc.*⁵⁰ He also strongly rejected the government’s assertion that the CDA is “no more vague than the [Court’s own] obscenity standard...established in *Miller v. California*....”⁵¹

The CDA does not provide the same protections afforded in the *Miller* standard, Justice Stevens wrote, because it failed to include two key prongs of that test: “(1) that, taken as a whole, the material appeal to the ‘prurient’ interest, and (2) that it ‘lack serious literary, artistic, political, or scientific value.’”⁵² Stevens noted that this second prong is important because it is not judged by contemporary community standards, thereby allowing appellate courts to “impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value.”⁵³

This analysis led Justice Stevens to conclude that the CDA presented a threat to free speech:

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.

....

It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an

⁴⁸ 390 U.S. 629 (1968).

⁴⁹ 438 U.S. 726 (1978).

⁵⁰ 475 U.S. 41 (1986); *ACLU*, 521 U.S. at 844. Justice Stevens distinguished the CDA from the rationales that allowed the Court to uphold convictions in each of these three cases. *Id.* at 864-68. He noted that the statute at issue in *Ginsberg* contained a more narrow prohibition against sales of explicit material, by including the requirement that the material at issue be “utterly without redeeming social value,” and that the CDA added an additional year (from 17 to 18 years of age) to those prohibited from receiving the material at issue. *Id.* at 865-66. He noted further that the CDA fails to define “indecent” and “importantly, omits any requirement that the patently offensive material covered by §223(d) lacks serious literary, artistic, political, or scientific value.” *Id.* at 865. Moving on to the *FCC v. Pacifica* case, the Court distinguishes it by noting that the *Pacifica* case limited the times when indecent material could be broadcast over the radio; a medium that could only be afforded “limited First Amendment protection . . . because warnings could not . . . protect listeners from unexpected program content.” *Id.* at 867. The Court noted the District Court findings that the Internet had “no comparable history,” and that persons seeking to access material online had to take “a series of affirmative steps” to reach it, as opposed to merely turning a dial. *Id.* Finally, the Court distinguished the *Renton* case, noting the purpose of the zoning ordinance was to prevent the so-called “secondary effects” . . . of crime and deteriorating property values” that allegedly would plague neighborhoods where adult theaters and similar businesses were allowed to operate. *Id.* Acknowledging that cyberspace might be a sort of neighborhood, the Court nonetheless found that the CDA, with its prohibition against “indecent” speech, was a “content-based blanket restriction on speech,” instead of a “time, place and manner” form of regulation. *Id.* at 867-68.

⁵¹ *ACLU*, 521 U.S. at 872.

⁵² *Id.* at 873.

⁵³ *Id.* It is significant to note that Justice Stevens did not follow this characterization of the value of this prong of the *Miller* test with any citations to cases that subsequently established this “national floor for socially redeeming value”. There is little evidence to suggest that this optimistic goal was ever achieved.

unnecessarily broad suppression of speech addressed to adults. As we have explained, the government may not “reduce the adult population ... to ... only what is fit for children.”⁵⁴

In her concurrence and dissent, Justice O’Connor argued that the majority opinion went too far in its determination that the CDA is facially overbroad and vague.⁵⁵ She agreed that to the extent the CDA was, in her view, “little more than an attempt by Congress to create ‘adult zones’ on the Internet,” that it failed because there was inadequate screening technology in 1997 to screen out only minors from viewing content.⁵⁶ Justice O’Connor also argued that there was no showing by the plaintiff that the CDA burdened a substantial amount of material with some redeeming value for minors, and that the CDA’s ban on the communication of obscene material from an adult to a minor, where the minor’s status is known to the adult, should have been upheld by the Court.⁵⁷

The relatively quick challenge and subsequent invalidation of the CDA’s effort to restrict allegedly harmful online content sent Congress back to the drawing board for another attempt to craft legislation that would pass constitutional scrutiny. The result of this second effort was the enactment of the Children’s Online Protection Act (COPA).⁵⁸

Mindful of the concerns with unconstitutional overbreadth that plagued the CDA’s attempt to address online content, the Congress fashioned COPA in a manner intended to comply with the guidelines set forth by the Supreme Court in the *Reno v. ACLU* decision. The House Report that accompanied the legislation outlined the purpose of COPA and the effect the prior ruling had on its creation:

The purpose of H.R. 3783 is to amend the Communications Act of 1934 by prohibiting the sale of pornographic materials on the World Wide Web (or the Web) to minors. H.R. 3783 has been carefully drafted to respond to the Supreme Court’s decision in *Reno v. ACLU*, 117 S. Ct. 2329 (1997) and the Committee believes that the bill strikes the appropriate balance between preserving the First Amendment rights of adults and protecting children from harmful material on the World Wide Web.

H.R. 3783 prohibits a person from knowingly making, by means of the World Wide Web, any communication for commercial purposes that is harmful to minors, unless such person makes a good faith effort to restrict access by minors.⁵⁹

⁵⁴ *ACLU*, 521 U.S. at 874-75 (citation omitted).

⁵⁵ *Id.* at 886-97.

⁵⁶ *Id.* at 886-87. Justice O’Connor’s view of the limits imposed by technology foreshadow the Court’s subsequent determination that CIPA is not unconstitutionally overbroad, based on the perception of the Court that by 2004, the technology of screening had advanced to the point that these concerns were no longer valid. The accuracy of that perception will be discussed. *Id.*

⁵⁷ *Id.* at 896-97.

⁵⁸ 47 U.S.C. § 231 (1998).

⁵⁹ TOM BLILEY, CHILD ONLINE PROTECTION ACT, H.R. REP. NO. 105-775, at 5 (1998). The Report notes that the Act gives examples of what would constitute a good faith effort to restrict access to minors – citing “the use of a credit

The ACLU viewed the terms of COPA with the same skepticism it had for the CDA provisions and, in early 1999, launched a similar immediate constitutional challenge. The case was filed in the United States District Court for the Eastern District of Pennsylvania, and included, as plaintiffs, an array of different organizations representing booksellers and other media organizations.⁶⁰ The ACLU and the other plaintiffs sought an injunction barring enforcement of COPA on the grounds that it abridged the free speech rights of adults.⁶¹ The District Court agreed and issued the injunction, finding that the plaintiffs were likely to prevail at trial in establishing that COPA was content-based regulation on sexual expression that was presumptively invalid, subject to strict scrutiny, and was not the least restrictive means of preventing access by minors.⁶²

Attorney General Reno appealed the District Court's ruling.⁶³ To the government's dismay, the Court of Appeals affirmed the District Court's decision, based on an entirely different line of reasoning.⁶⁴ The Court of Appeals found that COPA's use of the *Miller* case's "contemporary community standards" test to identify material harmful to minors rendered the Act substantially overbroad because it was impossible, from a technology standpoint, for Web publishers to limit access to their sites based on the geographic location of particular Internet users.⁶⁵ This analysis highlights a conflict between the nature of the Internet, and the keystone of the *Miller* decision – how can you determine the contemporary community standards of Web users, who come from all over the country and the world? The *Miller* standard's reliance on the geographic boundaries of a local community has no meaning in the boundlessness of cyberspace.

The Supreme Court disagreed. In May 2002, the Court vacated the Court of Appeals' decision and remanded the case to the District Court.⁶⁶ The decision by the Supreme Court reflects seriously conflicting viewpoints by the justices over the meaning and applicability of the amorphous *Miller* case phrase "contemporary community standards."⁶⁷ The only point a

card, debit account, adult access code, or adult personal identification number." The Report notes that the Act "requires providers of interactive services to notify customers that parental control protections, such as computer hardware, software, and filtering services, are commercially available that may assist the customer in limiting access to material that is harmful to minors...." The Act also "establishes a Commission on Online Child Protection that is required to study technological and other methods to help reduce access by minors to material that is harmful to minors on the Internet." *Id.* at 6.

⁶⁰ *ACLU v. Reno*, 31 F. Supp. 2d 473, 493-97 (E.D. Pa.1999). This case is also referred to in subsequent decisions as *Reno II*.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000).

⁶⁴ *Id.*

⁶⁵ *Id.* at 175.

⁶⁶ *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

⁶⁷ *Id.* at 566 A detailed paragraph was required to identify the split of views of the members of the court, thusly: THOMAS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, in which REHNQUIST, C.J. and O'CONNOR, SCALIA and BREYER, JJ., joined, an opinion with respect to Part III-B, in which REHNQUIST, C.J. and O'CONNOR and SCALIA, JJ., joined, and an opinion with respect to Parts III-A, III-C, and III-D, in which REHNQUIST, C.J., and SCALIA, J., joined. O'CONNOR, J., and BREYER, J., filed opinions concurring in part and concurring in the judgment. KENNEDY, J., filed an opinion concurring in the judgment, in which SOUTER and GINSBURG, JJ., joined. STEVENS, J., filed a dissenting opinion. *Id.* at 565.

majority of the Court was able to agree on was that COPA's use of this standard to determine if material is harmful to minors does not, on its face, violate the First Amendment.⁶⁸ Since the Court's discussion on this issue will reappear in a slightly different context in the CIPA case that is the focus of this article, it warrants careful examination.

Justice Thomas began the analysis by acknowledging the Court of Appeals' concern that the community standards test may not apply to the Internet because Web publishers have no technological ability to limit the geographic territories in which their content may be viewed. He carefully parsed the language of the *Miller* case, noting that the Court's standard allowed communities to define "community" by use of a precise geographic area, such as the State of California, or a less precise phrasing, such as "contemporary community standards."⁶⁹ In the latter case, he acknowledged that the standard the jurors would apply "will inevitably draw upon personal 'knowledge of the community or vicinage from which he comes.'"⁷⁰ The government acknowledged in their brief that even if jurors in a COPA case were instructed to apply the standard of the adult population as a whole, "the variance in community standards across the country could still cause juries in different locations to reach inconsistent conclusions as to whether a particular work is 'harmful to minors.'"⁷¹

Acknowledging that this kind of inconsistency is troubling, Justice Thomas noted that COPA attempts to make up for the potential uncertainty by adding the "serious literary, artistic, political or scientific value for minors" standard and that the material, to be subject to the Act, must be designed to appeal to the prurient interest of minors.⁷² He noted that the Court had held that where these added standards are present, "we have held that requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment."⁷³

Justice Thomas noted that Justice Kennedy and Justice Stevens questioned the applicability of those "community standards" prior decisions to the Internet, but disregarded this concern by suggesting that if this poses a problem for a publisher, the solution is to abandon the Internet and choose a medium with geographic controls:

The publisher's burden does not change simply because it decides to distribute its material to every community in the Nation.... If a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple

⁶⁸ *ACLU*, 535 U.S. at 566.

⁶⁹ *Id.* at 576 (citing *Jenkins v. Georgia*, 418 U.S. 453 (1974)).

⁷⁰ *Id.* at 577 (citing *Hamling v. U.S.*, 418 U.S. 87, 105 (1974)).

⁷¹ *Id.* (citing Brief for Petitioner at 39).

⁷² *Id.* at 578-579.

⁷³ *Id.* at 578-580. Justice Thomas relies here on the previously cited case of *Hamling*, 418 U.S. at 453, and on *Sable*, 492 U.S. at 115. It should be noted however, that neither of these cases dealt with online communications, *Hamling* dealing with transmittal of obscene material through the mail, and *Sable* with so-called "dial-a-porn" telephone systems. As other members of the Court note, these cases may not be dispositive in the Internet context, since the purveyors of the material at issue in those cases had the ability to limit distribution to different geographic sectors, an ability Web operators lack.

step of utilizing a medium that enables it to target the release of its material into those communities.⁷⁴

Based on this analysis, Justice Thomas summed up the Court's decision by noting that the decision only addressed the error of the Court of Appeals' finding that COPA's reliance on community standards does not by itself render the statute unconstitutional. The Court expressed no opinion on the merit of the District Court's finding that the Act suffered from constitutional overbreadth and would not survive strict scrutiny. The Court remanded the case to the District Court for further proceedings.⁷⁵

In her partially concurring opinion, Justice O'Connor urged the Court to set aside the concerns previously voiced in *Roth*, *Jacobellis*, and *Miller*, regarding the impossibility of adopting a national standard, and suggested that such a standard should now be adopted for the regulation of obscenity on the Internet.⁷⁶ It appears that she came to this conclusion because she recognized that since Web publishers can't control the geographic locations in which their content can be viewed, they are likely to engage in suppression of otherwise allowable speech. Her solution, though, to adopt a national standard, did not offer any real assistance since the same or an even greater degree of variance, despite her claim to the contrary, is likely to be the result. Her efforts to convince her colleagues of this view rang hollow, and it feels as if she is also trying to convince herself as well:

If the *Miller* Court believed generalizations about the standards of the people of California were possible, and that jurors would be capable of assessing them, it is difficult to believe that similar generalizations are not also possible for the Nation as a whole. Moreover, the existence of the Internet, and its facilitation of national dialogue, has itself made jurors more aware of the views of adults in other parts of the United States. Although jurors asked to evaluate the obscenity of speech based on a national standard will inevitably base their assessments to some extent on their experience of their local communities, I agree with Justice B[reyer] that the lesser degree of variation that would result is inherent in the jury system and does not necessarily pose a First Amendment problem.⁷⁷

The unanswered question that follows from Justice O'Connor's analysis is that if jurors are going to apply their experience in their local communities, then how is the standard, as applied, a "national" one? The further question of what criteria are applied to determine what the "national standard" is in a given case is also not answered. A third question that arises is that if a publisher distributes material in hard copy as well as online, will the same material be subject to two different standards, a local community standard for the hard copy, and a national standard for the online material? This issue is not addressed.

⁷⁴ *ACLU*, 535 U.S. at 583. Justice Thomas claims that, contrary to the views expressed by Justice Kennedy and Justice Stevens, COPA does not foreclose an entire medium of expression, it only requires that material potentially harmful to minors be placed behind adult identification screens. *Id.* at 584 n.14. Easier said than done, since such screens are trivially circumscribable.

⁷⁵ *ACLU*, 535 U.S. at 585-586.

⁷⁶ *Id.* at 586.

⁷⁷ *Id.* at 589.

Issues not addressed by either the District Court or the Court of Appeals are the motivating force behind the separate concurrence of Justice Kennedy, whose viewpoint was shared by Justice Souter and Justice Ginsburg. Justice Kennedy began by noting that the District Court may have been right in determining that COPA is overbroad, and as a content-based regulation it was presumptively invalid and an abridgement of free speech.⁷⁸

Justice Kennedy disagreed with Justice Thomas' suggestion that publishers should simply find another medium, noting that "laws that foreclose an entire medium of expression" pose a danger to free speech. Zeroing in on the "community standards" debate, he rejected Justice O'Connor's national standard proposal, noting: "The national variation in community standards constitutes a particular burden on Internet speech".⁷⁹ He also sounded a note of concern that the use of a national standard would allow forum shopping in Internet cases, since there is some uncertainty whether a Web site moves "through" a number of different communities.⁸⁰ As he pointed out, this could give the government the opportunity to choose the forum for bringing an action, and for that reason, the Court of Appeals was right to consider the community standards issue:

The more venues the [g]overnment has to choose from, the more speech will be chilled by variation across communities....The Court of Appeals was correct to focus on the national variation in community standards, which can constitute a substantial burden on Internet communication; and its ultimate conclusion may prove correct.⁸¹

Justice Stevens, in his dissent, was more direct. Citing the result in the first *ACLU v. Reno* case regarding the CDA, he reminded the Court that it previously held that community standards, as applied to the Internet, created an overbreadth problem.⁸² In a pointed footnote, he also reminded the Court that although it had not held that applying a national standard to obscenity cases was constitutionally impermissible, "we have said that asking a jury to do so is 'an exercise in futility.'"⁸³

On remand to the Court of Appeals, focusing this time on the same overbreadth of the Act that motivated the District Court to issue injunctive relief, the Court reaffirmed its prior determination that COPA violated the First Amendment.⁸⁴ The Court of Appeals considered whether other less restrictive means of shielding minors from harmful material existed.⁸⁵ One alternative method it considered was the use of blocking and filtering software programs.⁸⁶ The Court noted that the District Court had also considered this option, and had concluded that

⁷⁸ *ACLU*, 535 U.S. at 591.

⁷⁹ *Id.* at 596-597.

⁸⁰ *Id.* at 602.

⁸¹ *Id.* Ultimately, Justice Kennedy concluded the Court of Appeals erred in finding that COPA could be enjoined simply because it included the community based standard. *Id.* at 598. While agreeing that this might prove to be a valid basis for concern, he came down in favor of simply remanding the case for further analysis of the Act, with the instruction that the lower court should consider the community standard issue as part of its overbreadth and vagueness analysis. *Id.*

⁸² *Id.* at 606.

⁸³ *Id.* at 607 n.3.

⁸⁴ *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003).

⁸⁵ *Id.*

⁸⁶ *Id.*

although filtering and blocking software was imperfect, it would be at least as successful as COPA in restricting minors' access to harmful material. It would also impose less of a burden on constitutionally protected speech than the Act imposed on adult users.⁸⁷

In response, the government argued that filtering software was not a viable means of preventing access by children to harmful material, and that COPA was a much more effective tool. The Court describes the three problems the government ascribed to filtering software:

The [g]overnment offers the following three reasons for this conclusion: (1) filtering software is voluntary – it transfers the burden of protecting children from the source of the harmful material, i.e. the Web publishers, to the potential victims and their parents; (2) filtering software is often both over- and underinclusive of targeted material; and (3) it is more effective to screen material “prior to it being sent or posted to minors” on the Internet.⁸⁸

The Court of Appeals, while acknowledging that these arguments had some merit, concurred with the District Court's view that blocking and filtering techniques, despite their weaknesses, were at least less restrictive than COPA in achieving the Act's goal of preventing minors' access to harmful material.⁸⁹ On the way to reaching this conclusion, the Court had to reconcile this view of filtering software with the decision of a three-judge Pennsylvania District Court in *American Library Ass'n. v. U.S.*⁹⁰ In that decision, which is discussed in detail in Section III of this Article, the panel struck down the Children's Internet Protection Act's (CIPA) requirement that all public libraries receiving government funding for computers and Internet access must install filtering and blocking software on all computers in the library. The three-judge panel found that this requirement violated the First Amendment rights of library patrons.⁹¹

The Court of Appeals in *ACLU v. Ashcroft* distinguished the decision in *American Library Ass'n v. U.S.* by noting that unlike CIPA, it was not proposing the mandatory use of the software, and that voluntary use was therefore not as burdensome on free speech, particularly when compared with COPA's broadly sweeping provisions.⁹² The Court also noted that CIPA's method for allowing adults to gain access to blocked sites, the “disabling provision”, which required adults to identify themselves to librarians in order to disable a filter and therefore gain unlimited access to online material, created a “chilling effect” on their free speech, and that the remedy they were proposing as an alternative to COPA, did not contain this provision.⁹³

And so, this second Congressional effort to prevent minors from accessing Internet-based material harmful to them was rejected by the judiciary.⁹⁴ Congress, however, is not so easily

⁸⁷ *ACLU*, 322 F.3d at 261-262 (citing *Reno II*, 31 F. Supp. 2d at 497).

⁸⁸ *Id.* at 262 (citing the Government's Brief on Remand at 47).

⁸⁹ *Id.* at 265.

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

⁹¹ *Id.* at 406, 411.

⁹² *ACLU v. Ashcroft*, 322 F.3d at 264-65.

⁹³ *ACLU*, *supra* note 66, at 264-265. The Court also noted that despite the problems inherent in filtering technology, they present a reasonable choice for parents and teachers whose high priority was on preventing exposure of harmful material to minors. *Id.* at 265.

⁹⁴ *ACLU*, 322 F.3d at 243, 271.

deterred, and before the final ruling in the *ACLU v. Ashcroft* was issued, Congress had once again passed legislation aimed at limiting minors' access.⁹⁵ This time, Congress reined in their sights, and focused on an area that their budget power reached – access to the Internet on government-funded computers in public libraries.

b. The Third Strike: Congress Adopts CIPA

This new statute was known as the Children's Internet Protection Act, or CIPA.⁹⁶ The August 1999 Senate Report detailing the terms of the bill creating CIPA explained that the purpose of the bill was “[t]o protect America's children from exposure to obscene material, child pornography, or other material deemed inappropriate for minors while accessing the Internet from a school or library receiving Federal Universal Service assistance for provisions of Internet access, Internet service, or internal connection.”⁹⁷

The “Federal Universal Service” referred to in the bill is a subsidy that was added by Section 254 of the Telecommunications Act of 1996. It is commonly referred to as the Schools and Libraries Discount, or E-rate, and is a 2.25 billion dollar subsidy to assist schools and libraries with the costs associated with connecting those institutions to the Internet.⁹⁸ In addition to the E-rate program, libraries also receive subsidies for Internet access via the Library Services and Technology Act (“LSTA”).⁹⁹

Concerned that federal dollars may be providing a means for children to access the many dangerous websites on the Internet, which the Senate Report described as including child pornography, pedophilia sites, and sites which promote hate, illicit drug use and bomb-making information, CIPA was intended to prevent access to this kind of material in public schools and libraries, by requiring that all computers in those institutions, as a condition of obtaining E-rate and LSTA subsidies, must install filtering and blocking software packages.¹⁰⁰

As valid as the concern of sheltering minors from this material may be, there are troubling economic and social manipulation issues posed by this legislation. Recent surveys reflect that more than 60% of the households in American contain Internet connections. Many schools and universities now require students to have Internet access to take advantage of web-enhanced courses or to conduct research. For the vast majority of the middle and upper class of

⁹⁵ CIPA's provisions are found in two federal statutes; 47 U.S.C. § 254(l) (2005); 20 U.S.C. § 9134 (2005).

⁹⁶ 47 U.S.C. § 254(l) (2005); 20 U.S.C. § 9134 (2005).

⁹⁷ S. REP. NO. 106-141, at 1 (1999). The Senate Report, citing the March 4, 1999 testimony of Mary Anne Layden Ph.D., Director of Education for the Center of Cognitive Therapy, at the University of Pennsylvania, before the Committee on Commerce, Science and Transportation, quoted her view that “The Internet presents a unique threat to normal sexual development in children by playing upon common elements that contribute generally to antisocial behavior in children. ‘Research indicates that there are three factors that produce the best environment to stimulate antisocial behavior in children; it is the combination of anonymity, role models of behavior and arousal. Internet Web sites possess exactly these three factors.’” *Id.* at 3, n.7. The Senate Report does not discuss or address other environments that include these factors – the author suggests that movies, cable television, explicit musical lyrics, drive-in theaters, and high school classrooms and social activities would also meet this description.

⁹⁸ *Id.* at 2. The Senate Report notes that there are approximately 86,000 public schools and 9,000 public libraries in the United States, all of which are eligible to participate in the E-rate program. *Id.*, at 2, 10-1.

⁹⁹ 20 U.S.C. § 9101 *et. seq.* (2005).

¹⁰⁰ S. REP. NO. 106-141, at 3-6 (1999).

the United States, computer and Internet savvy is a given aspect of their lives, and it is rapidly becoming a necessary tool in business and society in general.

However, the Information Superhighway often is just an off-ramp to a dead end for the less fortunate citizens in the United States. For those children of families of modest means, the cost of a personal computer and Internet access is beyond those means. For those children, access to a computer and the Internet may only be found in their schools or public libraries. Yet the effect of legislation like CIPA restricts what those students will see to only those sites deemed by the producers of the filtering and blocking technology as “appropriate” for them. The Act does not attempt, nor does any other legislation, to shield children who have private computers from accessing these allegedly harmful sites. In essence then, a side effect of CIPA is to create a two-tier system of access to Web sites for citizens in the United States – filtered and blocked Internet access for the poor, and full access for the rich.¹⁰¹

Anticipating the First Amendment arguments that would follow the imposition of mandatory filtering in America’s public libraries and schools, the Senate Report noted the compelling government interest in protecting children from harmful influences, and set the stage for a significant argument in the ensuing litigation: whether public schools or libraries are public forums, since if they are, any content-based restriction affecting them would be subject to strict scrutiny First Amendment analysis; and if they are not, intermediate scrutiny will be the relevant standard.¹⁰²

The Senate Report also focused on the right of Congress, in a spending bill, to require, as a condition for receipt of a Federal subsidy, measures to restrict children’s access to harmful material. The Report cited Supreme Court decisions in *Rust v. Sullivan*¹⁰³ and *National Endowment for the Arts v. Finley*¹⁰⁴ as precedent to support conditioning receipt of Federal assistance on compliance with the filtering and blocking software requirement. Congress indicated its belief that it had successfully addressed the Supreme Court’s First Amendment

¹⁰¹ There is an interesting historical parallel here. The first laws restricting obscenity came into existence concurrent with the development of the printing press, which in turn allowed for dissemination of books to the middle and lower classes. Pornographic books had long been in circulation to the wealthy, who were the only ones who could afford them or who had received reading instruction, with no restriction on the content of those books.

¹⁰² S. REP. NO. 106-141, at 7-9. The Senate Report cites *Hazelwood School District v. Kuhlmeier*, 482 U.S. 260 (1988), in support of the view that schools are non-public forums that are outside the general marketplace of expression. For libraries, the Report appears to be on shakier ground, with the only authority cited being *Brown v. Louisiana*, 383 U.S. 131 (1966), wherein the Court held that libraries are “a place dedicated to quiet, to knowledge, and to beauty.” *Id.* at 142. The authors of the Report assert that libraries are not public forums because they require patrons to maintain quiet, and note that “[P]atrons are not permitted to give speeches, make public statements, sing, speak loudly. Further, patrons at a library do not have the right to make editorial decisions regarding the availability of certain material”. S. REP. NO. 106-141, at 7. No authority is offered in support of these claims regarding the nature of libraries, and it would appear that this is a broad generalization of questionable accuracy. For example, while it may be true that the reading rooms of most libraries are places of quiet, many libraries also feature community-meeting rooms where members of the public engage in all of the activities associated with public forums and for First Amendment activities. The lack of evidentiary support regarding these claims becomes significant as we will see, *infra*, that these same claims are adopted without investigation, by the majority of the Supreme Court in the subsequent litigation over the constitutionality of CIPA.

¹⁰³ S. REP. NO. 106-141, at 8 (citing 500 U.S. 173 (1991)).

¹⁰⁴ *Id.* (citing 524 U.S. 569 (1998)).

concerns by noting: “In sum, the Committee is confident that the approach of S. 97 to schools would survive any constitutional challenge brought in Federal court”.¹⁰⁵

The net effect of CIPA was to require all public schools and libraries receiving E-rate subsidies, to install and operate filtering or blocking technology on computers when in use by children. The Act does not allow libraries to designate specific computers for use by children. Instead it requires that all computers be filtered and blocked.¹⁰⁶ What about adult users? CIPA provides that “[a]n administrator, supervisor, or other authority may disable a technology protection measure under paragraph (1) to enable access for bona fide research or other lawful purposes.”¹⁰⁷

This “disabling” provision is troubling in the extreme – it poses far more problems than it purports to solve. The provision is silent as to what standard the “administrator, supervisor or other authority” is to use in determining whether a patron’s request to disable the filter is for “bona fide research or other lawful purpose”, an omission which gives the person with control over the computer discretion to determine the rights of adult patrons to access online content.¹⁰⁸ Additional privacy issues are posed by this provision – in a large city, the relative anonymity of library patrons provides some shield on this issue – but the small town library does not. Instead, we are left with the image of a well known citizen of the small town having to ask the librarian to disable the filter in order to allow the patron to access sites dealing with breast cancer, or penile dysfunction, both sites likely to trigger sensitive filtering software.

CIPA’s disabling provision is also silent regarding technological and logistical challenges posed by its terms. It requires librarians to train personnel on how to disable the filters, and poses such questions as whether the disabling is limited to a specific site, or will result in disabling the entire filter. If the former, it will be unpopular and burdensome on both patrons and staff if research in a filtered area requires multiple requests for disabling the filter. If the latter, disabling the filter in general for a patron invites the same problems of access of inappropriate material that CIPA is intended to prevent. Moreover, once the filter is disabled, the patron and staff must remember which computers have disabled filters, and to renew the filter before the next patron uses the computer. For a major metropolitan library, which may have a substantial number of computers available for the public, this provision poses a logistical nightmare.

CIPA also came equipped with enforcement provisions. Libraries that fail to certify the presence of filtering and blocking software on all of their computers are required to reimburse the telecommunications carrier that provided their Internet access with the amount of the discounted rates they received under the E-rate system.¹⁰⁹

¹⁰⁵ S. REP. NO. 106-141, at 8.

¹⁰⁶ 20 U.S.C. § 9134(f) (2005).

¹⁰⁷ *Id.* § 9134(f)(3) (2005).

¹⁰⁸ *Id.*

¹⁰⁹ S. REP. NO. 106-141, at 19.

Like the previous attempts at limiting online access to prevent children from receiving harmful material, CIPA garnered an immediate legal challenge. The first stage of that challenge was in the District Court, and is the focus of the next section.

III. The District Court Decision: A Sunny Day

The challenge to CIPA was filed by an assortment of plaintiffs, including the American Library Association as lead plaintiff.¹¹⁰ Following an expedited but extensive discovery schedule, the District Court conducted an eight-day trial, in which the parties presented testimony from 20 witnesses, and provided the court with numerous deposition transcripts, stipulations and documents. The principal focus of the trial was on the viability and capacity of the filtering and blocking software programs available at the time – which goes to the heart of the CIPA requirements.¹¹¹

The Court produced an extraordinary opinion at the conclusion of the trial, comprising 71 pages, of which it devoted 30 pages to summarizing the extensive findings of fact derived from the expert testimony and related documents presented on the filtering technology issue.¹¹² The balance of the opinion dealt with the appropriate level of scrutiny CIPA was subject to, either strict scrutiny or the “rational basis” standard; and the related issue of whether public libraries are public forums in a traditional or new sense; and whether the filtering and blocking software required by CIPA was narrowly tailored to meet the government’s objectives, or whether less restrictive alternatives existed, mandating a determination that the statute was overbroad.¹¹³

The Opinion began with the Court’s Preliminary Statement, in which it summarized the grounds advanced by the plaintiffs in support of a desired finding that CIPA is facially unconstitutional. Plaintiffs alleged that CIPA required libraries to give up their patrons’ First Amendment rights as a condition of receiving federal funds, an impermissible requirement under the doctrine of unconstitutional conditions.¹¹⁴ The gravamen of this argument was that, given the limits of filtering and blocking software, CIPA’s insistence on this technology being installed on all library computers resulted in content-based restrictions of patrons’ access to what is otherwise constitutionally protected speech. The Court noted that plaintiffs contended that content-based restrictions such as are found in CIPA are subject to review under a strict scrutiny standard because libraries are public forums, and such restrictions are only allowable if they are narrowly

¹¹⁰ *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002). The plaintiffs comprise representatives of public library associations, including the California Library Association, the New York Library Association and the Wisconsin Library Association, as well as individual city and county libraries in Norfolk, Virginia; Santa Cruz, California; and the Multnomah County Public Library in Oregon. Individual plaintiffs included Emmalyn Rood, a sixteen-year-old user of the Multnomah County Public Library who had difficulties researching information regarding her sexual identity, finding that library blocking software prevented her from accessing sites regarding gay and lesbian issues, and Mark Brown, who in accessing the Internet at the Philadelphia Free Library did online research regarding breast cancer and reconstructive surgery for his mother who had breast surgery. Web publisher plaintiffs included Afraid to Ask, Inc., which maintains a free health education website, and Planned Parenthood Federation of America, Inc., which also maintains several free websites that provide a range of information about reproductive health.

¹¹¹ *Id.* at 407-08.

¹¹² *Id.* at 401-472.

¹¹³ *Id.* at 408-11.

¹¹⁴ *Id.* at 407 (citing *South Dakota v. Dole*, 483 U.S. 203 (1987)).

tailored to further a compelling state interest and no less restrictive alternatives would further that interest.¹¹⁵ Plaintiffs' further grounds included the argument that CIPA

imposes an unconstitutional condition on public libraries by requiring them to relinquish their own First Amendment rights to provide unfiltered Internet access as a condition of their receipt of federal funds...that CIPA is facially invalid because it effects an impermissible prior restraint on speech by granting filtering companies and library staff unfettered discretion to suppress speech before it has been received by library patrons and before it has been subject to a judicial determination that it is unprotected under the First Amendment. Finally, plaintiffs submit that CIPA is unconstitutionally vague.¹¹⁶

After summarizing the statutory framework of CIPA and the nature of the various plaintiffs in the case,¹¹⁷ the Court provided a detailed summary of the workings of the Internet, the size and scope of websites found online, and the amount of sexually explicit material on the Web.¹¹⁸ Although the Court noted that recent estimates put the number of sexually explicit online content at only 1-2% of the total content on the Web, given the size of the Web this translates to more than 100,000 sites offering free sexually explicit material, and many more fee or subscriber based sites with this type of content.¹¹⁹

The Court's next focus was on the delivery of Internet access by U.S. public libraries to citizens. The Court found that approximately 95 of all public libraries provided public access to the Internet.¹²⁰ This access is hugely popular, and greatly expands the amount of information available to library patrons. In many ways, it provides a tremendous benefit, particularly to public libraries in smaller cities or economically depressed areas, since it allows a library to provide a vast amount of material without significantly increasing the acquisition budget of the library. The Court noted that over a fifth of the Internet users with low (under \$15,000) household family incomes use their public library for Internet access.¹²¹

The Court's findings also provided a detailed analysis of the diverse range of approaches libraries have taken in creating "acceptable use" policies governing patrons' use of the

¹¹⁵ *Am. Library Ass'n*, 201 F. Supp. 2d at 407. (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 837 (1995); *Reno v. ACLU*, 521 U.S. 844, 874 (1997)).

¹¹⁶ *Id.* n.1 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *City of Chicago v. Morales*, 527 U.S. 41 (1999)).

¹¹⁷ *Id.* at 411-17.

¹¹⁸ *Id.* at 417-19. The Court notes that as of September 2001, over 400 million people, 143 million in the U.S.A., were using the Internet worldwide. *Id.* at 416. Much of the content on the Web is not publicly available, and therefore is not indexable, making it difficult to determine the true size of the Web. *Id.* at 419. The Court cites a 2000 study that estimated a total of 7.1 million unique Web sites, which by September 2001 would likely number 11 million sites. *Id.* Extrapolating further, this would suggest that by the date of this writing, in July 2005, the number would have grown to approximately 25 million sites. The Court also cites estimates that the Web is growing at a rate of approximately 1.5 million Web pages per day, and that at least 2 billion Web pages are theoretically reachable by standard search engines. *Id.*

¹¹⁹ *Id.* at 419. The Court notes that an additional problem with these sites is that some of them can be accessed accidentally, or contain innocuous names that can cause a Web surfer to unintentionally encounter sexually explicit material, a problem exacerbated by mouse-trap style pop-ups that make it difficult to exit a page that is accessed. *Id.*

¹²⁰ *Id.* at 422 (citing John C. Bertot & Charles R. McClure, *Public Libraries and the Internet 2000: Summary Findings and Data Tables*, Report to the National Commission on Libraries and Information Science, at 3).

¹²¹ *Id.*

Internet.¹²² Some libraries limit such policies to sexually explicit materials, whereas others apply their policy to a broader range of materials, including those found “harmful to minors,” “offensive to the public,” “racially offensive,” or those found to simply be “inappropriate.”¹²³

Enforcement of these policies has led libraries to develop a variety of approaches, broadly organized into four categories: (1) channeling patrons’ Internet use; (2) shielding other patrons from seeing what a Web surfer is viewing; (3) locating computer screens in a manner to allow librarians to see what a surfer is viewing, allowing the librarian to employ “tap on the shoulder” enforcement as to inappropriate material; (4) employing filtering or blocking software.¹²⁴

The development of this range of alternative approaches supports the view that regulating online content viewing in public libraries is a problem perhaps best addressed through a “local community standard,” since each library is uniquely equipped to understand the needs and sensitivities of the community they serve. Given the diverse nature of communities nationwide, great caution should be observed before attempting to adopt a national approach to this issue – a caution acknowledged by the District Court in this case.¹²⁵

The Court noted that a significant issue presented by blocked or filtered Internet access was the privacy and embarrassment factors that are presented when patrons must ask a librarian to unblock a site or page. These findings are summarized as follows:

It is apparent that many patrons are reluctant or unwilling to ask librarians to unblock Web pages or sites that contain only materials that might be deemed personal or embarrassing, even if they are not sexually explicit or pornographic. We credit the testimony of Emmalyn Rood, discussed above, that she would have been unwilling as a young teen to ask a librarian to disable filtering software so that she could view materials concerning gay and lesbian issues.¹²⁶

The Court next reviewed the state of Internet filtering technology. The opinion devoted twenty-three pages to an exhaustive analysis of the viability and problems with the application of this technology to use in public libraries providing Internet access.¹²⁷

¹²² *Am. Library Ass’n*, 201 F. Supp. 2d at 422.

¹²³ *Id.* In some cases, the Court notes, libraries have imposed use policies precluding patrons from using library Internet terminals for receiving personal email, or playing games, or participating in chat rooms. *Id.*

¹²⁴ *Id.* at 424-27. The Court notes that all of these techniques have their supporters and detractors. Privacy screens make it difficult for more than one person to see what is on the screen, which makes assisting patrons in need of help challenging; the “tap on the shoulder” practice is distasteful to many librarians, who do not want to risk a possible confrontation with a patron; and filtering and blocking software is often over- or under-inclusive. It is this concern that likely explains the very limited use (only about 7% of libraries) of filtering software in public libraries before CIPA. *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 427. The Court cites further findings indicating that very few unblocking requests are received by counties that use blocking and filtering technology – not because of a lack of desire for access – but because patrons are reluctant to ask that sites be unblocked. *Id.*

¹²⁷ *Id.* at 427-50.

The analysis began by explaining that the major purveyors of this software create control lists of hundreds of thousands of Universal Resource Locator (URL) sites, divided into numerous text-based categories, which then are submitted to the filtering and blocking program, and sites whose URL's have been identified as containing the text listed within these categories, are blocked from a patron's view. The evidence submitted to the Court focused on the three major products on the market which were currently in use in public libraries - SurfControl's Cyber Patrol, N2H2's Bess/12100, and Secure Computing's SmartFilter – each of which have control lists containing between 200,000 and 600,000 URLs.¹²⁸

Of considerable significance are the technological limitations of these products. The court noted that none of the category definitions used in these products were identical to CIPA's definitions of visual depictions that are obscene, child pornography, or harmful to minors.¹²⁹ Further, none of these category definitions made any attempt to incorporate local community standards, a very troubling omission given the significance the Supreme Court had attached to this standard in the determination of legal obscenity.¹³⁰

A second significant technological weakness in these products is their inability to identify and block or filter sites based on visual images. These products only search and identify offending URLs based on text. So, if a Web site contains graphic visual depictions of a sexually explicit nature, but no text is included on the pages, it will sail right past the filter unless the site is also reviewed by a human employee of the software company. The Court noted that this was not a problem likely to be solved in the near term: "Image recognition technology is immature, ineffective, and unlikely to improve substantially in the near future."¹³¹

A third technological limitation is the practice of categorizing Web sites based on what is known as the "root URL" of the entire site. The example cited by the Court was the practice of blocking all of the content on the Playboy Web site because the Root URL was categorized as Adult, Sexually Explicit, or Pornography, despite the fact that many pages on the site may contain content that is not sexual in nature, such as the celebrity interviews, or articles relating to historical or political events.¹³²

Two human factors also are found by the Court to add to the problems of using filtering and software technology: the proprietary nature of the lists of blocked URLs, and the inability to re-review blocked sites and pages due to the sheer number of new pages (1.5 million per day) that are added to the Web.¹³³ The Court noted that since the manufacturers of these software products considered the actual lists of URLs blocked under their categorization regimes to be

¹²⁸ *Am. Library Ass'n*, 201 F. Supp. 2d at 427-28. The Findings noted that these companies use 30-40 broad categories of URLs to be blocked. Examples include Adult/Sexually Explicit; Glamour & Intimate Apparel; Nudity; Sex; Pornography, etc.

¹²⁹ *Id.* at 429.

¹³⁰ *Id.* at 429. The Court notes further that no judicial determination is involved before these products categorize a Web site. Additionally, the Court notes that none of the filtering companies trains its reviewers in the legal definitions of obscenity, or makes any effort to incorporate any determination of local community standards into its categorization or review processes. *Id.* at 433.

¹³¹ *Id.* at 431.

¹³² *Id.* at 433-434. Apparently the application of the Root URL method renders the time-worn rationalization of Playboy subscribers, "I only read it for the articles," ineffective.

¹³³ *Id.* at 408, 430.

proprietary in nature, it was more difficult to determine if those sites contained protected speech.¹³⁴

The second factor, the lack of a re-reviewing practice, is even more troublesome. Many Web sites are dynamic, meaning that the content on their pages is changed frequently.¹³⁵ If an entire site or even discrete pages are blocked once, they stay blocked in that software program unless specifically reviewed and the blocking is released.¹³⁶ Additionally, URLs are often abandoned and reassigned to new owners, who may substitute content, with the result that a blocked site that formerly contained objectionable content may no longer present that content.¹³⁷ However, it will remain blocked by one or more of the filtering software companies' product simply because no one knew it was blocked initially, and no re-review takes place.¹³⁸

Based on their exhaustive analysis, only a portion of which is summarized herein, the Court concluded that under CIPA, not only is the dirty bathwater of pornographic material thrown out by the filtering software, but the baby is too – in the form of significant amounts of protected free speech:

Nonetheless, out of the entire universe of speech on the Internet falling within the filtering products' category definitions, the filters will incorrectly fail to block a substantial amount of speech. Thus, software filters have not completely eliminated the problems that public libraries sought to address by using the filters, as evidenced by frequent instances of underblocking.

....

Even more importantly...we find that commercially available filtering programs erroneously block a huge amount of speech that is protected by the First Amendment. Any currently available filtering that is reasonably effective in preventing users from accessing content within the filter's category definitions will necessarily block countless thousands of Web pages, the content of which does not match the filtering company's category definitions, much less the legal definitions of obscenity, child pornography, or harmful to minors.

....

...Many erroneously blocked pages contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as "pornography" or "sex."

....

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 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.¹³⁹

¹³⁴ *Am. Library Ass'n*, 201 F. Supp. 2d at 429-430.

¹³⁵ *Id.* at 408

¹³⁶ *Id.* at 435.

¹³⁷ *Id.* at 435-436.

¹³⁸ *Id.* at 435-436.

¹³⁹ *Id.* at 448-449.

The Court next turned to the merits of the plaintiffs claim that CIPA was facially invalid and violated the First Amendment rights of the libraries and their patrons.¹⁴⁰ The strength or weakness of that claim depended in significant part on the outcome of the analysis of constitutional limitations on Congress' exercise of the spending power.¹⁴¹ Based on the fourth prong of the standard set forth in *Dole*,¹⁴² plaintiffs argued that the "First Amendment 'provides an independent bar to the conditional grant of federal funds' created by CIPA."¹⁴³ In considering this argument, the District Court noted that the general rule that a "court may sustain a facial challenge to a statute only if the plaintiff demonstrates that the statute admits of no constitutional application"¹⁴⁴ was subject to an exception in cases dealing with First Amendment overbreadth.¹⁴⁵ In the case where a statute burdens a "substantial amount of protected" speech, facial invalidation was permissible, "even if the statute may be constitutionally applied in particular circumstances."¹⁴⁶

The District Court also acknowledged that the parameters of this First Amendment exception to the facial challenge standard presented somewhat of a moving target for lower courts in view of disparate Supreme Court opinions in *Rust v. Sullivan*¹⁴⁷ and *NEA v. Finley*.¹⁴⁸ These cases first present a tougher standard, and then a more liberal standard for the application of the exception.¹⁴⁹

Given the somewhat ambiguous jurisprudence regarding this exception, the District Court adopted the more restrictive standard - for CIPA to fail, the libraries must show that compliance with the statute would necessarily violate the First Amendment.¹⁵⁰ Despite the adoption of this tougher standard, the District Court noted that compliance with CIPA does in fact violate the First Amendment "[b]ecause of the inherent limitations in filtering technology, public libraries can never comply with CIPA without blocking access to a substantial amount of speech that is

¹⁴⁰ *Am. Library Ass'n*, 201 F. Supp. 2d at 450.

¹⁴¹ *Id.* at 450. The Supreme Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987) provides the standard for analysis of spending power issues. "In *Dole*, the Court upheld the constitutionality of a federal statute requiring the withholding of federal highway funds from any state with a drinking age below 21." *Id.* (citing *Dole*, 483 U.S. at 211-12). The Court set forth four general constitutional limits on Congress' use of the spending power: 1) "the exercise must be in pursuit of 'the general welfare.'" *Id.* at 207; 2) "any conditions that Congress sets on states' receipt of federal funds must be sufficiently clear to enable recipients 'to exercise their choice knowingly, cognizant of the consequences of their participation.'" *Id.*; 3) "the conditions on the receipt of federal funds must bear some relation to the purpose of the funding program." *Id.*; and 4) "other constitutional provisions may provide an independent bar to the conditional grant of federal funds." *Id.* The Court in *Dole* explained this last limitation as precluding the use of the spending power "to induce the States to engage in activities that would themselves be unconstitutional". *Id.* at 210.

¹⁴² *South Dakota v. Dole*, 483 U.S. 203 (1987).

¹⁴³ *American Library Ass'n, Inc.*, 201 F. Supp.2d at 448-449.

¹⁴⁴ *Id.* at 451, (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Bowen v. Kendrick*, 487 U.S. 589, 612 (1988)).

¹⁴⁵ *Id.* at 451-452.

¹⁴⁶ *Id.* at 452, (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

¹⁴⁷ 500 U.S. 173 (1991).

¹⁴⁸ 524 U.S. 569 (1998).

¹⁴⁹ See *supra* notes 118-119.

¹⁵⁰ *American Library Ass'n.*, 201 F. Supp. 2d at 453.

both constitutionally protected and fails to meet even the filtering companies' own blocking criteria."¹⁵¹

This conclusion led the District Court to next consider the government's argument that the appropriate level of scrutiny of CIPA's limitations on protected speech was rational basis review, and the plaintiffs' argument that as a content-based limitation, CIPA was subject to strict scrutiny. The outcome of this argument determined whether the government would be required to show that CIPA was narrowly tailored to promote a compelling government interest and that no less restrictive alternatives would further that interest, or whether CIPA need only be reasonable, that the government's interest that the restriction serves need not be compelling, the statute need not be narrowly tailored, and that it need not be the most reasonable or the only reasonable limitation.¹⁵²

The answer to this question required the District Court to next consider where libraries fit under public forum doctrine, since the government's power to limit speech on its own property is dependent on the nature of the forum the government has created.¹⁵³ If the restriction is applied to an area less amenable to free expression, such as a military base or a jail, First Amendment considerations are less stringently applied¹⁵⁴ Conversely, if the government property is a public street, sidewalk or park, restrictions on protected speech are subject to strict scrutiny.¹⁵⁵

Applying these principals to the public libraries provision of Internet access to patrons, the District Court noted further that the relevant forum is "not defined by the physical limits of the government property at issue, but rather by the specific access that the plaintiff seeks" – which in this case means that the Court is not to examine the entire library, but only the Internet access provided by the library, in determining what kind of fora is involved.¹⁵⁶

The first stage of this inquiry required a discussion of what is the purpose of a public library. In *Perry*, the Court held that the purpose of a public library is "for use by the public...for expressive activity."¹⁵⁷ The government response to this question was to note that public libraries routinely make decisions limiting the content of their collection, and that such decisions are not subject to strict scrutiny, nor should they be.¹⁵⁸ In support of this argument the government cited the decisions in *Rust* and *Finley*, for the principle that the government may make a decision to fund a particular viewpoint it seeks to advance, without necessitating a level of scrutiny beyond rational basis.¹⁵⁹

¹⁵¹ *Am. Library Ass'n*, 201 F. Supp. 2d at 453.

¹⁵² *Id.* at 454, (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000); *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 808 (1985)).

¹⁵³ *Am. Library Ass'n*, 201 F.Supp. 2d at 454.

¹⁵⁴ *Id.* (citing *Greer v. Spock*, 424 U.S. 828 (1976); *Adderly v. Florida*, 385 U.S. 39 (1966)).

¹⁵⁵ *Id.* The Court notes that public streets, sidewalks and parks are deemed traditional public fora, and are contrasted with designated (or limited) public fora, defined as public property that the state has opened for use by the public as a place for expressive activity, ie: school board meetings. *Id.* (citing *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 46 (1983)). Finally, the Court identified the third tier of fora as being nonpublic fora, which consists of all remaining public property. *Id.*

¹⁵⁶ *Id.* at 455-456.

¹⁵⁷ *Id.* at 457 (citing *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983)).

¹⁵⁸ *Id.* at 457.

¹⁵⁹ *Id.*

In *Rust*, for example, the Court upheld viewpoint-based funding, noting “[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. §4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.”¹⁶⁰

This principal was strengthened in the *Finley* case, in which the Court upheld the right of the National Endowment for the Arts to condition its grants on a judgment it reserved as to the artistic merit of submissions. In support of its ruling, the *Finley* Court noted: “The very assumption of the NEA is that grants will be awarded according to the artistic worth of competing applications, and absolute neutrality is inconceivable.”¹⁶¹

Based on these authorities, it would seem at first impression that the conditional grant of funds must allow the government broad latitude to impose content-based restrictions. The District Court in *American Library Ass’n. v. U.S.* disagreed, distinguishing *Rust* and *Finley* by noting that:

The more broadly the government facilitates private speech, however, the less deference the First Amendment accords to the government’s content-based restrictions on the speech that it facilitates. Thus, where the government creates a designated public forum to facilitate private speech representing a diverse range of viewpoints, the government’s decision selectively to single out particular viewpoints for exclusion is subject to strict scrutiny.¹⁶²

In sum, the District Court concluded: “Thus, we believe that where the state designates a forum for expressive activity and opens the forum for speech by the public at large on a wide range of topics, strict scrutiny applies to restrictions that single out for exclusion from the forum particular speech whose content is disfavored.”¹⁶³

It is at this point that the District Court confronted a central tenet in the government’s argument: if we agree that public libraries have the power to limit their collection of books, and that challenges to those limitations must proceed on a rational basis level of scrutiny, Internet access limitations in a public library must be judged by the same standard. The District Court considered this argument, and rejected it, noting that in the traditional library screening process, staff review and select the books based on a determination of the needs of the community, whereas the Internet provides a vast amount of material, which no one person could ever review and select from:

Nonetheless, we disagree with the government’s argument that public libraries’ use of Internet filters is no different, for First Amendment purposes, from the editorial discretion

¹⁶⁰ *Am. Library Ass’n*, 201 F. Supp. 2d at 458 (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

¹⁶¹ *Id.* at 459 (citing *NEA v. Finley*, 524 U.S. 569 (1998) (the Court upheld the right of the NEA to award grants to artists based on a determination of artistic excellence)).

¹⁶² *Id.* at 460.

¹⁶³ *Id.* at 461.

that they exercise when they choose to acquire certain books on the basis of librarians' evaluation of their quality. The central difference, in our view, is that by providing patrons with even filtered Internet access, the library permits patrons to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers, without attempting to restrict patrons' access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable.¹⁶⁴

This analysis focused on the flaw in the argument that using filters to block or limit Internet content accessible by patrons is no different than the selectivity librarians' exercise in choosing which books to purchase for the library collection. The difference is found in the nature of the Internet – with over 2 billion pages available, and over 1.5 million added daily, it is simply impossible for mechanical filters, or human reviewers working for filtering or blocking software manufacturers, to review and delete material allegedly obscene or harmful to minors without at the same time preventing access to vast amounts of protected speech. Neither the technological nor the human means exist to effectively perform this selection function. Given the significant role libraries play as a “mighty resource in the free marketplace of ideas,”¹⁶⁵ the District Court was reluctant to sanction the broad use of this technology mandated by CIPA.¹⁶⁶

While also acknowledging that the Internet is not a traditional example of public fora, the Court found that the Internet does share many of the characteristics of streets, sidewalks and parks as loci for free expression.¹⁶⁷ In fact, these traditional fora suffer from geographic limitations not present in online expression and communication – you can only physically address a limited number of people in the park or on the street – whereas an unlimited number can be reached via cyberspace, through the use of chat rooms, message boards and free Web hosting services. Moreover, Internet access in public libraries also serves the role of making the digital highway a road accessible for all, eliminating the off-ramps and dead ends that poverty mandates for those unable to afford private Internet access.¹⁶⁸ The District Court summarized its finding that Internet access in public libraries, as public fora, require that any statute that attempts to restrict that access be subject to strict scrutiny, as follows:

In short, public libraries, by providing their patrons with access to the Internet, have created a public forum that provides any member of the public free access to information from millions of speakers around the world. The unique speech-enhancing character of Internet use in public libraries derives from the openness of the public library to any member of the public seeking to receive information, and the openness of the Internet to any member of the public who wishes to speak.

....

A faithful translation of First Amendment values from the context of traditional fora such as sidewalks and parks to the distinctly non-traditional public forum of Internet

¹⁶⁴ *Am. Library Ass'n*, 201 F. Supp. 2d at 462 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995)).

¹⁶⁵ *Id.* at 466 (citing *Minarcini v. Strongsville City School Dist.*, 541 F. 2d 577, 582 (6th Cir. 1976)).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 467.

¹⁶⁸ *Id.* (citing National Telecommunications and Information Administration, U.S. Department of Commerce, *Falling Through the Net: Defining the Digital Divide* (1999), available at <http://www.ntia.doc.gov/ntiahome/fitn99/contents.html>).

access in public libraries requires, in our view, that content-based restrictions on Internet access in public libraries be subject to the same exacting standards of First Amendment scrutiny as content-based restrictions on speech in traditional public fora such as sidewalks, town squares, and parks.¹⁶⁹

The District Court's determination that strict scrutiny must be applied to CIPA's mandated restrictions on Internet access next required the Court to review the statute to see whether (1) there was a compelling government interest that the use of filtering software promotes; (2) the use of filtering software under CIPA was narrowly tailored to further that interest; and (3) whether less restrictive alternatives existed that would promote the government's interest.¹⁷⁰

The Court found no difficulty in determining that the government's stated interest in preventing the dissemination of obscenity, child pornography and material harmful to minors was a legitimate state interest, particularly given the possibility that library patrons, either those using the libraries' computers to surf the Internet, or those merely passing by the computers, might also be unwillingly exposed to offensive material. The Court found that this legitimate interest could be served by filtering software that prevented access to those materials.¹⁷¹

The Court next considered whether CIPA's requirement that all library computers be equipped with filtering or blocking software was narrowly tailored to meet the legitimate state interest. Here CIPA ran afoul of the limits of technology. The Court found:

The commercially available filters on which evidence was presented at trial all block many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that, while possible harmful to minors, are neither obscene nor child pornography.... Given the substantial amount of constitutionally protected speech blocked by the filters studied we conclude that use of such filters is not narrowly tailored with respect to the governments' interest in preventing the dissemination of obscenity, child pornography, and material harmful to others.¹⁷²

The Court found that CIPA resembled the Communications Decency Act, and noted that the CDA had been found to be facially invalid due in part to limitations in the available technology to determine the age of Internet surfers. These similarities were summarized as follows:

¹⁶⁹ *Am. Library Ass'n*, 201 F. Supp. 2d at 470. The District Court, in making this determination, reflects its awareness that we live in a new age of communication, and that the traditional places of interchange of human ideas have been replaced in many respects, by cyberspace. The Court acknowledges that this transition has not passed the notice of the Supreme Court either, as is reflected by the following quote: "Indeed, '[m]inds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media.'" *Id.* (quoting *Denver Area Educ. Telecomms. Consortium, Inc., v. FCC*, 518 U.S. 727, 802-03 (1996)).

¹⁷⁰ *Id.* at 471.

¹⁷¹ *Id.* at 475. The Court did not, however, accept the idea that filters were the appropriate way to deal with inappropriate behavior of patrons whose computer use in the library focused on viewing obscene or otherwise inappropriate material. The Court observed that the examples of behavior cited, such as masturbation or abusive behavior towards staff or other patrons, were best dealt with through education and punishment for violations of the law, rather than limiting the rights of all patrons to view otherwise protected speech. *Id.* at 474-75.

¹⁷² *Id.* at 475-76.

Similarly, although on its face, CIPA, like the CDA, requires the suppression of only constitutionally unprotected speech, it is impossible as a practical matter, given the state of the art of filtering technology, for a public library to comply with CIPA without also blocking significant amounts of constitutionally protected speech.¹⁷³

Turning to the third prong in the strict scrutiny analysis, the existence of less restrictive alternatives, the District Court found that the numerous other less restrictive methods public libraries had employed before the enactment of CIPA, including privacy screens, the “tap on the shoulder” method, and post-use review and warnings of suspension of access privileges, were all at least as effective in meeting the government’s interest in limited minor’s access to harmful material.¹⁷⁴ Based on this finding, the Court concluded that the “government had failed to show that the less restrictive alternatives...are ineffective at furthering the government’s interest.”¹⁷⁵

In an effort to rebut the lack of narrow tailoring argument, the government argued that the disabling provisions of CIPA cured the tailoring defect. The District Court rejected this argument, noting that the statute’s disabling provision, which allowed library staff to disable the filtering software for an adult patron, “to enable access for bona fide research or other lawful purposes,”¹⁷⁶ was vague and would likely deter many patrons, particularly “those who have sensitive positions.”¹⁷⁷ The District Court also noted that the disabling provision also present timing problems since in some libraries, response times to requests for disabling the filters could take days, which in turn imposed a serious burden on patron’s use of the Internet.¹⁷⁸

Having conducted this exhaustive review of the technological and legal barriers to CIPA, the District Court concluded as follows:

In view of the severe limitations of filtering technology and the existence of these less restrictive alternatives, we conclude that is it not possible for a public library to comply with CIPA without blocking a very substantial amount of constitutionally protected speech, in violation of the First Amendment.¹⁷⁹

The District Court entered judgment for the plaintiffs, finding that CIPA was facially invalid under the First Amendment and permanently enjoined its enforcement.¹⁸⁰ This carefully drafted decision represents a bright burst of sunlight in the often-murky fog of obscenity law. However, off the coast, fog was gathering. The government took an immediate appeal of the decision, and the ultimate fate of CIPA was placed in the hands of the Supreme Court.

¹⁷³ *Am. Library Ass’n*, 201 F. Supp. 2d at 478. The Court employed a colorful turn of phrase in describing the effect of CIPA: “Where the government draws content-based restrictions on speech in order to advance a compelling government interest, the First Amendment demands the precision of a scalpel, not a sledgehammer.” *Id.* at 479.

¹⁷⁴ *Id.* at 481.

¹⁷⁵ *Id.* at 484.

¹⁷⁶ 20 U.S.C. § 9134(f)(3) (2005).

¹⁷⁷ *Am. Library Ass’n*, 201 F. Supp. 2d at 486.

¹⁷⁸ *Id.* at 487-88.

¹⁷⁹ *Id.* at 490.

¹⁸⁰ *Id.* at 496.

IV. The Fog Returns: The Supreme Court Decision

In an opinion marked by fundamental misunderstanding of the nature of the Internet, and with little regard to past Supreme Court obscenity law jurisprudence, the Supreme Court reversed the District Court decision.¹⁸¹ Chief Justice Rehnquist, writing for the four-judge plurality, began the Opinion with several questionable assertions of fact, which become critical to the merits of the legal principals subsequently based on those assumptions.

At the outset, Justice Rehnquist, quoting from various sources who provided data to the Congressional hearings regarding the enactment of CIPA, opined that the accessibility for library patrons of pornography on the Internet is a “serious” problem, noting that one source collected over “2000 incidents of patrons, both adults and minors, using library computers to view online pornography, including obscenity and child pornography.”¹⁸² Since this is the principal evidence cited by the plurality as indicative of the severity of the problem, and given that with over 9000 public libraries nationwide this works out to an average of .22 incidents per location, it is uncertain if this level of activity warrants Congressional attention.

Justice Rehnquist next noted that conditional grant jurisprudence, as outlined in *Dole*, had affirmed the wide latitude given to Congress to impose conditions on the grant of federal subsidies, such as the E-rate and LSTA subsidies.¹⁸³ In the first of a series of defensive responses to dissent opinions, Justice Rehnquist argued that Justice Stevens “[m]isapprehends the analysis we must perform to determine whether CIPA exceeds Congress’ authority under the Spending Clause.”¹⁸⁴ The dissent is criticized for focusing on whether Congress had the right to “impose [CIPA’s filtering] requirement” on public libraries, instead of “allowing local decisionmakers [sic] to tailor their responses to local problems.”¹⁸⁵ Justice Rehnquist pointed out that the appropriate standard was whether the condition Congress required “would...be unconstitutional” if performed by the library itself.¹⁸⁶

While this is a correct statement of the *Dole* standard, Justice Rehnquist missed the point Justice Stevens was making in the cited reference. Justice Stevens was pointing out that in adopting a standard applicable on a nationwide basis, requiring the use of filtering software that has no component recognizing and applying local community standards to the definition of “obscene” materials, Congress was ignoring the Court’s prior determination in *Miller* that local communities were best equipped to determine what was, or was not, obscene in their regions.¹⁸⁷ Justice Stevens found a secondary source author who expressed this view in unequivocal terms:

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

¹⁸¹ United States v. Am. Library Ass’n, 539 U.S. 194, 214 (2003).

¹⁸² *Id.* at 200 (citing Obscene Material Available Via The Internet: Hearing Before the H. Subcommittee on Telecomm., Trade, and Consumer Prot., 106th Congress, 2d Sess. 1, 27 (2000), (citing D. Burt, *Dangerous Access, 2000 Edition: Uncovering Internet Pornography in America’s Libraries* (2000))).

¹⁸³ *Id.* at 203.

¹⁸⁴ *Id.* at 203 n.2.

¹⁸⁵ *Id.*, (citing the dissent by Justice Stevens, at 242).

¹⁸⁶ *Id.* (citing *South Dakota v. Dole*, 483 U.S. 203, 210 (1987)).

¹⁸⁷ *Id.* at 223-24 n.3.

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 position to judge local community standards for what is and is not obscene, as required by the *Miller [v. California]* 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.¹⁸⁸

One of the more troubling aspects of the plurality decision in this case is the total absence of any discussion of the effect CIPA's mandate will have on local community input into obscenity analysis. As the District Court noted, the three principal providers of filtering software do not include, in their category definition, or in their mechanical or human website review, any consideration of the contemporary community standards of the city or county in whose libraries the software will be deployed. The prescient warnings of Justice Douglas in *Roth*, Justice Warren in *Jacobellis*, and Justice Warren in *Miller*, that a national standard is not susceptible of definition, were ignored by Congress in the enactment of CIPA, and by the plurality in this decision. It remains to be seen whether Santayana's warning will return to haunt us, and whether this refusal to learn from the past will doom us to repeat the mess we have made of obscenity law in cyberspace.

Justice Rehnquist next focused on the issue of whether Internet access at public libraries qualifies for strict scrutiny analysis on the theory that in providing this access, the libraries are serving as public fora.¹⁸⁹ He rejected the District Court finding in the affirmative, holding that the principles relied on are "out of place in the context of this case."¹⁹⁰ Citing the *Cornelius* decision, he asserted that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum."¹⁹¹ Justice Rehnquist noted that since the Internet is a recent development, it may not avail itself of the benefit of traditional public forum status, holding: "The doctrines surrounding traditional public forums may not be extended to situations where such history is lacking."¹⁹²

¹⁸⁸ *Am. Library Ass'n*, 539 U.S. at 223-224 (citing Gregory K. 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)).

¹⁸⁹ *Id.* at 205.

¹⁹⁰ *Id.* at 205.

¹⁹¹ *Id.* at 205 (citing *Cornelius v. NAACP Legal Defense & Ed. Fund., Inc.*, 473 U.S. 788, 802 (1985)).

¹⁹² *Id.* at 205-06 (citing *Arkansas Ed. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998)). In *Forbes*, the Court declined to extend public forum principles to a public television station's editorial judgments regarding the private speech it presents to its viewers, noting that extending broad rights of access for outside speakers would be antithetical to the discretion the station and its editors would need to exercise as journalists. The plurality's reliance

The plurality decision disregarded the District Court’s discussion of the manner in which the Internet serves as a public forum for library patrons. The value provided to patrons by allowing them access to chat rooms, Web hosting, and the entire panoply of interactive services and contact with speakers all over the world is of no consequence to the Court. Instead, Justice Rehnquist asserted that public libraries do not acquire Internet terminals in order to create a public forum for Web publishers, just as public libraries do not acquire books to provide a forum for the authors to speak. Access to the Internet, he argued, is provided by libraries as part of their basic function: “to facilitate research, learning and recreational pursuits by furnishing materials of requisite and appropriate quality”.¹⁹³ Reaching back to a 1999 Congressional report, he noted that, “[a]s Congress recognized, ‘the Internet is simply another method for making information available in a school or library.’ It is ‘no more than a technological extension of the book stack.’”¹⁹⁴

To contemporary ears, the assertion by a the Chief Justice of the Supreme Court, speaking for a plurality of the Court, that the Internet is nothing more than a technological stack of books is both shocking and deeply disappointing. It simultaneously disregards and affirms the concerns voiced by Professor Lawrence Lessig in his seminal works, *Code and Other Laws of Cyberspace*¹⁹⁵ and *The Future of Ideas*¹⁹⁶ that the promise of the Internet to function as a contemporary “commons” for the unrestricted (or at least relatively so) communication and development of ideas, as had been afforded by traditional public forums in the past might not be met, if over-regulation was to be its fate.¹⁹⁷ As Professor Lessig put it:

My central claim throughout is that there is a benefit to resources held in common and that the Internet is the best evidence of that benefit. As we will see, the Internet forms an *innovation commons*. It forms this commons not just through norms, but also through a specific technical architecture. The Net of these norms and this architecture is a space where creativity can flourish. Yet so blind are we to the possible value of a commons that we don’t even notice the commons that the Internet is. And, in turn, this blindness leads us to ignore changes to the norms and architecture of the Net that will weaken this commons. There is a tragedy of the commons that we will identify here; it is the tragedy of losing the innovation commons that the Internet is, through the changes that are being rendered on top.¹⁹⁸

The blocking and filtering software CIPA mandates is an example of the regulation of the Internet by architecture, or code, which is likely, over time, to adversely affect creativity and

on *Forbes* seems misplaced in the context of public libraries provision of Internet access for patrons. The library staff is not responsible for the content of the Internet, and no journalistic principles are involved. Moreover, once again the fact that the Court sees television as a medium comparable to the Internet highlights how little appreciation or understanding the Court seems to have for the unique interactive nature of the Internet, and how that interactivity is central to the public forum function it offers users.

¹⁹³ *Am. Library Ass’n*, 539 U.S. at 206, (citing *Rosenberger*, 515 U.S. at 834; *Cornelius*, 473 U.S. at 805).

¹⁹⁴ *Id.* at 207; S. Rep. No. 104-141, at 7 n.3.

¹⁹⁵ Lawrence Lessig, *Code and Other Laws of Cyberspace* (1999).

¹⁹⁶ Lawrence Lessig, *The Future of Ideas* (2001).

¹⁹⁷ *Code*, *supra* note 183, at 213-221; *Future*, *supra* note 184, at 19-25.

¹⁹⁸ *Future*, *supra* note 184 at 23.

communication. It is particularly unfortunate that this restriction will likely do the greatest harm to the segment of the population that is economically disadvantaged.

Justice Rehnquist next considered another aspect of the purpose of public libraries in providing Internet access, which he viewed as further evidence that public forum doctrine did not apply. He adopted the government argument, rejected by the District Court, that in offering access to the Internet to patrons, public libraries are simply offering patrons another form of book in the libraries collection. As he put it:

But this mistakes a public library's purpose for acquiring Internet terminals: A library does so to provide its patrons with materials of requisite and appropriate quality, not to create a public forum for Web publishers to express themselves. ...A library's decision to use filtering software is a collection decision, not a restraint on private speech.¹⁹⁹

The assertion that libraries do not provide Internet access to create a public forum for Web publishers misses the point – a significant benefit libraries grant their patrons in providing Internet access is the ability of the patrons to interact with other speakers online, as well as to partake of the views of those speakers. Again, the Court seemed either intent on disregarding, or unaware of, what is probably the most significant value of the Internet – its dynamic interactivity. The qualities Justice Rehnquist ascribed to the Internet are more appropriately descriptive of CD-ROM storage media, and not the Internet.

The concept that acquiring Internet terminals is a “collection decision” is also flawed, and reveals another misapprehension about the nature of the Internet and Web sites and pages. In his dissent, Justice Souter succinctly challenged the merit of this concept:

At every significant point, however, the Internet blocking here defies comparison to the process of acquisition. Whereas traditional scarcity of money and space require a library to make choices about what to acquire, and the choice to be made is whether or not to spend the money to acquire something, blocking is the subject of a choice made after the money for Internet access has been spend or committed. Since it makes no difference to the cost of Internet access whether an adult calls up material harmful for children or the Articles of Confederation, blocking (on facts like these) is not necessitated by scarcity of either money or space....The proper analogy therefore is not to passing up a book that might have been bought; it 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.²⁰⁰

Justice Souter's argument, powerful as it is, in fact does not go far enough in describing the effect of the deployment of filtering software under CIPA – in fact it is not as though the library bought an encyclopedia and cut out allegedly unsuitable pages – given the “root URL” filtering methodology used, it is more akin to the library buying an encyclopedia and removing the S and P volumes, because “sex” and “pornography” are discussed in those volumes – sacrificing all of the other “s” or “p” entries in the process.

¹⁹⁹ *Am. Library Ass'n*, 539 U.S. at 209.

²⁰⁰ *Id.* at 236.

If we remove the Internet component from the discussion, the conditional grant argument becomes harder to make given First Amendment protections – can the government, for example, condition subsidies provided to libraries for building expenses on the libraries agreeing not to provide patrons with copies of Mark Twain’s *Huckleberry Finn*, or Margaret Mitchell’s *Gone With the Wind*, on the grounds that their portrayal of African-Americans is racist, or romance novels, on the grounds that the portrayal of women is sexist; and in both cases, that the works are therefore harmful to minors? The government argument in favor of this kind of conduct would again be that it was not preventing libraries from acquiring these works – just denying subsidies to those libraries that do make those selections. The issue here is that by targeting a particular type of speech, the statute is content-based, which invites strict scrutiny, and distinguishes this case from *Finley* or *Rust*, where the limitations at issue were not directed to a particular category of speech.

In a similar vein, the plurality opinion asserted, without any supporting authority, that libraries do not include “pornography” in their other collections, so there should be no basis for objecting to a government program that supports that practice regarding Internet access.²⁰¹ Putting aside the questionable assumption that providing Internet access is the same thing as adding another book to the libraries’ collection, this assumption is, with respect to the works found in many libraries, debatable if not simply incorrect. It is likely that many citizens, shown copies of explicit gay pulp novels or Robert Mapplethorpe photography books found in the collections of libraries in San Francisco or New York City might disagree with the statement that libraries do not include “pornography” in their collections. Rather, it is accurate to say that the collections of libraries across the country reflect the contemporary community standards of the city or county in which they are located – and that the extent of regulation they attach to Internet access provided to their patrons should similarly be reflective of those standards – and not a national standard mandated by the federal government, and implemented by private industry software companies.

The final area in which the plurality opinion revealed its lack of understanding of how software filters will work under CIPA is in its discussion of the effect of the “disabling provision” of the Act. Justice Rehnquist wrote:

Assuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled....The Solicitor General confirmed that a “librarian can, in response from a person, unblock the filtering mechanism altogether.”²⁰² He further explained that a patron would not “have to explain...why he was asking a site to be unblocked or the filtering to be disabled.”²⁰³ The District Court viewed unblocking and disabling as inadequate because some patrons may be too embarrassed to request them. (*citation omitted*). But the

²⁰¹ *Am. Library Ass’n*, 539 U.S. at 211-12. Justice Rehnquist writes: “Congress may certainly insist that these “public funds be spend for the purposes for which they were authorized.” *Ibid*. 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. As the use of filtering software helps to carry out these programs, it is a permissible condition under *Rust*.” *Id*.

²⁰² *Id*.

²⁰³ *Id*.

Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment.²⁰⁴

This understanding of the viability of the disabling provision under CIPA was the key basis for the support the plurality obtained from Justices Kennedy and Breyer in their concurring opinions. Justice Kennedy's entire view of the case was colored by what he understood was the ease of implementation of this disabling provision: "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. The [g]overnment represents this is indeed the fact."²⁰⁵

Justice Breyer also found that the disabling provision provided significant relief from the potential interference with the constitutional rights of library patrons:

As the plurality points out, the Act allows libraries to permit any adult patron access to an "overblocked" Web site; the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, "Please disable the entire filter".

....

The Act does impose upon the patron the burden of making this request. But it is difficult to see how that burden (or any delay associated with compliance) could prove more onerous than traditional library practices associated with segregating library materials in say, closed stacks, or with interlibrary lending practices that require patrons to make requests that are not anonymous and to wait while the librarian obtains the desired materials from elsewhere.

....

Given the comparatively small burden that the Act imposes upon the library patron seeking legitimate Internet materials, I cannot say that any speech-related harm that the Act may cause is disproportionate when considered in relation to the Act's legitimate objectives.²⁰⁶

The plurality's analysis of the mechanics of the "disabling provision" is flawed in several respects. The first is the failure of the Court to consider the substantial logistical burdens the disabling provision imposes on libraries and their staff. In order to be able to respond to patrons' request for unblocking pages, sites or the entire filter, the library will need to have staff on duty at all times who are familiar with the software, and are able to disable it. Library staff will also have to keep up with the frequent updates this software, like most software, requires – incurring

²⁰⁴ *Am. Library Ass'n*, 539 U.S. at 209. In a footnote following this statement, Justice Rehnquist notes that the dissents' argument that overblocking will "reduce the adult population ... to reading only what is fit for children", (citing *Butler v. Michigan*, 357 U.S. 380, 383 (1957)) and related authorities, is based on inapposite authority, because the case cited "addressed Congress' direct regulation of private conduct, not exercises of its Spending Power." *Id.* at n.4. It is unclear whether, by this argument, Justice Rehnquist is suggesting that Congress has the authority, under the Spending Power, to enact restrictions that reduce the adult population to reading what is only fit for children.

²⁰⁵ *Id.* at 214. Justice Kennedy acknowledges that the District Court noted evidence of delays that sometimes were as long as days to accomplish this unblocking. However, he points out that since this statement is found in the Preliminary Statement of the District Court, it is not "a specific finding" that was a basis for the District Court's decision. He notes further that in any event, if a particular problem arose in the unblocking of a site, this could be the basis for an "as-applied" challenge to the law, but would not support a claim of facial invalidity". *Id.* at 214-215.

²⁰⁶ *Id.* at 219-220.

both the cost of purchasing updates and the training required of staff to install and run the software. Further, each unblocking request, once implemented, requires follow-up by staff to re-install the filter before the next patron uses the computer. In a busy urban library, with 20 or more computers located in different parts of the library, the responsibility of keeping track of which computer has had filtering disabled, on a single page, a single site, or the entire filter, is a daunting logistical nightmare. The consequences of failure are also severe, since a library that knowingly fails to maintain the filters in place, despite having certified compliance, can be compelled to reimburse the government for any subsidies it received.²⁰⁷

A second flaw in the disabling provision is that it assumes that the library patron will know what is on the site or page which is blocked, and will therefore be able to identify for the librarian which page or site is to be unblocked. There is no certainty that the process will be handled this easily. To the extent sites are blocked, particularly if the blocking is done by “root URL”, the patron may not be able to tell whether the site contains pages that the patron needs or wants to view, or not. A patron who is doing research in an area subject to significant filtering, ie: child pornography, may find that every site and page is blocked, and research will quickly become impossible unless the entire filter is disabled. Justice Stevens highlighted this problem in his dissent:

Until a blocked site or group of sites is unblocked, a patron is unlikely to know what is being hidden and therefore whether there is any point in asking for the filter to be removed. 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....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.²⁰⁸

The third flaw in the plurality’s reliance on the disabling provision of the Act is that contrary to the assurances offered by the Solicitor General in oral argument before the Court, the Act does not allow the wholesale disabling of filters without any reason – the mere request of a patron is not sufficient under the Act, which instead reposes discretion in the library staff to accede to a patron’s request, upon a showing that the patron is engaged in “bona fide research” - which is undefined in the statute - or for “other legal purposes” -again undefined.²⁰⁹

²⁰⁷ Children’s Internet Protection Act, 47 U.S.C. § 254 (F)(ii). Libraries that simply fail to comply may not be compelled to reimburse funds, but may be denied future subsidies, and may be forced to comply through the issuance of a complaint against them. 20 U.S.C.A. § 9134 (5)(A)(i – ii).

²⁰⁸ *Am. Library Ass’n*, 539 U.S. at 224-25.

²⁰⁹ *Id.* at 233. Justice Souter, in his dissent, noted these limitations, found at 20 U.S.C. § 9134 (f)(3), and at 47 U.S.C. § 254 (h)(6)(D). He also points out that the government has failed to offer any guidance in the Act as to when unblocking is appropriate, leaving librarians with little guidance as to its implementation: “But the Federal Communications Commission, in its order implementing the Act, pointedly declined to set a federal policy on when unblocking by local libraries would be appropriate under the statute.” *See In re Federal-State Joint Board on Universal Service: Children’s Internet Protection Act*, 16 FCC Rcd. 8182 8204, ¶53 (2001).

Finally, since the stated purpose of the Act is “[t]o protect America’s children from exposure to obscene material, child pornography, or other material deemed inappropriate for minors while accessing the Internet from a school or library...”,²¹⁰ there appears to be no reason, related to that purpose, for requiring that all computers in the library, whether acquired or operated with the use of federal funds or not, be equipped with filters if any federal subsidies are received – including computers operated by staff and never available to patrons. The First Amendment overbreadth considerations that motivated the District Court to find the Act facially invalid would be eliminated if the Act was narrower in scope – for example if it required public libraries to maintain computers dedicated to use by minors only, and which were therefore required to apply filters, while leaving libraries to their own discretion as to the regulation methodology to employ for adult Internet use. Justice Souter was critical of the government’s distrust of adults and library staff in his dissenting opinion:

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 federal conditions (*citation omitted*). Instead, the [g]overnment’s funding conditions engage in overkill to a degree illustrated by their refusal to trust even a library’s staff with an unblocked terminal, one to which the adult public itself has no access. (*citation omitted*).

The question for me, then, is whether a local library could itself constitutionally impose these restrictions on the content otherwise available to an adult patron through an Internet connection, at a library terminal provided for public use. The answer is no.... This would simply be censorship... (a) to those who did not qualify for discretionary unblocking, the censorship would be complete and, like all censorship by an agency of the [g]overnment, presumptively invalid owing to strict scrutiny in implementing the *Free Speech Clause of the First Amendment*.²¹¹

These arguments, strong as they may seem, and amply supported by the extensive findings of fact in the District Court proceeding, were not persuasive to the plurality, and were not enough to dissuade Justices Kennedy and Breyer from their mistaken view that the disabling provision offered an adequate safeguard against the defects of the filtering process. But for Justice Kennedy, and Justice Breyer’s misapprehension that CIPA’s disabling provision rendered the over- and underblocking of protected expression an insignificant burden to the First Amendment rights of library patrons, it appears that there would not have been a majority found to support the Act. Given their support however, Justice Rehnquist, writing for the plurality,

²¹⁰ S. REP NO. 106-141, at 1.

²¹¹ *Am. Library Ass’n*, 539 U.S. at 234-35. Justice Stevens, in his separate dissent, echoed this lack of trust concern: “Also unlike *Finley*, the Government does not merely seek to control a library’s discretion with respect to computers purchased with Government funds or those computers with Government-discounted Internet access. CIPA requires libraries to install filtering software on *every* computer with Internet access if the library receives *any* discount from the E-rate program or *any* funds from the LSTA program. (U)nder 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.” *Id.* at 230-231. This over-reaching aspect of the Act is passed over without comment by the plurality opinion.

found that CIPA did not induce libraries to violate the Constitution, and was a valid exercise of Congress' spending power, mandating the reversal of the District Court's decision.²¹²

In addition to the responsive arguments previously analyzed, Justice Stevens' dissent also takes aim at the plurality's support of the government view that CIPA does not penalize libraries that do not employ filtering software – it just conditions the grant of federal funds on the use of this software. In Justice Steven's view, this is a bit of sophistry that will not pass muster: "An abridgment of speech by means of a threatened denial of benefits can be just as pernicious as an abridgment by means of a threatened penalty".²¹³

Justice Souter, in his dissenting opinion, offered the best summary of the error and the consequence of the approach taken by the plurality:

There is no good reason, then, to treat blocking of adult enquiry as anything different from the censorship it presumptively is. For this reason, I would hold in accordance with conventional strict scrutiny that a library's practice of blocking would violate an adult patron's First and *Fourteenth Amendment* right to be free of Internet censorship, when unjustified (as here) by any legitimate interest in screening children from harmful material.²¹⁴

However compelling the views of the dissenters may be, the fog had returned to the coastline, and libraries across the nation were left, in the wake of this plurality opinion, with the question of how to implement a statute most strongly believed would cause them to violate the First Amendment rights of their patrons.

V. Clear Skies Peeking Through the Fog? The Library Community Reaction to *American Library Ass'n v. U.S.*

Reaction by public libraries to the decision in *American Library Ass'n v. U.S.* has fallen into three categories: full compliance, interpretive compliance, and refusal to comply. Libraries that are in full compliance are those that have continued to accept federal subsidies, and have installed filtering and blocking software systems on every computer in their library, and only disable those filters upon request of adult patrons, for bona fide research projects or other lawful reasons. Once disabled, filters are re-enabled for the next patron.

While there does not appear to be any comprehensive study presently available to indicate the rate of full compliance among the nations' public libraries, anecdotal evidence and a small study of libraries taken shortly after the Supreme Court decision suggests that approximately 60-70% of the libraries in the nation are in full compliance.²¹⁵ A significant factor

²¹² *Am. Library Ass'n*, 539 U.S. at 214.

²¹³ *Id.* at 227.

²¹⁴ *Id.* at 242.

²¹⁵ A unscientific (data was collected through a Google search of local newspaper coverage of CIPA) survey of 25 libraries done in August 2003, by Joseph Anderson, published by WebJunction, revealed that of the 25 libraries reviewed, 8 were filtering, 5 were not, and 12 were in various stages of evaluation. Joseph Anderson, *CIPA Reports From the Field*, posted Sept. 9, 2003, last seen at <http://webjunction.org/do/id=995> . A similar percentage can be

in the decision to fully comply seems to be the loss of funding resulting from a refusal to comply. The Free Library of Philadelphia, for example, is fully complying, presumably in part so it could retain the \$200,000 in *federal* fund subsidies it receives.²¹⁶ What is interesting from this small study is that the cost of implementing the filters is often equal to the subsidy benefit retained. In at least one case, the financial equation is upside down. The San Antonio Public Library system in Texas estimated that it would lose \$30,000 in federal funding if it chose not to comply with CIPA, however it also estimated that the cost of licensing and maintaining the software would be \$35,000, and that it would also incur up to \$500,000 in additional staff costs to hire staff for managing the filter systems.²¹⁷

The second category of response, what I call interpretive compliance, refers to an interesting response to CIPA, following the Supreme Court decision. In its press release immediately following the announcement of the Court's decision, the President of the ALA and the Executive Board of the Association asserted that the decision meant: "The law is constitutional only if the mandated filters can be disabled upon the request of adult library users. Users do not have to explain why they are making the request."²¹⁸

This interpretation of the decision is based on the plurality's reliance on the advice of the Solicitor General, which was relied on by the plurality, and by concurring Justices Kennedy and Breyer, as has been discussed, *supra*.²¹⁹ Based on the field reports compiled by the ALA, it appears to be the basis of the approach taken by one New York library, where adult patrons, after certifying their adult status, may instruct the library as to whether they wish to have filters turned on or off, and their preference is saved in the library computer system, and automatically triggered each time they log on, without any further involvement of library staff.²²⁰

This interpretive compliance may also skew the results of any survey of CIPA compliance. Even though the statute mandates that the filters remain on for adult patrons and may only be removed by library staff, the comments by the plurality and Justices Kennedy and Breyer seem to be providing a basis for libraries to interpret the decision as its essence rewriting and expanding the disabling provision of the law to allow adult patrons to elect to disable the filters on their own. Hence, we find an article by the Director of the Carroll County (Maryland) Public Library discussing the decision of the library, which had previously used voluntary filtering of its Internet access, to continue the practice under CIPA: "With the CIPA ruling I think the basic filter will remain throughout the system. Adult patrons can choose to turn off the filter for their entire session, but the filter will automatically resume at the start of the next session."²²¹ This interpretive compliance allows public libraries to accept E-rate and LSTA subsidies by installing filters and either allowing them to be disabled by adult patrons at their

extrapolated from the listings under the heading *ALA CIPA and Libraries From the Field*, last updated 15 July 2005, last seen at <http://www.ala.org/ala/washoff/Woissues/civilliberties/cipaweb/adviceresources/fromthefield.>

²¹⁶ Joseph Anderson, *CIPA Reports From the Field*, posted Sept. 9, 2003, last seen at <http://webjunction.org/do/id=995>, at 3.

²¹⁷ *Id.* at 4.

²¹⁸ *CIPA Decision Response: A statement from ALA President Carla D. Hayden and the ALA Executive Board* (July 25, 2003), at 1-2, last seen at <http://www.ala.org/ala/pressreleasesbucket/pressreleases2003jul/cipadecision.htm>.

²¹⁹ See, generally, the discussion herein in Section IV, at 37-40, *supra*.

²²⁰ *ALA CIPA and Libraries From the Field*, last updated 15 July 2005, last seen at <http://www.ala.org/ala/washoff/Woissues/civilliberties/cipaweb/adviceresources/fromthefield>, at 2.

²²¹ Linda Mielke, *CIPA and Carroll County, Maryland: Why We Filter*, WebJunction (Sept. 9, 2003), last seen at <http://webjunction.org/do/id=993>.

discretion, or by allowing staff to disable them upon patron request, without requiring any explanation for the request.²²²

The final category of response, those public libraries that have chosen to do without federal subsidy in order to provide unfiltered Internet access to their patrons, is in some instances marked by a significant financial sacrifice. In a 2003 article, San Francisco City Librarian Susan Hildreth estimated that the City's enactment of an ordinance banning the use of filters for any public access computer within the city limits would cost the public library \$225,000 in lost E-rate subsidies.²²³ If the assumption previously made, that approximately 40% of the nation's public libraries are going without this funding, the losses resulting from the affirmance of CIPA are in excess of several million dollars nationwide.

Justice Kennedy, in his concurring opinion, noted that the plurality's reversal of the District Court did not rule out an as-applied challenge to CIPA:

If some libraries do not have the capacity to unblock specific Web sites or to disable a 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.²²⁴

It has, as of this writing, been over two years since the Supreme Court decision was published. To date, there have been no as-applied challenges filed against CIPA. The reasons for this absence of filings, one can assume, are varied. Mounting a challenge to a federal statute, for an individual, is a daunting prospect. National organizations have little to gain in supporting such a challenge, since its effect, even if successful, would be limited in scope to the particular jurisdiction in which the action was filed. The interpretive compliance approach taken by many libraries has rendered CIPA somewhat toothless for libraries that allow adult patrons to disable the filters themselves, or allow staff to disable the filter with no questions asked. Those libraries that have declined the subsidies have also removed themselves from the possibility of mounting an as-applied challenge. It would appear that libraries have figured out ways to find a patch of clear sky in this murky fog.

VI. Conclusion

Following the District Court's decision invalidating the Children's Internet Protection Act, critics of Congress' efforts to limit access or regulate content on the Internet had reason to celebrate – it appeared that sunlight had finally cut through the fog of judicial and legislative

²²² The anecdotal evidence from the field, collected by the ALA, suggests that the same approach is being adopted by staff – the field report contains a submission by an unidentified library staffer, who wrote: "All computers (including those used by staff) must have filtered access initially. Staff, however, can turn off their filters, or get a coworker to do it for them." *ALA CIPA and Libraries From the Field*, last updated 15 July 2005, last seen at <http://www.ala.org/ala/washoff/Woissues/civilliberties/cipaweb/adviceresources/fromthefield>, at 2.

²²³ Joseph Anderson, *CIPA and San Francisco, California: Why We Don't Filter*, WebJunction, posted September 9, 2003, last seen at <http://webjunction.org/do/id=996>. Ms. Hildreth notes, however, that the city agreed to restore \$150,000 that had been cut from that year's library budget, making those funds available for purchasing Internet access.

²²⁴ *Am. Library Ass'n*, 539 U.S. at 215.

efforts to regulate online content and interaction among adults. The Supreme Court decision, marked by a singular failure to learn from its own prior obscenity case jurisprudence and a fundamental lack of understanding of the workings of the Internet, fulfilled Dickens' dark vision of the courts as the locus for the murkiest fog in the nation. The resiliency and adaptability of our public libraries to this regrettable decision allows a little sunshine to peek through those clouds, and fortifies us for the day when a different Congress and/or Supreme Court once again ventures into the fog, and hopefully offers citizens a brighter horizon. •

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