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Adam Goldstein

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Like A Sieve: The Child Internet Protection Act and Ineffective Filters in Libraries

Adam Goldstein*

INTRODUCTION

The Child Internet Protection Act (hereinafter “CIPA”) requires libraries receiving certain discounted telecommunications services¹ to install content filtering software.² Installing the software would result in a violation of the First Amendment because the filters are ineffective in blocking all objectionable material, yet block many permissible Web sites. Furthermore, installing the software would have a disparate impact on low-income individuals who rely on Internet access from libraries because they cannot afford to have a computer at home. Accordingly, CIPA should be repealed.

This article analyzes the constitutional implications of CIPA and shows how the statute runs afoul of both the First and Fourteenth amendments. After reviewing the background of the issue, this article explains why content filters’ failure to work properly means that CIPA offends freedom of speech. Next, it offers statistics to show that low-income individuals rely on libraries for Internet access in ways that higher-income individuals do not, arguing that this disparate impact on low-income families offends the Fourteenth

* J.D. expected May 2002, Fordham University School of Law; B.A., Internet Journalism, *summa cum laude*, Fordham College, 1999.

¹ 47 U.S.C. § 254(h)(1)(B) (2001) (requiring telecommunications providers to provide discounted services for educational purposes upon a bona fide request from any library or elementary or secondary school).

² Child Internet Protection Act, 47 U.S.C. § 254(h)(6)(B)(i) (2001) (“Certification with respect to minors. A certification under this subparagraph is a certification that the library—(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are— (I) obscene; (II) child pornography; or (III) harmful to minors”).

Amendment. Finally, this article recommends that libraries adopt policies that will preserve their discounted telecommunications services (hereinafter “E-rate discounts”) by complying with CIPA while minimizing the potentially unconstitutional effects of the statute.

In order to “protect America’s children from exposure to obscene material, child pornography, or other material deemed inappropriate for minors while accessing the Internet,”³ Congress passed CIPA in December of 2000.⁴ CIPA requires that libraries receiving E-rate discounts install content-filtering software. These filters must block the obscene material and child pornography covered by CIPA, as well as any other material that the library determines to be harmful to minors.⁵ In addition, CIPA requires the library to adopt and enforce a policy that ensures the filters are working.⁶ Filters on material that is harmful to minors may be suspended for adults.⁷ It is not clear, however, whether the filters on child pornography may be suspended for adults, as well.⁸ Libraries who did not file a report with the

³ 146 CONG. REC. S5836 (daily ed. June 27, 2000) (statement of Sen. McCain).

⁴ Child Internet Protection Act, Pub. L. No. 106-554 § 1721(b) (December 21, 2000), available at <http://www.ala.org/cipa/Law.PDF> (codified as amended at 47 U.S.C. § 254(h)(6) (2001)). Congress also passed the Neighborhood Child Internet Protection Act, a parallel bill that operates on schools and libraries receiving Title III funds. While arguments for opposing both laws parallel each other, for the sake of simplicity and clarity, this paper will deal only with CIPA and libraries receiving E-rate discounts.

⁵ *Id.* 47 U.S.C. § 254(h)(6)(B)(i)(I)-(III) (requiring libraries to protect against materials that are (I) obscene, (II) child pornography, or (III) harmful to minors). The statute defines a minor as “any individual who has not yet attained the age of 17 years.” *Id.* at 47 U.S.C. § 254(h)(7)(D).

⁶ *Id.* § 254(h)(6)(B)(ii) (requiring libraries to enforce “the operation of such technology protection measure during any use of such computers”).

⁷ *Id.* § 254(h)(6)(D).

⁸ The statute omits from adult-user filtering requirements any material harmful to minors, only requiring filtering for obscene material and child pornography. *Id.* § 254(h)(6)(C). Nevertheless, the statute contains a provision allowing “the technology protection measure concerned” to be suspended for an adult to enable access for “bona fide research or other lawful purpose.” *Id.* § 254(h)(6)(D). The term “technology protection measure” is defined as a “specific technology that blocks or filters Internet access to the material covered by a certification under paragraph (5) [schools] or (6) [libraries] to which such certification relates.” *Id.* § 254(7)(I). In essence, all filtering software can be suspended for any adult capable of establishing a lawful purpose for accessing child pornography. Even assuming such a lawful purpose exists, the likelihood of someone requesting that a librarian aid them in the attempt (by suspending the filtering software)

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Federal Communications Commission (“FCC”) by April 20, 2001 explaining how they will comply with the requirements will, in effect, be fined by having to pay more for their telecommunications services.⁹

Telecom companies providing E-rate discounts receive a 1:1 reimbursement for the discounts given to libraries by being excused from certain infrastructure maintenance requirements.¹⁰ Therefore, in the long run, the CIPA status of the telecom companies’ library customers will have little impact on the companies’ bottom line, as every dollar discounted from the cost of services offered to libraries is a dollar the telecommunications provider may retain instead of spending it on wires and electricity in rural areas.

Web content filters are software programs that are integrated with Web browsing software like Microsoft’s Internet Explorer. Filters attempt to distinguish between offensive content (e.g., child pornography) and permissible content by searching the text of a Web page for certain words, comparing the location to lists of known inappropriate sites, or by analyzing the structure of a Web page. For example, some filters will block a Web page if the word “sex” appears in the name of the page, whether the page is pornography, a news report on sexually transmitted diseases, or information on sex-based discrimination in the workplace. However, filtering pornography is inherently difficult because most pornography is made of images, not text. Currently, no filter on the market can analyze the content of an image. Therefore, the name “content filter” is something of a misnomer because the filters can only analyze text, not content. Some content filters can operate on more than just Web browsers, and will filter through names of newsgroups, e-mail, and

seems low. The chilling effect makes the theoretically possible request seem highly unlikely.

⁹ *Id.* § 254(h)(6)(E).

¹⁰ Title 47 imposes an “obligation to contribute to the mechanisms to preserve and advance universal service.” *Id.* § 254(h)(1)(B)(i) (2000). This provision, part of the Telecommunications Act of 1996, essentially requires service providers to offer access in remote (and hence unprofitable) areas. If, however, a telecommunications provider offers discounted services to libraries and other nonprofit organizations, the provision removes the economic burden by subsidizing the infrastructure requirements. *Id.* § 254(h)(1)(B)(1) (2000).

other types of Internet access. Not all filters, however, have such capabilities, and few libraries provide access to newsgroups or non-Web-based e-mail anyway.

Some aspects of how commercial software filters work are a mystery. While it is known that most commercial software filters use lists of banned sites as one of their filtering methods, these lists are the intellectual property of the software manufacturers. Manufacturers do not allow libraries—or any other end-users—to see which sites are on the list.¹¹ In addition, while it is known how these programs work in general, the specifics of their respective algorithms are, of course, also proprietary. Therefore, it is not possible to know in advance what sites a program will block and which ones to which it will allow access.

II. CONGRESS' CHILD ONLINE PROTECTION ACT (COPA) COMMISSION

CIPA is not Congress' first attempt to prevent children from accessing "harmful" material. In 1998, Congress passed and President Clinton signed into law the Child Online Protection Act (hereinafter "COPA"), which made it a Federal crime to allow minors to access harmful material posted for commercial purposes.¹² At the same time, Congress created the COPA Commission, an eighteen-member panel whose purpose was to identify methods to reduce minors' access to harmful material on the Internet.¹³ After two years, the Commission recommended, among other things: that

¹¹ In one instance, Microsystems Software, Inc. (the Mattel-owned manufacturer of Cyber Patrol filtering software) sought and obtained permanent injunctions against two hackers who distributed a utility that allowed users to see Cyber Patrol's list of filtered sites. *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35 (1st Cir. 2000), *dismissing appeal from* 98 F. Supp. 2d 74 (D. Mass. 2000). Later, the Copyright Office of the Library of Congress issued regulations stating that accessing the list solely for the purpose of criticism could constitute fair use. Exemption to Prohibition on the Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,555 (October 27, 2000) (to be codified at 37 C.F.R. pt. 201).

¹² See Child Online Protection Act (COPA), Pub. L. No. 105-277, § 231, 112 Stat. 2681-2736 (1999) (later codified at 47 U.S.C. § 201 (1999) (amended 2000)).

¹³ See <http://www.copacommission.org> (last visited Mar. 10, 2002).

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libraries, schools and community centers *promote public awareness* of available technologies designed to protect children online, that libraries adopt acceptable use policies; and that materials appropriate for Internet safety curricula be distributed in libraries and reprinted in school publications.¹⁴

Notably absent from the commission's recommendations was any mention of installing software of any kind in libraries. In fact, in its study of filtering software, the commission noted that "[t]his technology raises First Amendment concerns because of its potential to be over-inclusive in blocking content."¹⁵ Perhaps alluding to the report's focus on education for families rather than filtering in public spaces, commission member Jerry Berman of the Center for Democracy and Technology (a free speech group) wrote:

Acknowledging the unique, global character of the Internet, the Commission concludes that new laws would not only be Constitutionally dubious, they would not effectively limit children's access to inappropriate materials. The Commission instead finds that empowering families to guide their children's Internet use is the only feasible way to protect children online while preserving First Amendment values.¹⁶

Furthermore, while not effectively blocking material harmful to minors, the filters incorrectly block harmless material. Despite claims to the contrary by manufacturers, filtering software blocks Web sites for political candidates and human rights groups. During the 2000 election, Jeffrey Pollack, a conservative republican candidate who originally supported installing filtering software in public libraries changed his mind when Peacefire, a free speech

¹⁴ Final Report of the COPA Commission. III: Recommendations, at <http://www.copacommission.org/report/recommendations.shtml> (presented to Congress Oct. 20, 2000) (last visited Mar. 10, 2002).

¹⁵ *Id.* at II(B): Filtering/Blocking, at <http://www.copacommission.org/report/filteringblocking.shtml> (last visited Mar. 10, 2002).

¹⁶ Statement of COPA Commissioner Jerry Berman, Companion Volume to the COPA Report to Congress, available at <http://www.copacommission.org/report/statements/berman.shtml> (last visited Jan. 30, 2002).

group, showed that Cyber Patrol software blocked his Web site (as well as the Web sites of other politicians).¹⁷ When Cyber Patrol's manufacturer denied that its software blocked Pollack's Web site, an independent news organization, ZDnet, verified Peacefire's results.¹⁸

III. CONTENT FILTERS FAIL: THE FIRST AMENDMENT

While CIPA's goal of protecting children from the dangers of the Internet is commendable, the content filtering software CIPA requires in pursuit of this goal is highly unreliable. By denying access to a significant number of permissible Web sites while allowing access to many inappropriate sites, the filtering is unreliable enough to raise First Amendment concerns.

Strict scrutiny is the appropriate First Amendment framework for analyzing CIPA. First, courts have consistently viewed a library as a semi-public forum, and accordingly, people are allowed to "speak" in libraries without suppression.¹⁹ Second, the statute is not a time, place, or manner restriction and is inherently content-based.²⁰ For a statute to survive strict scrutiny review, it must serve a *compelling* government interest using the *least restrictive means possible*.²¹

¹⁷ Jeffery Pollack ran as a candidate for Oregon's third district. His Web site, <http://www.pollock4congress.com>, is still active, though the content has changed as of Mar. 18, 2002. Bennett Haselton and Jamie McCarthy, *Blind Ballots: Web Sites of U.S. Political Candidates Censored by Censorware*, Nov. 7, 2000, at <http://www.peacefire.org/blind-ballots/> (Nov. 7, 2000) (last visited Jan. 30, 2002).

¹⁸ Lisa M. Bowman, *Filtering Programs Block Candidate Sites*, ZDNET NEWS, November 7, 2000, at <http://zdnet.com.com/2100-11-525405.html?legacy=zdn> (last visited Mar. 12, 2002).

¹⁹ *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992). See also *Martin v. Struthers*, 319 U.S. 141 (1943) (holding that the freedom of speech protected by the First Amendment not only covers the freedom to disseminate information, but also to freely receive it).

²⁰ Note that this is because CIPA requires filtering of material that the library determines is harmful to minors; pornography, while harmful to minors, is still protected by the First Amendment. Therefore, the measure is content-based. See *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41 (1986).

²¹ *Mainstream Loudoun v. Board of Trustees of Loudon County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998).

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One pre-CIPA case held that installing filtering software on library computers violates the First Amendment. In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, a U.S. District Court in Virginia held unconstitutional a library's policy of using filtering software to block pornography in order to avoid sexual harassment.²² In holding that the policy was not necessary to further any compelling government interest, the court noted that the defendant's expert was only able to find three libraries which had allegedly experienced problems with unfiltered Internet access. The court wrote, "[t]here is no evidence . . . establishing that any other libraries have encountered problems; rather, [expert witness David] Burt's own statements indicate that such problems are practically nonexistent."²³

A parallel can be drawn between *Mainstream Loudoun* and CIPA that calls into question whether the government's interest is compelling. In *Mainstream Loudoun* there was no evidence that anyone had tried to access pornography in a library before filters were installed. Similarly, CIPA's legislative history gives no indication that even a single person tried to access child pornography from a library computer, and even if such evidence were offered, it would have to meet the strict scrutiny threshold of creating a compelling interest in crafting legislation.²⁴ While there is certainly a government interest in protecting children from the dangers of the Internet, the *Mainstream Loudoun* decision suggests that the danger does not rise to the level of a compelling interest when there is no evidence that the harm the government seeks to avoid has yet occurred.²⁵

²² *Id.*

²³ *Id.* at 566.

²⁴ See *Loudoun*, at 564-65 (stating that content-based limitations on speech must be shown to be a compelling governmental interest).

²⁵ There can be no doubt that children have, on occasion, downloaded pornography on library computers. There is a mathematical principle applicable to this kind of statistical justification: as the possibilities approach infinity, the probabilities approach one. In other words, with around 11 million individuals (see generally notes 28-31 *infra* and accompanying text) using library computers as a primary means of Internet access, improprieties will no doubt be found. This kind of abstract probability is not illegal; it creates no greater a government interest than the government's interest in outlawing the

Even if the interest is compelling, it is unlikely that installing Web content filtering software is the least restrictive means of serving that interest. Congress' own COPA Commission did not recommend installing filtering software on library computers and instead merely suggested that libraries adopt acceptable use policies and disseminate information to educate families about the Internet's risks.²⁶ Clearly, when Congress chose a means that is more restrictive of speech than the one recommended by its own expert commission, it has not attempted to use the least restrictive means. Therefore, CIPA violates the First Amendment.

IV. LOW-INCOME INDIVIDUALS²⁷

While Internet access in libraries is a convenience for some, for those who cannot afford Internet access at home, it is a much-needed source of access to the Information Superhighway. Many people who cannot afford Internet access at home rely on library computers as a source of Internet access. As of August 2000, only 12.7 percent of households making under \$18,000 per year had personal Internet access, but 18.9 percent of individuals in that range used the

color red for vehicles because statistics suggest red cars are involved in more accidents. Although the government's intent is sympathetic, it cannot manufacture a compelling need by weighing probabilities.

²⁶ See *supra* notes 13-16 and accompanying text.

²⁷ The calculations in this section are meant to show the general magnitude of the low-income population that stands to face CIPA's negative effects. Because of differences in how government agencies break down population by income—the Census uses “total income of under \$17,500” as its lowest category while the Department of Commerce uses “total income of under \$18,000”—this is not a mathematically precise calculation. However, because the individuals excluded by the difference fall in the \$17,500-\$18,000 range, those individuals would be more likely to have computers than the ones making under \$17,500. Therefore, in estimating that one in five individuals in the under \$17,500 category accesses the Internet from a library (*see infra* note 31 and accompanying text), the numbers are more likely to be underrepresented than overrepresented because the 20% statistic was calculated using Department of Commerce numbers that included homes making between \$17,500 and \$18,000.

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Internet.²⁸ One in five individuals in this economic range who access the Internet from some place other than the home uses a library.²⁹

Using Census data, it is possible to calculate an approximate figure of how many low-income individuals access the Internet from a library. According to the most recent census, in 1999, about 21.3 million households had a total money income of under \$17,500.³⁰ As there are about 2.6 individuals per household,³¹ this equals roughly 55.8 million people living in these households. If one in five of them access the Internet from a library, about 11.2 million people living in households with a total money income of under \$17,500 rely on libraries for Internet access. As the importance of the Internet increases in our society, more low-income families will require Internet access. As they do so, the number of low-income families looking to libraries for Internet access will increase. The number of low-income individuals *potentially* affected is therefore much greater than the roughly 11 million individuals *immediately* affected.³²

V. THE FOURTEENTH AMENDMENT

Installing Web content filters on library computers might violate the Fourteenth Amendment's equal protection clause by having a

²⁸ *Falling Through The Net: Toward Digital Inclusion* (U.S. Dep't of Commerce, Nat'l Telecomm. & Info. Admin., Oct. 2000), available at <http://www.ntia.doc.gov/ntiahome/fttn00/contents00.html>. (last visited Mar. 21, 2002). It is interesting to note that in the \$35-50,000 range, while 46.2 percent of households had computers, only 46.5 percent of individuals used the Internet.

²⁹ *Id.* Compare this statistic to the \$35-50,000 range, where over 60 percent have a computer in their workplace, and to the \$75,000+ range, where only 6.4 percent of people used library Internet access, corresponding roughly to one in every fifteen or sixteen people.

³⁰ See U.S. Census Bureau, *Selected Characteristics of Households by Total Money Income in 1999*, available at http://ferret.bls.census.gov/macro/032000/hhinc/new01_001.htm (figure reached by adding columns up to \$17,499) (last visited Apr. 5, 2002).

³¹ U.S. Census Bureau, *Households by Type and Selected Characteristics: 1998*, available at <http://www.census.gov/population/socdemo/hh-fam/98ppla.txt> (last visited Mar. 21, 2002).

³² Presumably, all of the estimated 55.867 million people in the under \$17,500 income range are potentially harmed. See *id.* and accompanying text.

disparate impact on the 11 million low-income individuals who rely on libraries for Internet access. On March 20, 2001, the ACLU filed a lawsuit asserting violations of both the First and Fourteenth Amendments; the Fourteenth Amendment arguments are rooted in equal protection.³³

It is likely the appropriate standard of review under the Fourteenth Amendment will be the low-tier scrutiny of the rational basis test. A higher level of scrutiny is not available because although the impoverished have occasionally been viewed as a protected class within the meaning of the Fourteenth Amendment,³⁴ a law neutral on its face will not be held to violate the Equal Protection clause unless a discriminatory intent can be shown.³⁵ Nevertheless, the law must still rationally serve a legitimate purpose.³⁶

While in theory there is a rational basis for installing flawed but occasionally effective filtering software and protecting children, in practice, if enough of the Web sites that should be blocked manage to get through, the requirement ceases to be rational. The COPA Commission's evaluation of filtering software found that, at best, software configured to the specific needs of an end-user working with a URL list of blocked sites had, on a scale of 1 to 10 with 10 being the most effective, an effectiveness rating of 7.4.³⁷ Using text-based analysis, the effectiveness dropped to 5.4.³⁸ Since most Web content filtering software relies on a combination of the two (filtering some sites by URL and some by text), the average effectiveness of

³³ See "As ACLU Prepares Legal Challenge to Mandatory Internet Blocking, Consumer Reports Says Products Fail Test," American Civil Liberties Union, Feb. 14, 2001, at <http://www.aclu.org/news/2001/n021401b.html> (last visited Jan. 30, 2002).

³⁴ See *generally* Tate v. Short, 401 U.S. 395 (1971) (finding a violation of the Equal Protection clause where a state required traffic fines to be paid by those who could afford it but jailed the indigent). On remand, the Texas Court of Criminal Appeals further remanded to a county court, noting that Texas law had changed to allow defendants unable to pay the fines to pay over time, or on a deferred basis, and holding that such a change made the law constitutional. *Ex Parte Tate*, 471 S.W.2d 404 (Tex. Crim. App. 1971).

³⁵ See *Washington v. Davis*, 426 U.S. 229, 239-40 (1976) (holding that the Equal Protection clause was not implicated by a disparate racial impact, absent discriminatory intent).

³⁶ *Id.* at 246.

³⁷ See Final Report of the COPA Commission, *supra* note 14.

³⁸ See *id.*

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the two methods is 6.4.³⁹ This means that three or four times out of ten the software failed to deny access to the sites it was *supposed* to filter.

Given that filtering software generally allows one-third of all inappropriate links to be viewed normally, someone performing a Web search for banned material in a library would be presented with several working links to banned material in every search. Search engines generally display ten links at a time; statistically, three or four links on each page of a successful search for child pornography would be active and would actually lead to obscene material, even when the filters are enabled and fully functional. If the first link did not work, a user would probably just click another link until he or she clicked on one that the software failed to filter—meaning the software’s effect would be to slow down the search for pornography by a few seconds. Furthermore, there is no current measure of how often permissible sites are incorrectly filtered out, but there is ample empirical evidence that indicates they are.⁴⁰ Finally, there is still no indication that there actually *are* individuals downloading pornography from library computers. Taken as a whole, CIPA is a statute that restricts speech for approximately 11 million people in order to take a minimally effective step toward solving a problem that does not exist.⁴¹ Whether a court applying the rational

³⁹ It is erroneous to think that the effect of using two filters is cumulative. This is because the failure rates on server-side filtering are structure-specific (i.e., relate to how links are accessed by servers) while the ones on text-side filtering are content-specific (i.e., relate to what is written on the page). Because they filter for different things, their effect is not strictly cumulative; the sites filtered out by server-side technology are, in fact, most likely to be those that would not be filtered out by text-based technology. Otherwise, there would be no need to put their name in the list of filtered-out sites; the text-based filtering would catch them. The filters, though they both operate on the content seen by the end user, will generally not do so in coordination.

⁴⁰ See *supra* notes 19-20 and accompanying text.

⁴¹ An analogy is in order to illustrate just how poor this 64% effective measure really is. Effectiveness is judged per link; that is, 64% of the links that should be blocked by the software will be. However, this means that in any given search, 36% of the links that should be blocked will *not* be. Trying to stop pornography from flowing through a 64% effective filter is like trying to catch water in a sieve where 36% of its surface is open—more water will flow through the holes and you’ll still end up with an empty sieve that didn’t catch anything. To think that anyone brazen enough to access child pornography in a public space will be deterred by one or two blocked links is naive. Therefore, to say that a filter is 64%

relationship test will find this sort of legislation “rational” is an open question.

Arguments for higher levels of scrutiny exist. Because there is also a racial gap in Internet usage (a higher percentage of whites use the Internet than do blacks or Hispanics),⁴² it is possible that more of the low-income households without Internet access are minority households as well.

VI. PENDING LEGAL CHALLENGES

So far, two groups have brought suit to invalidate CIPA. On March 20, 2001, the American Library Association (hereinafter “ALA”) filed a complaint in a federal court in Pennsylvania seeking declaratory and injunctive relief.⁴³ On the same date and in the same court, the American Civil Liberties Union (hereinafter “ACLU”) filed a complaint seeking the same remedies.⁴⁴

The plaintiffs in the ALA complaint are seven library associations from across the country, two groups that give money to libraries (described as “library patrons”), and two Pennsylvania individuals.⁴⁵ The complaint alleges that CIPA violates the First Amendment by restricting speech;⁴⁶ that the inadequacy of filtering software makes compliance impossible;⁴⁷ that conditioning funding for library services on filtering technology is inconsistent with the First

effective in blocking sites is far from saying it is 64% effective in stopping access to porn. In general, when search engine users are confronted by a link that will not work, they just try another link.

⁴² In August 2000, 50.3 percent of whites accessed the Internet, compared to 29.3 percent of blacks and 23.7 percent of Hispanics. In addition, 46.3 percent of white households had Internet access, compared to 23.5 percent of black households and 23.6 percent of Hispanic households. See *Falling Through The Net: Toward Digital Inclusion*, *supra* note 28.

⁴³ The suit was filed in the Eastern District of Pennsylvania. The complaint, *American Library Association, Inc., et al v. United States*, available at <http://www.ala.org/cipa/cipacomplaint.pdf> (last visited Jan. 30, 2002).

⁴⁴ The complaint, *Multnomah County Public Library, et al. v. United States*, available at <http://www.aclu.org/court/multnomah.pdf> (last visited Jan. 30, 2002).

⁴⁵ See *supra* note 43, at 3.

⁴⁶ *Id.* at 3.

⁴⁷ *Id.* at 4.

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Amendment role of libraries as public fora;⁴⁸ and that giving libraries unlimited discretion in when to disable (or not disable) filters invites widespread discrimination and creates a chilling effect on speech.⁴⁹

In addition, the plaintiffs in the ACLU case are seven library associations from across the country, six individuals, and eight non-obscene, non-pornographic Web sites that are blocked by widely used filtering software.⁵⁰ The library plaintiffs argue that the inadequacy of filtering software makes compliance impossible⁵¹ and that the individual library plaintiffs would suffer varying economic burdens (either by complying with CIPA and being forced to buy software, or by not complying with CIPA and being forced to pay more for telecommunications services).⁵² The individual citizen plaintiffs allege that many individuals rely on the library as their only means of Internet access;⁵³ that being required to establish “bona fide research purposes” to have filters lifted creates a chilling effect that harms their right to privacy;⁵⁴ and that it infringes on their First Amendment rights.⁵⁵ The Web site plaintiffs argue that CIPA violates their First Amendment right to speak in a public forum.⁵⁶

VII. WHAT LIBRARIES CAN DO

Libraries that wish to continue receiving E-rate discounts while CIPA is being challenged in the courts should adopt policies that will minimize the statute’s constitutionally questionable effects and at the same time implement constitutionally sound and effective measures of restricting access to offensive and illegal material on public

⁴⁸ *Id.*

⁴⁹ *Id.* at 5.

⁵⁰ *See id.* Although the Web sites are non-pornographic and non-obscene, some might feel they are inappropriate for children. The Web sites include the Planned Parenthood Web site, Safersex.org and the Naturist Action Committee Web site.

⁵¹ *Id.* at 28, paragraph 125.

⁵² *Id.* at 29-41, paragraphs 132-79 inclusive.

⁵³ *Id.* at 41, paragraph 181 (arguing restriction would prevent many individuals from receiving information at all).

⁵⁴ *Id.* at 42, paragraph 183.

⁵⁵ *Id.* at paragraph 184 (asserting that library patrons would have to surrender their privacy when trying to access constitutionally restricted speech).

⁵⁶ *Id.* at 51-53, paragraphs 211-21 inclusive.

computers. Opposition to CIPA is by no means opposition to its goals; no matter what happens to CIPA in the courts, libraries should look to protect children while they are online.

Installing filters is unquestionably required by the statute.⁵⁷ However, the statute is silent on how those filters should work. Libraries should seek out packages that allow shutting off text-based filtering and rely on URL filtering alone. While overall fewer offensive sites will be filtered out by the software, fewer sites will be *incorrectly* filtered as well; the overall effectiveness of the filter will increase and the negative effect on speech will be greatly lessened. This complies with the statute's filtering requirement, as the statute, after all, does not and could not require perfection from the filtering software.

Another problem with CIPA is that requiring adults to request that filters be suspended on material inappropriate for minors creates a chilling effect by requiring adults to ask librarians—members of their community—to permit access to obscene material. Rather than disabling filters for adult use, as the statute permits, a library could set up separate adult terminals. In the alternative, by collecting the date of birth of individuals with a library card and requiring a card number to access terminals, libraries could have the software automatically suspend filters on content inappropriate for minors when an adult is using the terminal. This complies with the statute, as it does not require that material harmful to minors be filtered out when adults are using the terminal.⁵⁸

The statute invites libraries to define additional content they feel is inappropriate for minors and block it with the filtering software.⁵⁹ Local governments are free to criminalize the display of certain types of content to minors as they see fit; it is not the role of the library to do so. Libraries should resist this invitation to “play legislature.”

If at all possible, libraries should supervise children using computers and should make visible a policy of turning over to the

⁵⁷ See *supra* note 2 and accompanying text.

⁵⁸ See *supra* note 8.

⁵⁹ *Id.*

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police any information that suggests illegal content was accessed on a library computer. If a library cannot afford to pay someone to supervise the Internet use of minors, the American Library Association's recommendation that terminals be placed in highly trafficked areas would have a similar effect.⁶⁰ Neither minors accessing harmful material or adults accessing child pornography are likely to be so brazen as to do it in plain sight with others watching their screen, particularly not if the library has a policy of reporting such conduct and the software took their library card number when they started using the terminal. If the terminals cannot be placed in a highly trafficked area, simply arranging them in a circle could have a substantially similar effect. In addition, librarians could check the browser's history to see if harmful material was accessed and turn in individuals violating the already-existing laws against child pornography and obscenity.

CONCLUSION

Perhaps the single most disturbing thing about CIPA is that Congress appointed a commission to study methods of protecting children from the Internet's dangers, waited two years for the commission's report, and four months after receiving it, enacted legislation that ran completely counter to the commission's recommendations. The Congressional record gives no clues as to why Congress decided it knew more than its appointed experts. From October 18, 2000 to December 18, 2000, the Web site Vote.com ran an online poll asking "[s]hould Congress require schools and libraries to use Internet filters?" Of the 1,392 participating voters, 830 (60 percent) said they should.⁶¹

Congress cannot abdicate policymaking to online polls or public opinion, particularly when the policies that are popular are often unconstitutional. Most people do not understand the technology behind Internet content filters; as evidenced in Congress'

⁶⁰ See *supra* note 43.

⁶¹ See <http://www.vote.com/vResults/index.phtml?voteID=18158984&cat=6834297> (last visited Jan. 30, 2002).

appointment of a commission to have content filters researched and explained. The logical, if not inevitable, conclusion is that Congress, presented with the commission's report, said it was protecting our children and then voted to protect their jobs by surrendering the responsibility of legislation to public opinion.

The importance of ensuring unfiltered access to the Internet for all Americans cannot be overestimated. Ineffective filtering software strips ideas from the stream of discourse and engineers ignorance. As the ALA wrote on its Web site:

If the same standards used in online filters were applied to a library's books and not just its Web, the shelves would practically empty. Filtering technology is not subtle enough to distinguish between *Hustler* and Shakespeare. Filters work by spotting words, not by making judgments about decency. The word "sex"—whether in a medical context, a law book or a great poem—is all a filter needs to "see" to block the page or site. Emptying the Internet the way these filters would empty a library is not "better than nothing" for our children. It deprives them of much of the world's great science, art and politics.⁶²

CIPA harms children by depriving them of ideas and harms some First Amendment speakers by depriving them of a forum. CIPA harms low-income individuals by limiting their primary means (library use) of accessing online information in violation of their Fourteenth Amendment rights. Finally, CIPA harms libraries by forcing them to choose between offering restricted Internet access to the community and not being able to afford Internet access at all.⁶³

CIPA, it would seem, only helps Congress. Instead of enacting sensible online policy, Congress chose to utilize CIPA as a public relations tool.

⁶² A Message from the American Library Association, available at <http://www.stlib.state.nm.us/libraryservices/develop.CIPAala.pdf> (last visited May 3, 2002).

⁶³ See *supra* note 43.