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FAMILY MOVIE ACT OF 2004

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

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FAMILY MOVIE ACT OF 2004

THURSDAY, JUNE 17, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:07 a.m., in Room 2141, Rayburn House Office Building, Hon. Lamar Smith (Chair of the Subcommittee) presiding.

Mr. SMITH. The Subcommittee on Courts. the Internet, and Intellectual Property will come to order.

I will recognize myself for an opening statement, and the recognize other Members who wish to give opening statements as well.

Let me say to you all the I don't know quite how to explain why only one room in the Rayburn Building has had their air conditioning system broken, but apparently we do not have air conditioning in this room, and of course, anybody who wants to, can feel free to take off their jacket if it makes them more comfortable. Like I say, to me, I thought it was a unified air conditioning system, and why one room is lacking, I do not know.

Let me recognize myself for an opening statement.

Today we will hear testimony on legislation that is of vital importance to families across America. It helps ensure that mothers and fathers can provide a wholesome home environment for their children. A generation ago there was not nearly the amount of sex, violence and profanity on television and in movies that there is today. But I still remember how my own parents dealt with it. They had a small box with a switch on it, that they manually clicked to mute the television's audio if they felt it was inappropriate, or they would get up and turn the television off for a moment or two.

These days I don't think anyone would even consider buying a DVD player that doesn't come with a remote control that can be used for the same purpose. Yet, there are some who would deny parents the right to protect their children from sex, violence and offensive language on television.

Raising children may be the toughest job in the world. Parents need all the help they can get, and they should be able to determine what their children see on the screen. Yes, we parents might mute dialogue that others deem crucial, or we might fast forward over scenes that others consider essential, but that's irrelevant. Parents should be able to mute of skip over anything they want if they feel it's in the interest of their children. And as a practical

matter, parents cannot monitor their children's viewing habits all the time. They need an assist.

Companies developing electronic tools to help parents are spending money paying lawyers rather than providing services to families.

It is time for this Committee to act and let parents decide what their children watch. Remote control technology is not some form of evil. If you look at a DVD or a VCR before and after technology has been used to mute or fast forward over offensive material, there would be absolutely no difference in the product. It has been spliced, diced, mutilated or altered. The director's work is still intact. No unauthorized copies have been distributed. No copyright has been violated.

I want to emphasize that the legislation allows the use of technology only for private home viewing. There is no sale of DVD or VCR tapes. No commercialization is involved. Surely a parent can decide in the privacy of their own home what their child can watch on television.

I am pleased to see that the Register of Copyrights agrees that what some companies are doing today is legal under existing law. While she may feel that this makes additional legislation unnecessary, I believe that the financial burden of the ongoing litigation that has been imposed on companies like ClearPlay, that are operating legally, does make legislation necessary. Moreover, there is no certainty that all courts will agree, so the only way to protect the right of parents is in fact to pass legislation.

Let me also point that this issue has been simmering for 18 months since the first lawsuits were filed. I had hoped that the parties would reach a negotiated solution, but none has been forthcoming yet.

Yesterday I introduced H.R. 4586 to resolve this issue by ensuring that parents who skip over mute—skip over or mute content do not face liability under existing copyright or trademark law. Apparently legislation is necessary to end the unnecessary litigation. The Chairman of the Judiciary Committee and I are prepared to move this legislation on a stand-alone basis, whereby attaching it to another legislative vehicle to protect the right of parents to shield their children from violence, sex and profanity.

That concludes my opening statement, and the gentleman from California, Mr. Berman, the Ranking Member is recognized for his.

Mr. BERMAN. Thank you, Mr. Chairman. Before I give my opening statement, I just want to point out the irony of proposing legislation that the Register of Copyrights says will legalize that which is already legal in order to save one company some litigation expense, and the parallel of that. Perhaps we can just do away with the judicial system, leave the court clerks so that the lawsuits can be filed, and Congress decides how we think the litigation should come out, and then propose and pass legislation to produce that outcome.

I'm opposed to the legislation before us today. Maybe this hearing will convert me, but I doubt it. I have too many concerns about the nature and implications of this bill. Clever redrafting might address some of those concerns, but nothing can address my concerns about its basic premise.

While I believe that parents should be able to protect their children from exposure to media they find offensive, I don't believe the legislation before us today will advance this goal. In some ways it may have the opposite effect. This legislation sends the wrong message to parents, namely that technology can fulfill parental responsibilities. In our modern world parents cannot control what their kids see and hear every minute of the day. Parents must, as Professor Heins testified on May 20th at our earlier hearing on this subject, parents must equip their children for exposure to offensive media, not just turn on the TV or movie filter and leave the room. Technology should not become an excuse for avoiding the hard work of parenting.

To be clear, I don't oppose the ClearPlay technology itself. Rather, I'm opposed to legislation that benefits one particular business over its competitors and abrogates the rights of copyright owners and trademark holders in the process. The marketplace is the proper forum for resolving this business dispute, not Congress. Congress should focus on encouraging the relevant copyright owners and trademark holders to work out a licensing deal for ClearPlay technology, not roil the waters with legislation that verges on a bill of attainder.

Unfortunately, the legislative activity on this issue appears to have already hampered the industry negotiations. I understand that following the May 20th hearing, ClearPlay presented new demands that represented a significant departure from its previous position in the negotiations. In other words, the positions of the parties, which had been fairly close before the May 20th hearing, are getting farther apart as the prospects for legislation improve.

Since neither ClearPlay nor any of its competitors have been found liable for copyright or trademark infringement, this legislation addresses a hypothetical problem. While a Federal District Court has before it a case raising these issues—a case I might add initiated by one of the technology companies, not by one of the copyright holders—it has not yet issued even a preliminary ruling. Furthermore, the Register of Copyright will apparently testify that ClearPlay is likely to succeed. In other words, there is no problem for Congress to correct. While legislation addressing hypothetical problems, like the law protecting fast food restaurants against obesity liability, is all the rage these days. It is not a trend with which I agree.

Most importantly, Congress should not give companies the right to alter, distort and mutilate creative works, or sell otherwise infringing products that do functionally the same thing. Such legislation is an affront to the artistic freedom of creators and violates fundamental copyright and trademark principles. Where the underlying issue, the distinction of proponents of this bill, is this technology doesn't alter or mutilate the fixed product, it just filters out the material that the manufacturer of the technology wants to filter out, that that's a distinction which—that should fundamentally make a difference, doesn't make real sense to me.

The sanitization of movies allowed by this legislation may result in the cutting of critically important scenes. The legislation legalizes the decision of a ClearPlay competitor to edit the nude scenes from Schindler's List, scenes critical to conveying the debasement

and dehumanization suffered by concentration camp prisoners. A close reading of the bill reveals that it will also legalize editing that makes movies more offensive, more violent and more sexual.

Just as the legislation allows nudity to be edited out, it allows everything but nudity to be edited out. For instance, the legislation allows some enterprising pornographer to offer a filter that edits the movie Caligula down to its few highly pornographic scenes and endlessly loops these scenes in slow motion. The legislation would also appear to legalize filters that make imperceptible the clothes of all actors in a movie. Do the bill sponsors really want to legalize all-nude versions of Oklahoma and Superman? The types of edits legalized by this bill are limited only by editorial imagination. Anti-tobacco groups could offer a filter that strips all movies of scenes depicting tobacco use. Racists might strip Jungle Fever of scenes showing interracial romance, perhaps leaving only those scenes depicting interracial conflict. Holocaust revisionists could strip World War II documentaries of concentration camp footage. Fahrenheit 9/11 could be filtered free of scenes linking the houses of Bush and Fahd.

Since the bill also applies to television programming, a number of troubling consequences may result. Digital video recorder services like TiVo, which enable their subscribers to digitally record TV shows for time-shifting purposes, might offer filters geared to those programs. This is not farfetched. At least one DVR service has already tried to filter out all commercials. In the future they might offer filters that cleanse news stories of offensive content, for instance, by editing out comments critical of a beloved politician. In fact, under the bill, the DVR service could unilaterally engage these filters without the permission of the TV viewer, and thus might choose to filter out stories helpful to a corporate competitor or critical of a corporate parent.

I know these outcomes are opposite to the intent of the bill's sponsors, but they are the unavoidable outcomes nonetheless, and these are just a few of the problems that are apparent after just a couple of days of looking at this issue.

I hope the Subcommittee will not rush to legislate in this area and will allow the marketplace to address the legitimate concerns of parents.

I yield back, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Berman. I actually like several of your ideas, particularly the one about editing criticism of popular politicians, but we can save that for another time.

Are there any other opening statements by Members? The gentleman from Florida is recognized for an opening statement.

Mr. KELLER. Thank you, Mr. Chairman. First and foremost, I want to thank all the witnesses for taking time out of your busy schedules to be here.

Just as Berman started to make sense, he trashed my Personal Responsibility in Food Consumption Act that banned lawsuits against fast food restaurants, which I may add passed the Congress by a two-thirds vote, and supported by 9 out of 10 of the American public. If ClearPlay technology had existed and had silenced Berman's remarks on that issue, he almost could have had my vote, I suspected.

But this is an interesting issue that puts me directly in the cross-hairs of two competing interests from the area that I represent, Orlando, Florida, which is a very family-oriented youthful community that prides itself on the number one family vacation destination of the world, but is also home to companies such as Disney and Universal, which do have substantial movie-making interests, and so I feel a little bit like a fur sales at an animal rights convention on this issue. [Laughter.]

And in light of the fact that this issue puts me squarely in the cross-hairs of two very friendly groups to me, I appreciate the Chairman holding multiple hearings on this issue. I was just thinking this morning I don't have enough stress in my life, so it's good to keep dealing with this over and over.

I stand here today—and I had to get that full disclosure out of the way in the interest of straight talk—though as someone who is very open-minded on this issue, and appreciates very much the witnesses coming here. I certainly, on the one hand, understand directors and movie companies not wanting to have scenes which they believe are critical to them, edited out, that they may think change the focus of the movie. I also very much appreciate the technology used by companies like ClearPlay that takes movies and makes them all family friendly. I think it is am amazing technology. I think that the Nobel prize should go to people who give our community amazing technology that changes our lives like the George Foreman Grill and stadium seating in movie theaters and——[Laughter.]

—technology that makes things family friendly.

So I really appreciate both sides of this issue and look forward to getting better educated on them, and thank the witnesses again for coming here today.

Mr. Chairman, I will yield back.

Mr. SMITH. Thank you, Mr. Keller.

Are there other Members who wish to make opening statements? The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Mr. Chairman, I won't make an extensive statement. I am looking forward to hearing as much of the testimony as I can, and I also wanted to mention how pleased I am to see Mr. Valenti, since he has announced his retirement, and I think it is enormously gracious of him to come by even though he is going on to brighter fields to share his views on this, certainly along with the other witnesses, but thank you very much, Jack.

Mr. VALENTI. Thank you, Ms. Lofgren.

Mr. SMITH. We will proceed, and I will introduce our first witness today who is the Honorable Marybeth Peters, the Register of Copyrights for the United States. Ms. Peters is the author of "The General Guide to the Copyright Act of 1976," and has lectured extensively on copyright law. She received her undergraduate degree from Rhode Island College and her law degree with honors from George Washington University Law Center.

Our next witness is Dr. Amitai Etzioni, who was named the first University Professor at the George Washington University, where he is the Director of the Institute of Communitarian Policy Studies. From 1987 to 1989 he served as the Thomas Henry Carroll Ford

Foundation Professor at the Harvard Business School. Dr. Etzioni is the author of 24 books.

The next witness is Jack Valenti, who has served as the President and Chief Executive Officer of the Motion Picture Association of America for the past 38 years. Born in Houston, Texas, Mr. Valenti was the youngest high school graduate in the city, and became a highly decorated serviceman while serving in the Army Air Corps in World War II. He has a BA from the University of Houston and an MBA from Harvard.

Our last witness is Penny Nance, who is President of the Kids First Coalition, a nonprofit organization that works to educate Congress, State and local officials, and the media on a variety of issues relating to children. Kids First Coalition works to promote and encourage traditional families, as well as to help those in crisis pregnancies.

Welcome to you all. As you know, we have your written statements. We ask that you limit your testimony to 5 minutes, and without objection the complete testimonies of all witnesses will be made a part of the record.

Ms. Peters, before we begin with you, I'd like to take a minute to recognize Jack Valenti.

Jack, this may or may not be your last time to testify before a congressional Committee. I hope it's not your last, but if it is, I just want to thank you for your service to our country, for your service to your profession, whom you have served so well, as I mentioned a while ago, for 38 years. You have brought to the task intelligence, wit, integrity, credibility and even charm. Those are examples for all of us to follow, and we hope that even though you may go on to other endeavors, that certainly your example will continue with us to emulate.

I'm tempted to quote—I think it was Bob Hope who said "Thanks for the memories." And we certainly, if you do retire in the near future, we'll remember all of those good memories and we will remember them for a long time to come. So we appreciate your being here.

Ms. Peters, we'll begin with you.

STATEMENT OF THE HONORABLE MARYBETH PETERS, REGISTER OF COPYRIGHTS, COPYRIGHT OFFICE OF THE UNITED STATES, THE LIBRARY OF CONGRESS

Ms. PETERS. Mr. Chairman, Representative Berman, Members of the Subcommittee, I am pleased to appear before you to discuss H.R. 4586, the "Family Home Movie Act of 2004."

Litigation addressing whether the manufacture and distribution of software that automatically mutes certain sounds and skips past certain images in a motion picture when a consumer plays a DVD of the motion picture in the privacy of his own home is pending in Federal Court in Colorado. Although I'm reluctant to express a view on that pending litigation, it's necessary for me to do that in order to address the issues related to the merits of the bill.

The Family Movie Act would provide that it is not a copyright infringement for the lawful possessor of an authorized copy of a motion picture to make imperceptible limited portions of audio or video content of the motion picture in the private home viewing of

an individual. It would further provide that the use of technology to make such audio or video content imperceptible is not an infringement.

As I understand the technology, it involves software that instructs a DVD to mute limited portions of the audio content or to fast forward past limited portions of the audio-visual content of a motion picture in order to avoid exposing the viewer to language or images that the viewer might find offensive. To qualify for the exception no fixed copies of the altered version of the motion picture may be made.

I understand there's a scrivener's error that will be protected—that will be corrected, rather, in the version that was introduced yesterday. The requirement that no fixed copy of the altered version may be made is supposed to apply to both the act of making the content imperceptible and the use of technology. The way it's worded in the bill that was introduced yesterday, it would apply only to the use of technology and not to the conduct.

The conduct that takes place in the context of individuals and families making private performances of movies in their homes. The legislation basically says that this applies only to private home viewing, and it would have defined, as the version I saw was, "private home viewing" as: viewing in a household by means of consumer equipment or services that are operated by an individual in that household and that serve only that household. My written testimony describes the bill as permitting private home viewing and as containing that definition.

The bill, as actually introduced, doesn't use that term, but the concept of private home viewing remains in the bill, which now uses that definition to describe the context in which the conduct is permitted.

I believe that both the conduct and the technology should be lawful, but I also believe that such conduct is already lawful.

For that reason and for others, I oppose enactment of this legislation. Should this conduct be permitted? For me it's a close call. We can all agree that someone watching a movie on a DVD has the right to press the mute button and to fast forward to avoid hearing or seeing parts of the movie. On balance I believe that a technology that basically automates that process for the consumer serves a beneficial purpose.

I do, however, have a number of reservations which I elaborate on in my written testimony. I will mention only one this morning. Permitting a product that results in altered performances of a motion picture certainly raises questions about whether the moral rights of the directors have been violated. Because this alteration consists of only bypassing limited portions of the motion picture in context with a private performance, where that altered performance is desired by the person watching the movie, I think there is no violation of moral rights.

But that is not to say that the creator of the motion picture does not have a legitimate artistic reason to complain, and I'm very sympathetic to those complaints.

In any event, it seems clear to me that under existing law this conduct and these products are lawful. I believe that in order to violate the right to prepare derivative works, that the derivative

work must be fixed, that is, an actual copy of the derivative work must exist. According to my understanding of the technology, there is no fixation of a derivative work, and if that's true, there can be no infringement.

I admit that my reading of the statute is at odds with what the 1965 Report of the Register basically recommended, and with the legislative history. However, I can't get to where they wanted to be with the language of the statute. I believe that fixation is required.

I do, however, with regard to new technology, see that looking at the derivative work right and what it should be and what its scope should be in light of new technology is something that we probably should in fact be doing, and I basically hope that we have an opportunity to do that.

Because I see that my time has run out, let me just quickly say that with regard to why I oppose it, I don't see a need for it. I think the law is already clear. Second, I see little risk that the law will find that this conduct is unlawful, and I'm not in favor of enacting legislation to fix a nonexistent problem. I'd rather take this opportunity to look at what new technology may cause with regard to real life problems.

I'd like to end by saying that I have a concern that basically with where we are, the pendency of this legislation will make the settlement in the Colorado litigation less likely, and enactment certainly will remove all incentive for the companies to work together to work out a negotiated settlement.

If you enact this legislation, please include a sunset provision that will expire in two or 3 years. That will provide continuing incentives for motion picture companies and companies that produce these products to negotiate and come up with arrangements that provide both family friendly versions of movies to the public and give directors and motion picture studios more control over how their works are presented to the public. If the negotiations don't work, then you can always renew the Act.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS

Mr. Chairman, Representative Berman and Members of the Subcommittee, thank you for inviting me to appear before the Subcommittee to discuss H.R. 4586, "The Family Movie Act."

The Family Movie Act would make it lawful for a person who is watching a motion picture on a DVD in the privacy of his or her own home to use software that filters out certain types of content that the person would prefer not to see or hear. As you pointed out at a hearing last month, Mr. Chairman, such software can be used by parents to assist them in preventing their children from seeing or hearing objectionable content by muting the sound or fast forwarding past objectionable material. What material is to be filtered out is determined by the provider of the software, but such software can include options that give the user the ability to select categories of material that the user prefers not to see or hear.

I do not believe that such legislation should be enacted—and certainly not at this time. As you know, litigation addressing whether the manufacture and distribution of such software violates the copyright law and the Lanham Act is currently pending in the United States District Court for the District of Colorado. A summary judgment motion is pending. The court has not yet ruled on the merits. Nor has a preliminary injunction been issued—or even sought. At the moment, providers of such software are free to sell it and consumers are free to use it. If the court ultimately rules that the making or distribution of the software is unlawful—a ruling that I believe is unlikely—the time may then be opportune to consider legislation. But meanwhile, there is every reason to believe that the proposed Family Movie Act is a solution to a problem that does not exist.

It is difficult to address the merits of this legislation without addressing the merits of the litigation in Colorado—something that I would prefer not to do, in part because the litigation remains at a very early stage. The Copyright Office generally expresses its views on individual copyright cases only in those cases that involve important questions of copyright law and policy and in which an erroneous ruling would create precedent harmful to the appropriate balance between the rights of copyright owners and the needs of users of copyrighted works. For example, I have spoken out on issues relating to copyright infringement on peer-to-peer networks while litigation involving those issues has been pending because I believe that mass infringement on such networks poses an unprecedented threat to creators and copyright owners. In contrast, I do not believe that the litigation relating to the subject matter of this legislation implicates such issues, and I have no desire to be drawn into the Colorado litigation.

Nevertheless, I cannot avoid offering some views on the current state of the law, because my recommendation against the enactment of the Family Movie Act is based in part on my conclusion that the conduct that it is intended to permit is already lawful under existing law.

POLICY CONSIDERATIONS

Let me start with a proposition that I believe everybody can agree on. I do not believe anybody would seriously argue that an individual who is watching a movie in his or her living room should be forbidden to press the mute button on a remote control in order to block out language that he or she believes is offensive. Nor should someone be forbidden to fast-forward past a scene that he or she does not wish to see. And certainly parents have the right to press the mute and fast-forward buttons to avoid exposing their children to material that they believe is inappropriate.

Does that mean that parents should be able to purchase a product that makes those decisions for them—that automatically mutes certain sounds and skips past certain images that the provider of that product believes parents would not want their children to hear or see? What if the parent is able to determine what categories of material (e.g., profanity, nudity, violence) should be blocked, and is willing to trust the provider of the filtering product to make the ultimate judgments about what material in a particular movie falls into the selected categories?

It is very tempting to say that consumers should be able to purchase such products, and that providers of such products should be permitted to develop and market them. But I have to say that I am hesitant to endorse that proposition.

First of all, I cannot accept the proposition that not to permit parents to use such products means that they are somehow forced to expose their children (or themselves) to unwanted depictions of violence, sex and profanity. There is an obvious choice—one which any parent can and should make: don't let your children watch a movie unless you approve of the content of the entire movie. Parents who have not prescreened a movie and made their own judgments can take guidance from the ratings that appear on almost all commercially released DVDs. Not only do those ratings label movies by particular classes denoting the age groups for which a particular movie is appropriate (e.g., G, PG, PG-13, R), but those ratings now also give parents additional advice about the content of a particular motion picture (e.g., "PG-13 . . . Sexual Content, Thematic Material & Language" (from "The Stepford Wives") or "PG-13 . . . Non-stop Creature Action Violence and Frightening Images, and for Sensuality" (from "Van Helsing")). It is appropriate that parents and other consumers should be given sufficient information to make a judgment whether a particular motion picture is suitable for their children or themselves to view. And there are many third-party services that supplement the information provided by the movie studios. For example, the "Weekend" section of the Washington Post contains a "Family Filmgoer" column that briefly summarizes current motion pictures and offers more detailed commentary on the suitability of each movie for children of various age groups. For example, last week's column made the following observations as part of its commentary on the current motion picture, *Saved!:*

> [H]igh schoolers may find it both humorous and intriguing. A little too adult for middle-schoolers, the movie contains a strongly implied sexual situation and rather romanticizes the idea of being an 18-year-old unwed mother. Other elements include profanity, sexual slang, homophobic talk, drunkenness, smoking and a jokey reference to bombing abortion clinics.

It seems that if a parent doesn't want a child to see offensive portions of a particular movie that's available on DVD, or if a person doesn't want to watch such portions himself, there is a simple choice: don't buy or rent the movie. In fact, those

of us who are truly offended by some of the content found in many movies might ask ourselves whether we are doing ourselves or society any favors by buying or renting those movies. I have always had great faith in the marketplace, and I believe that if enough people simply refuse to spend their money on movies that contain offensive material, the incentives for motion picture studios to produce them will diminish.

I also have to wonder how effective such filtering products are. A review of one such product in the New York Times observed:

> The funny thing is, you have to wonder if ClearPlay's opponents have ever even tried it. If they did, they would discover ClearPlay is not objectionable just because it butchers the moviemakers' vision. The much bigger problem is that it does not fulfill its mission: to make otherwise offensive movies appropriate for the whole family.
>
> For starters, its editors are wildly inconsistent. They duly mute every "Oh my God," "You bastard," and "We're gonna have a helluva time" (meaning sex). But they leave intact various examples of crude teen slang and a term for the male anatomy.
>
> In "Pirates of the Caribbean," "God-forsaken island" is bleeped, but "heathen gods" slips through. (So much for the promise to remove references to "God or a deity.")
>
> Similarly, in "Terminator 3," the software skips over the Terminator—a cyborg, mind you—bloodlessly opening his abdomen to make a repair. Yet you're still shown a hook carving bloody gouges into the palms of a "Matrix Reloaded" character.[1]

Again, perhaps it's just better to avoid getting the offending movie in the first place.

Moreover, I have serious reservations about enacting legislation that permits persons other than the creators or authorized distributors of a motion picture to make a profit by selling adaptations of somebody else's motion picture. It's one thing to say that an individual, in the privacy of his or her home, should be able to filter out undesired scenes or dialog from his or her private home viewing of a movie. It's another matter to say that a for-profit company should be able to commercially market a product that alters a director's artistic vision.

That brings me to an objection that is more firmly rooted in fundamental principles of copyright, which recognize that authors have moral rights. To be sure, the state of the law with respect to moral rights is relatively undeveloped in the United States, and a recent ill-considered decision by our Supreme Court has weakened the protection for moral rights that our laws offer.[2] Moreover, I am not suggesting that enactment of the proposed legislation would violate our obligations under the Berne Convention to protect moral rights.[3] In fact, I do not believe that the Berne Convention's provision on moral rights forbids permitting the making and marketing of products that permit individual consumers to block certain undesired audio or video content from their private home viewing of motion pictures. But beyond our treaty obligations, the principles underlying moral rights are important. The right of integrity—the author's right to prevent, in the words of Article 6*bis* of the Berne Convention—the "distortion, mutilation, or any other modification of, or other derogatory action in relation to [his or her] work, which would be prejudicial to his honor or reputation"—is a reflection of an important principle. As one leading commentator has put it:

> Any author, whether he writes, paints, or composes, embodies some part of himself—his thoughts, ideas, sentiments and feelings—in his work, and this gives rise to an interest as deserving of protection as any of the other personal interests protected by the institutions of positive law, such as reputation, bodily in-

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[1] David Pogue, "STATE OF THE ART; Add 'Cut' and 'Bleep' To a DVD's Options," New York Times, May 27, 2004, page G1.

[2] *Dastar Corp.* v. *Twentieth Century Fox Film Corp.,* 539 U.S. ____, 123 S.Ct. 2041 (2003). While the *Dastar* decision is not the subject of this hearing, I believe that the subcommittee should examine whether section 43(a) of the Lanham Act should be amended to reflect what was the longstanding understanding prior to *Dastar*—that section 43(a) is an important means for protecting the moral rights of attribution and integrity. Although I will comment no further on *Dastar* at this hearing, and although I will not comment on the portion of the proposed legislation that would provide an exemption from liability under the Lanham Act, it is worth noting that in the wake of *Dastar* (and, for that matter, even under pre-*Dastar* law), there may be little reason to be concerned that the conduct proposed to be covered by the proposed Family Movie Act would violate the Lanham Act in any event.

[3] Berne Convention for the Protection of Literary and Artistic Works, Art. 6*bis*.

> tegrity, and confidences. The interest in question here relates to the way in which the author presents his work to the world, and the way in which his identification with the work is maintained.[4]

I can well understand how motion picture directors may be offended when a product with which they have no connection and over which they have no control creates an altered presentation of their artistic creations by removing some of the directors' creative expression. This is more than a matter of personal preference or offense; it finds its roots in the principle underlying moral rights: that a creative work is the offspring of its author, who has every right to object to what he or she perceives as a mutilation of his or her work.

Although I acknowledge that there is some tension between principles of moral rights and the products we are discussing today, I believe that this narrowly-defined activity does not violate moral rights, for several reasons: (1) it takes place in the context of a private performance of a motion picture in which the alteration of the original motion picture is not fixed in a tangible medium of expression; (2) it consists only of omissions of limited portions of the sounds and/or images in the motion picture, rather than the addition of material or alteration of material in the motion picture; and (3) it is desired and implemented by the individual who is viewing the private performance, who is perfectly aware that there are omissions of material and that the director and studio did not consent to those omissions. But that is not to say that the creator of the motion picture does not have a legitimate artistic reason to complain—and I am very sympathetic to such complaints.

Nevertheless, despite my misgivings, I believe that on balance parents and other consumers should be able to purchase products that allow them to mute and skip past audio and visual content of motion pictures that they believe is objectionable. While the artistic integrity as well as the continuity of the motion picture may suffer, the person viewing the edited performance is fully aware that he or she is viewing a performance of less than the entire motion picture because that was his or her preference. Because only a private performance is involved, the only changes consist of deletions, and no copies of an edited version of the motion picture are made or further communicated, I do not believe the director or copyright owner should have the power to stop the marketing and use of software that renders such a performance.

One reason why I am reasonably comfortable with this conclusion is that, although the producer and marketer of the software is presumably making a profit from its sale, it is difficult to imagine any economic harm to the copyright owner. The software is designed to be used in conjunction with an authentic DVD of the motion picture. In fact, arguably some people who would not have purchased or rented a particular movie if they did not have the ability to skip past portions that they believe are objectionable will purchase or rent it if they can obtain the software for that particular movie.

ANALYSIS OF CURRENT LAW

Despite my conclusion that on balance, the conduct that is addressed by the Family Movie Act should not be prohibited, I do not believe that legislation needed because it seems reasonably clear that such conduct is not prohibited under existing law. The exclusive rights of the copyright owner that might arguably be implicated are the reproduction, distribution, public performance and derivative work rights, but on examination, it seems clear that there is no infringement of any of those rights.[5]

There is no infringement of the reproduction right because no unauthorized copies of the motion pictures are made. Rather, an authorized copy of the motion picture, distributed on a DVD, is played in the same manner as it would be played on any conventional DVD player, but with some of the audio and video content of the motion picture in effect deleted from that private performance because it is muted or bypassed. The distribution right is not infringed because no copies of the motion picture are distributed, apart from the authorized, unedited DVD that the consumer has purchased or rented. The public performance right is not infringed because the

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[4] Sam Ricketson, *The Berne Convention: 1886–1986* 456 (1987).

[5] This brief legal analysis is based on my admittedly sketchy understanding of how the products that are the subject of the proposed legislation work. If, for example, these products actually caused copies to be made of any or all of a motion picture, my analysis might well be different.

motion picture is played in the privacy of the viewer's home, a quintessential private performance.[6]

Not surprisingly, the motion picture studios have not asserted claims of infringement of the reproduction, distribution and public performance rights. Rather, they have alleged infringement of the right to prepare derivative works. The analysis of that claim is a little more complex, but ultimately the result is the same: I believe that the arguments that such products infringe the derivative work right are weak.

The fundamental flaw in the claim of infringement of the derivative work right is that the only possible manifestation of a derivative work is in the private performance itself. It is true that the home viewer who uses one of these products to remove some of the movie's audio and/or visual content is seeing an altered version of the film. Such a version might appear to be an adaptation, or, in copyright parlance, a "derivative work." But that is not my reading of the law. Section 106(2) of the Copyright Act gives the copyright owner the exclusive right to "prepare derivative works based upon the copyrighted work." The question is, can you have a derivative work when no copy (or "fixation") of the derivative work exists? Is an altered private performance of a motion picture a derivative work when it leaves the copy of the motion picture intact and does not create a copy of the altered version?

A review of the legislative history of the 1976 Copyright Act might lead one to the conclusion that the derivative work right can be infringed simply by causing an altered performance of a work. The reports of both the House and Senate Judiciary Committees on the 1976 Act state:

> Preparation of derivative works.—The exclusive right to prepare derivative works, specified separately in clause (2) of section 106, overlaps the exclusive right of reproduction to some extent. It is broader than that right, however, in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.

H.R. Rep. No. 94–1476, at 64 (1976); S. Rep. No. 94–473, at 58 (1976). I believe that when the House and Senate Reports spoke of derivative works, such as ballets, pantomimes, and improvisations, that are not fixed in tangible form, they were referring to public performances of works in altered form. There are strong policy reasons for recognizing a derivative work right when a work is performed publicly in an altered form, even if the alteration never exists apart from the performance. Certain types of works, such as the works mentioned in the legislative history, are exploited primarily by means of public performance rather than by sale of copies, and to require fixation of the derivative work in order to have infringement of the derivative work right could defeat the very purpose of recognizing a derivative work right.

However, while it may have been the intent of Congress not to make infringement of the derivative work right turn on whether the derivative work has been fixed, I do not find that intent expressed in the language of the statute. The exclusive right is a right to "prepare derivative works based upon the copyrighted work." The question then becomes, what is a derivative work? Must a derivative work be fixed in a tangible medium of expression? Certainly in order to qualify for copyright protection, a derivative work—like any work—must be fixed in a tangible medium of expression. 17 U.S.C. § 102(a). But is there a fixation requirement for infringement of the derivative work right?

Although one might expect the extensive list of definitions in § 101 of the Copyright Act to include a definition of as fundamental a term as "work," no such definition is exists. However, § 101 does tell us when a work is "created:"

> A work is "created" when it is fixed in a copy or phonorecord for the first time where; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

If a work is created when it is fixed in a copy or phonorecord for the first time, it is difficult to imagine that the work exists prior to that time. Thus, the Copyright

[6] Of course, it is possible to use the filtering products to alter a performance of the motion picture in a public setting, resulting in an infringing public performance. But as I understand it, that is not the typical use, nor are the products that are the subject of this legislation marketed for such use. Moreover, if there were a public performance, it would be an act of infringement not because the performance was altered, but simply because the motion picture was performed in public without the authorization of the copyright owner.

Act seems to have the functional equivalent of a partial definition of a work; while it may not tell us everything that we need to know in order to recognize a "work," it does tell us that a work must be fixed in a copy or phonorecord. And if it is a work in progress, then at any point in time, the "work" consists of that which has already been fixed.

Because a plain reading of the statute leads to the conclusion that in order to have an infringement of the derivative work right, the derivative work must be fixed, I find it difficult to conclude that there is an infringement of the derivative work right when software instructs a DVD player to mute certain sounds or skip past certain images in a motion picture being played on the DVD. The putative derivative work is never fixed. Moreover, if, as I understand to be the case, the software itself consists of instructions to mute the soundtrack at a point a certain number of minutes and seconds into the performance of the movie, or to skip past the part of the movie that begins at a point a certain number of minutes and seconds into the performance of the movie and ends certain number of seconds later, I find it difficult to characterize that software as a derivative work, since none of the underlying work is actually incorporated into the software.

There are other products in the marketplace that serve a similar function, but which are infringing and should not be permitted. For example, I understand that some products on the market consist of videotapes of motion pictures that have had allegedly offensive scenes physically removed from the videotape. In such cases, there is—and ought to be—a violation of the derivative work right: permanent copies of edited versions of the copyrighted motion pictures are made and distributed. They can also be redistributed, competing in the marketplace with legitimate copies and perhaps ending up in the hands of recipients who aren't even aware that they are edited versions. But it is not the intent of the proposed Family Movie Act to make those products lawful.

IS THERE A NEED FOR LEGISLATION?

Because I believe that under existing law, the conduct that is addressed by this legislation is already lawful, and because I believe it is likely that the district court in Colorado will come to the same conclusion, I do not believe there is any reason to enact legislation that would make lawful that which already is lawful.

I could understand the possible need for legislation if there were substantial doubt as to the outcome of the litigation, or if there was a pressing need to settle the issue once and for all by Congressional action due to an urgent need to permit conduct which people could not engage in unless the legislation were enacted. But no injunction has been entered. The defendants are still producing their products. Indeed, I understand that recently a major consumer electronics equipment manufacturer has begun to distribute a DVD player that has such software preloaded—compelling evidence that the pending litigation has not had a chilling effect. And, given my ambivalence about the desirability of permitting the conduct at issue here, I cannot endorse the notion that there is a pressing need to resolve the issue here and now.

In fact, the issues raised at this hearing persuade me that we need to reexamine the derivative work right in order to determine whether the approach taken in 1976 still works in the 21st Century, when technological changes may well be making fixation an obsolete concept for purposes of determining when the derivative work right has been violated. While the technology that we have been discussing today is fairly benign, it is not difficult to imagine technologies that, without creating a fixation of a new derivative work, result in performances that do not simply edit out limited portions of the work that many viewers would find offensive, but either add new material or result in a rendition of the copyrighted work that so changes the character or message of that work that it constitutes an assault on the integrity of the work. The marketing and use of such technologies should not be tolerated, and I strongly believe that any legislation that affirmatively permits the use and marketing of the technologies we are discussing today should also expressly prohibit the use and marketing of technologies that result in performances of those more harmful alterations of a work.

Rather than enact narrow legislation that would create a safe harbor for the technologies that simply mute and skip content, a safe harbor that—as I have already explained—we do not urgently need, I believe we should take a little more time and give a little more thought to the extent to which the derivative work right should require fixation as a prerequisite for infringement. As I have already noted, Congress's original, but apparently unrealized, intent was that there need not be a fixation of the work in order to infringe the derivative work right. We should take a fresh look at that judgment and ask under what circumstances, if any, fixation

should be a requirement. For example, I believe that fixation should not be required in order to infringe the derivative work right in cases where there is a derivative public performance—e.g., of a play, or a ballet, the types of performances that were addressed in that part of the legislative history that stated that there "may be an infringement even though nothing is ever fixed in tangible form." Whether fixation should be a requirement in order to infringe the derivative work right where there is a only private performance may require a more nuanced approach, looking at the nature of the alteration from the original work. The result of such a study might be an amendment could be in the form of a new definition of "to prepare derivative works based upon the copyrighted work" to be added to section 101.

Assuming that you do decide to enact legislation now, I will now turn to the specific legislative text that has been proposed.

THE FAMILY MOVIE ACT

The Family Movie Act would amend section 110 of the Copyright Act to provide that it is not an infringement of copyright for the owner or lawful possessor of an authorized copy of a motion picture to make limited portions of audio or video content of the motion picture imperceptible in the course of private home viewing of the motion picture. It further provides that the use of technology to make such audio or video content imperceptible is not an infringement. In order to qualify for the exemption, no fixed copy of the altered (i.e., edited) version of the motion picture may be made.

"Private home viewing" would be defined as viewing for private use in a household, by means of consumer equipment or services that are operated by an individual in that household and that serves only that household. This definition is adapted from the definition of "private home viewing" found in section 119 of the copyright law, the statutory license for secondary transmissions of television broadcast signals by satellite carriers.

The legislation would codify what I believe is existing law: A consumer would be permitted to use technology, such as the software that we have been discussing, that automatically mutes parts of the soundtrack of a motion picture or fast-forwards past a part of the audiovisual content of the motion picture when the consumer is playing a lawfully acquired copy of the motion picture in the privacy of his or her own home. Not only would the consumer's use of that technology be noninfringing, but the manufacture and sale of that technology would also be noninfringing, to the extent that it enables the muting or fast-forwarding.

The legislation would also provide that it is not a violation of the Lanham Act to engage in such conduct, but that to qualify for this immunity the manufacturer of the technology must provide a clear and conspicuous notice that the performance of the motion picture is altered from the performance intended by the director or copyright holder.

Mr. Chairman, as I have already stated, I do not believe that this legislation is necessary or desirable at this time. But if the subcommittee disagrees, then I believe that the language that you have drafted is a reasonable means of accomplishing your goals.

Mr. SMITH. Thank you, Ms. Peters.

Dr. Etzioni.

STATEMENT OF AMITAI ETZIONI, FOUNDER AND DIRECTOR, THE INSTITUTE FOR COMMUNITARIAN POLICY STUDIES, GEORGE WASHINGTON UNIVERSITY

Mr. ETZIONI. Mr. Chairman, Members of the Committee, I greatly appreciate the opportunity to testify, and I strongly favor this bill. My main problem is, Mr. Chairman, that most of what I was going to say you already said, so let me try not to repeat too much of your well taken points.

I studied this matter for more than 40 years, not the new technology, but the need the protect our children from violent and vile material, first at Columbia University, then the year I served in the Carter White House, and most recently we prepared a special issue of the Chicago Kent Law Review to examine the first amendment issues, which allegedly are involved here, including the Heins

argument that even minors at age 1 or 2 have full court first amendment rights, and nobody can protect them from any vile or violent material. Otherwise, their first amendment rights are, we are told, being abridged.

The data is unmistakable, violence—and one of the merits of this bill, it covers not just pornography but also violence. Violence causes enormous harm to children. Our culture is awash in video games, movies, music which encourages violence, and by any sort of scientific measure, it's made children more predisposed to violent acts themselves, to drug abuse, to misbehaving in school. I don't want to take all the time to make—to list 1100 studies which show the harm done to children, especially by violence.

The argument that we cannot distinguish creative violence, which is essential to the story, from gratuitous violence, is completely unsustainable. Courts and other people have found very clear criteria to distinguish violence which adds nothing to the story, is just added to the movie so it will sell better in countries that don't speak English or for other gratuitous reason.

The only word I would like to add the your opening statement is parents don't only have a right, they have a duty to shape the educational environment of their children. That's what parenting is all about. So the notion—especially about young children, age up to 12—that parents would—that they should leave them exposed to whatever the media puts in there, and that they're not allowed any help against it, I find undermining parents' ability to shape the educational environment of their children.

I ch0ose—I have five sons. I cho0se the books they read, when they're young, when they once reach 12 or later, they make their own choices. I cho0se the school to send them to. I go to my board meetings of the school to participate in shaping what the school teaches them. And in the end, these are just minor forces countering the flood, which will not stop. So if we do not allow this technology to work, all we're going to do, we're going to leave all the other sources of media, video games and such, which reach our children, in place. And we're not allowed one of the few tools which allow parents to somewhat, help them somewhat in defending their children.

The same fallacious arguments have been raised against other technologies. We were told when the V-chip was introduced, that it's going to be the end of the world. When ratings were introduced to the movies we were told that that's going to be end of creative skills. The evidence simply shows that no harm was done to the creative industry, but you slightly help parents to protect their children.

I see no, nothing wrong if TiVo or anybody else would, as a next step, make it easier to acquire edited versions, exactly as defined, for use in the private home, and maybe one day the industry will get around to issue us age-appropriate products, to allow us to buy videotapes and DVDs which are marked, "These have been cleaned up for children 12 and younger," "Those are suitable for adolescents," and "Those are suitable for everybody else."

Let me say in summary, I'm strongly in favor of the bill as drafted.

Let me add as a footnote, if I may, as a Jew, I very much regret you drawing the Holocaust into this, Mr. Berman.

[The prepared statement of Mr. Etzioni follows:]

PREPARED STATEMENT OF AMITAI ETZIONI

ON PROTECTING CHILDREN FROM SPEECH

AMITAI ETZIONI*

INTRODUCTION

When freedom of speech comes into conflict with the protection of children, how should this conflict be resolved? What principles should guide such deliberations? Can one rely on parents and educators (and more generally on voluntary means) to protect children from harmful cultural materials (such as Internet pornography and violent movies) or is government intervention necessary? What difference does historical context make for the issue at hand? Are all minors to be treated the same? What is the scope of the First Amendment rights of children in the first place? These are the questions here explored.

The approach here differs from two polar approaches that can be used to position it. According to a key civil libertarian position, materials that are said to harm children actually do not have such an effect, and even if such harm did exist, adults should not be reduced to reading only what is suitable for children. Hence, as long as speech qualifies as protected for adults, it should be allowed.[1] In short, the First Amendment should trump other considerations.[2]

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1. *See* Combined Proposed Findings of Fact of the ACLU and ALA Plaintiffs, ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) (Nos. 96-963, 96-1458), *available at* http://archive.aclu.org/issues/cyber/trial/finding.htm.

2. Civil libertarians find very little speech they would agree to bar. For instance, they hold that using children to make child pornography is indeed a crime because children are abused, but once a tape is made, it should not be suppressed since the children were already harmed and suppressing the tape would create a precedent for limiting speech. Thus, when the Supreme Court upheld a New York state statute making the sale of child pornography illegal, the ACLU's Jack Novik denounced child pornography as "ugly, vicious stuff" that should be fought

In contrast, many social conservatives argue that pornography undermines the moral culture and corrupts character. Hence, such material should be barred, the way child pornography is, in order to protect children and adults alike—although additional protection of children is surely welcome. In short, according to this approach, protecting people and the community from harmful cultural products takes precedent over free speech when there is a conflict.

Neither of these positions focuses on the difference between children and adults. To put it strongly, quite a few civil libertarians lean towards treating children like adults, and many social conservatives focus on the child in all of us, on our vulnerabilities. Both focus on pornography and each, for its own reasons, is less mindful of the effects of exposure to violence.[3]

The position developed here[4] builds on extensive social science findings that there are cultural materials harmful to children—although we shall see that the greatest harm is not caused by the materials on which recent attempts to protect children have focused. I suggest the starting point of such deliberations should be an agreement that there be no *a priori* assumptions that either free speech or protection of children trumps the other, and that there are systematic ways to work out the relationship between these two core values.[5] I realize that to discuss the First Amendment in balance with something else is not a concept readily acceptable to those who treat free speech as the most primary right and who, while recognizing that it must be squared occasionally with other values, put the onus of proof completely on those making claims against it. My approach treats free speech as one of several values that must be balanced. Moreover, I hold that the balance between these two core values, like all others, is affected by historical context, in which excessive leanings in favor of one value (and neglecting the other) need to be corrected in the following time period if a reasonable balance is to be preserved. This

through stronger laws against exploitation of minors, but denounced the Court's decision, saying, "Government intrusion into freedom of speech is expanded." *Impact of Court's Child Pornography Ruling Assessed*, CHRISTIAN SCI. MONITOR, July 7, 1982, at 3.

3. *See, e.g.*, DAVID BURT, DANGEROUS ACCESS, 2000 EDITION: UNCOVERING INTERNET PORNOGRAPHY IN AMERICA'S LIBRARIES 2–3 (2000).

4. This idea is further developed in AMITAI ETZIONI, THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY (1996) [hereinafter THE NEW GOLDEN RULE].

5. The choice of the term "value" rather than "right" is deliberate here; rights imply things much less given to balancing with other considerations than values, for which one recognizes possible conflicts that will have to be worked out.

principle guides us in exploring whether one can rely on voluntary means to treat the issue at hand or whether government intervention is needed. And I not only treat minors as having fundamentally different rights from adults, but also take into account differences among minors of various ages.

It should be noted that the discussion here focuses on the right to "consume" speech rather than to produce it. The main question is not whether children should be entitled to make movies, produce CDs, and so on, but whether their access to the harmful content found in some cultural materials should be limited.

The discussion proceeds by providing some background (Part I), and then extensively examining five case studies to provide key examples for explorations of the issues at hand (Part II). Readers familiar with the cases or less interested in the fine print may wish to turn to the discussion of the lessons drawn from these cases regarding the proper relationship between speech and the protection of children (Part III). In this section, I pay special attention to the merit of separating the access children have to cultural materials from the access adults have—or if this cannot be fully accomplished, the possibility of minimizing the extent to which limitations on children "spill over" onto adult access—rather than dealing with "all patrons" as if they were of one kind. Also, I take it for granted that commercial speech can more readily be limited than other speech, and that while voluntary means of curbing access are superior to semi-voluntary ones, there might be room for some regulation.

This section is followed by an examination of the evidence of the scope and nature of the harm some cultural materials inflict on children, with special attention to the important differences in the effects of pornographic and violent content on children (Part IV). The need to correct the delicate balance between speech and the protection of children is viewed in the historical context in which it occurs (Part V), followed by an examination of differences among children according to their ages (Part VI). The Article closes by briefly reviewing the implications of the conclusions drawn up to this point for political theory (Part VII) and discussing whether the standards for limiting speech could be communal or must be national, and the implications of this factor for the protection of children (Part VIII).

I. BACKGROUND: CONTENT CONTROLS FAIL THE TEST

Congress has made several attempts to limit the access children have to materials that it considers harmful to them.[6] The constitutional challenges to these laws reveal a major flaw in these approaches and explain the current focus of other attempts to deal with the same problem. The issue has not been the need or legitimacy of taking special measures to protect children. In several cases, the Supreme Court has affirmed that the government has a compelling public interest in protecting children.[7] *Ginsberg v. New York* confirmed that "the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses.'"[8] Moreover, it specifically recognized that some cultural products can cause harm to children, and that children are entitled to protection from such materials. The decision in *Ginsberg*, which upheld a New York state statute prohibiting the sale of pornographic magazines to minors under the age of seventeen, relied on two basic principles regarding children: that children should not be allowed the same access to certain types of materials as adults, and that the state is entitled to pass laws aiding parents in carrying out their duties.[9] The Court ruled that though the materials in question were legal for adults, the Constitution permits the state to "accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see."[10] Furthermore, the Court stated that

> constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. . . . Parents and others. . . who have th[e] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.[11]

The Court later reaffirmed this position in *FCC v. Pacifica Foundation*,[12] which upheld an FCC ruling restricting the broadcast of

6. *See, e.g.*, Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223 (2000)); Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 (1998) (codified as amended at 47 U.S.C. § 231 (2000)); Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763A-335 (2001) (codified as amended at 20 U.S.C. § 9134 and 47 U.S.C. § 254(h) (2000)).

7. Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (upholding the "interests of society to protect the welfare of children, and the state's assertion of authority to that end").

8. 390 U.S. 629, 640 (1968) (quoting *Prince*, 321 U.S. at 165).

9. *Id.* at 637, 639.

10. *Id.* at 637.

11. *Id.* at 639.

12. 438 U.S. 726 (1978).

indecent speech to times of day when children were unlikely to be listening or watching unsupervised.[13] The Court reasoned that

> children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling through the exercise of choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than on an adult.[14]

The Court thus affirmed that "society may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat."[15]

The matter then became how to separate speech from which children should be protected from other speech. As in other attempts to separate two kinds of speech (such as "fighting words"[16]), this has so far proven next to impossible.

When Congress took up the challenge of protecting children on the Internet, it first passed legislation attempting to shield children by controlling the content of the materials they could access. The most notable attempts, the Communications Decency Act of 1996[17] ("CDA") and the Child Online Protection Act of 1998[18] ("COPA"), focused on restricting the type of content that could be posted on the Internet. These attempts largely failed when they were challenged in the courts. The Supreme Court ruled that the CDA's prohibitions on "indecent transmission" and "patently offensive display" violated freedom of speech as protected by the First Amendment.[19] Though it affirmed the compelling interest of the government in "protecting minors from potentially harmful materials" on the Internet,[20] the Court found that "the CDA places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of 'narrow tailoring' that will save an otherwise patently invalid unconstitutional provision."[21] The Court ruled that the scope of the legisla-

13. *Id.* at 733.
14. *Id.* at 757–58.
15. *Id.* at 758.
16. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). For a discussion of the fighting words doctrine and its application, see Note, *The Demise of the* Chaplinsky *Fighting Words Doctrine: An Argument for its Interment*, 106 HARV. L. REV. 1129 (1993); Melody L. Hurdle, Recent Development, R.A.V. v. City of St. Paul: *The Continuing Confusion of the Fighting Words Doctrine*, 47 VAND. L. REV. 1143 (1994); and Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527 (1993).
17. Pub. L. No. 104-104, 110 Stat. 133 (1996).
18. Pub. L. No. 105-277, 112 Stat. 2681-736 (1998).
19. Reno v. ACLU, 521 U.S. 844, 859, 882 (1997).
20. *Id.* at 871.
21. *Id.* at 882.

tion was too broad, attempting to shield those under the age of eighteen from certain content at too great an expense to adults' access to protected speech.[22]

COPA was deemed unconstitutional by the District Court for the Eastern District of Pennsylvania, which issued a preliminary injunction blocking enforcement of the statute.[23] The Third Circuit Court of Appeals affirmed, striking down COPA on the grounds that its use of the community standards test—established by Supreme Court precedent in earlier obscenity cases[24]—violated the First Amendment when applied to the Internet.[25] The case went before the Supreme Court, which rejected the Third Circuit's reasoning, ruling that using "community standards" to determine what materials on the Internet are "harmful to minors" was not itself a violation of the First Amendment.[26] However, the Supreme Court also recognized that COPA might be unconstitutional for other reasons, and thus remanded to the Third Circuit to review the other free-speech issues surrounding the statute.[27] On remand, the Third Circuit again upheld the injunction, reasoning that COPA is neither narrowly tailored nor the least restrictive means available to achieve the government's goal of protecting children from harmful online materials, and also that it impermissibly encroaches on speech that is constitutionally protected for adults.[28] In October 2003, the Supreme Court again granted certiorari to the case to review this opinion by the Third Circuit.[29] Commentators speculate that the case may well be ruled unconstitutional.[30] In fact, in his concurring opinion in the case, Justice Anthony Kennedy stated that "there is a very real likelihood that the Child Online Protection Act . . . is overbroad and cannot survive."[31]

22. *Id.* at 874.

23. ACLU v. Reno, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999) (holding that for the purpose of granting a preliminary injunction, the plaintiffs established a substantial likelihood that COPA is unconstitutional).

24. Roth v. United States, 354 U.S. 476, 489 (1957).

25. ACLU v. Reno, 217 F.3d 162, 173–74 (3d. Cir. 2000).

26. Ashcroft v. ACLU, 535 U.S. 564, 585–86 (2002); *see also* Warren Richey, *Porn Cases Exacerbate Divide on High Court*, CHRISTIAN SCI. MONITOR, May 15, 2002, at 2.

27. *Ashcroft*, 535 U.S. at 585–86; *see also* Charles Lane, *Justices Partially Back Cyber Pornography Law*, WASH. POST, May 14, 2002, at A03.

28. ACLU v. Ashcroft, 322 F.3d 240, 265–67 (2003).

29. Ashcroft v. ACLU, 124 S. Ct. 399 (2003).

30. Linda Greenhouse, *Justices Give Reprieve to an Internet Pornography Statute*, N.Y. TIMES, May 14, 2002, at A17.

31. 535 U.S. at 591.

In June 2003, the Supreme Court ruled that still another law, the Children's Internet Protection Act of 2000[32] ("CIPA"), was constitutional.[33] The case is discussed below, but suffice to say that while the law is the best there is so far, it remains a very flawed approach.

In trying to deal with the tension between free speech and the protection of children, we run into difficulties separating protected and unprotected speech and ensuring that the protection of children will not limit adults' access to speech. Given these rulings, my approach prefers measures that attempt to restrict the *manner* in which children can access harmful material rather than measures directly restricting the content itself. I proceed by examining five cases in which the issue at hand comes to a head in order to provide grist for the mill of the examination that follows.

II. FIVE CASES

The five cases studied here—those of Loudoun County, Virginia; Kern County, California; the Children's Internet Protection Act; restrictions on tobacco advertising; and television ratings and the V-chip—are not exhaustive. I chose them because they allow me to examine what I consider the two crucial dimensions of the issue at hand: (1) To what extent do the limitations succeed in curbing only the access of children, or are there also "spill over" effects that limit the access of adults? (2) To what extent are the measures involved mandated by the government and designed to directly control (*e.g.* ban) certain forms of access rather than enhance the ability of parents and educators to guide their charges? The reason for choosing these two dimensions will become evident as the argument unfolds.

The issues in all of these cases are multi-layered because, typically, when the access of minors is limited, the access of adults is also limited to some extent.[34] The Courts therefore tend to examine the issue in light of two different questions. In some cases, it is quite constitutional for the access of adults to be curbed for certain materials, such as child pornography.[35] The question then becomes whether or

32. Pub. L. No. 106-554, 114 Stat. 2763A-335 (2000).

33. United States v. American Library Ass'n, 123 S. Ct. 2297 (2003).

34. For a full discussion of this concept, see Eugene Volokh, *Speech and Spillover*, SLATE (July 19, 1996), *at* http://slate.msn.com/default.aspx?id=2371.

35. The United States Code makes it a crime not only to produce child pornography, which constitutes the sexual exploitation of minors, 18 U.S.C. § 2251 (2000), but also to distribute or possess child pornography, 18 U.S.C. § 2252 (2000). The justification for prohibiting the possession of child pornography as well as its production was laid out in *New York v. Ferber*, which

not those who put the limitations in place followed the proper procedures to determine that the material in question should be blocked. However, if the material in question cannot be constitutionally blocked from adults, the question still remains as to whether the same holds true for minors. In looking at the five cases at hand, I focus on the second question.

A. *Loudoun County, Virginia Library Case*

In July 1997, the Board of Trustees of the Loudoun County Library, in Virginia's conservative Loudoun County,[36] adopted a policy requiring all library computers to have blocking software, but allowing the filters to be disabled when adults used the computers, or when minors were accompanied by a parent or guardian.[37] The policy was revised later that fall, however, after several members voiced their concern that it was not strict enough.[38] The updated policy blocked access to all sexually explicit material, regardless of the patron's age, and required written permission from a parent or guardian for anyone under eighteen who wanted to use the Internet on a computer in a Loudoun County library.[39] Adult patrons who wished to have a specific site unblocked (not the filter itself disabled) needed to submit a written request providing one's name, the site to be unblocked, and the reasons one wanted access; the librarian would then review the requested site and manually unblock it if she deemed it appropriate under the terms of the policy.[40] The stated purpose of the policy was to prevent a "sexually-hostile environment" from forming due to the display of pornographic Internet sites and to exclude pornographic materials from the electronic resources available at the library, as

states that "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." 458 U.S. 747, 759 (1982).

36. *See* Victoria Benning, *2 Conservatives to Leave Library Board*, WASH. POST, June 13, 1996, at V1; Justin Blum, *For Black, Core Support Was the Difference*, WASH. POST, Feb. 8 1998, at V01; Peter Pae, *Abortion Rights Group Opens Office in "Conservative Country"*, WASH. POST, June 20, 1994, at B1.

37. American Civil Liberties Union, *Virginia Library Board Adopts Internet Restrictions*, http://archive.aclu.org/news/w080597c.html (Aug. 5, 1997).

38. American Civil Liberties Union, *Virginia County Restricts Net Access in Libraries*, http://archive.aclu.org/news/w102497a.html (Oct. 24, 1997).

39. *Id.*

40. Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library, 24 F. Supp. 2d 552, 556 (E.D. Va. 1998).

they had always been excluded from the print resources.[41] Whether deliberately or unwittingly, the policy clearly inhibited the access of adults by requiring that they disclose their name and preferences—in writing—before being able to access sexually explicit material.

Soon after, a grassroots group called Mainstream Loudoun County joined with several civil liberties groups to challenge the library policy in court, alleging that Loudoun County's policy, "as written and as implemented," violated the First Amendment rights of both the Internet site providers blocked by the software and Loudoun County Library patrons wishing to access the Internet by discriminating against protected speech on the basis of content.[42] Furthermore, the plaintiffs argued, even if the library was justified in blocking the content in question, they did not follow the correct procedures in doing so; therefore the policy constituted an unconstitutional prior restraint.[43]

In November 1998, the U.S. District Court for the Eastern District of Virginia declared Loudoun County's policy overly broad and unconstitutional.[44] The District Court found that the Loudoun County policy did involve First Amendment issues because the use of blocking software was more akin to an active decision to remove materials from the library than to a passive decision simply not to acquire them.[45] It also held that strict scrutiny was the appropriate standard by which any restriction of this kind of speech should be judged.[46] The Court then proceeded to evaluate the specific speech prohibited by the policy: obscenity, child pornography, and material deemed "harmful to juveniles" by Virginia statutes. It found that while neither obscenity nor child pornography are protected by the First Amendment, the definition of "harmful to juveniles" in the Virginia Code includes speech that the courts have held to be constitutionally protected for adults.[47] Having established that at least some of the content blocked by the Library was constitutionally protected, the Court then applied a three-prong test to determine whether the limitations imposed were constitutional. The Court asked: (1) whether the inter-

41. Loudoun County Public Library, *Policy on Internet Sexual Harassment*, http://www.loudoun.net/mainstream/Library/summintpol.htm (Oct. 20, 1997).

42. *Mainsteam Loudoun*, 24 F. Supp. 2d at 557.

43. *Id.*

44. *Id.* at 570.

45. *Id.* at 561.

46. *Id.* at 562.

47. *Id.* at 564.

ests asserted by the state, in this case "minimizing access to illegal pornography" and "avoidance of creation of a sexually hostile environment," are compelling; (2) "whether the limitation[s] [imposed by the policy are] necessary to further those interests"; and (3) whether the policy is "narrowly tailored to achieve those interests."[48]

The Court found that though the policy did not claim to further a compelling interest, it failed to meet the second and third parts of the test.[49] Loudoun County did not demonstrate to the Court's satisfaction that without the policy a sexually hostile environment might exist in the libraries, individuals would access obscene material or child pornography, or minors under the age of eighteen would view materials that are harmful to them.[50] Nor was the Court persuaded that the means the County decided upon were narrowly tailored to meet the compelling government interests.[51] The judges found that there were less restrictive means available to shield children from harmful material, such as privacy screens, casual monitoring of Internet activity by librarians, or installing filtering software on only some of the computers.[52]

They also ruled that the policy was "over inclusive because, on its face, it limits the access of all patrons, adult and juvenile, to material deemed fit for juveniles."[53] Quoting *Reno v. ACLU*, the Court noted that, in this instance, the spillover onto the ability of adults to receive protected speech and material was too great, for "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."[54]

In the case of Loudoun County, the policy promulgated by the Library Board empowered librarians to decide what speech to censor without providing "sufficient standards and adequate procedural safeguards."[55] In other words, librarians were given full discretion to

48. *Id.* at 564–66.
49. *Id.* at 567–68.
50. *Id.* at 565 (requiring that harms be "real, not merely conjectural" (quoting Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) and Johnson v. Los Angeles Fire Dep't, 865 F. Supp. 1430, 1439 (C.D. Cal. 1994))).
51. *Id.*
52. *Id.* at 568.
53. *Id.* at 567.
54. *Id.* at 565 (quoting Reno v. ACLU, 521 U.S. 844, 885 (1997)).
55. *Id.* at 568–69.

determine which sites to unblock, with no established guidelines of any sort to help define what constitutes material that is harmful to minors, and no provisions for further review (*i.e.*, by the Library Board or, perhaps more appropriately, by attorneys familiar with these legal standards).

The Court was particularly concerned with the lack of transparency in the blocking criteria used by Log-On Data Corporation, the makers of the X-Stop filtering software. Manufacturers like Log-On usually consider their blocking criteria to be proprietary information, and therefore protected trade secrets, in spite of the fact that this "entrust[s] all preliminary blocking decisions—and, by default, the overwhelming majority of final decision[s]—to a private vendor . . . that . . . does not base its blocking decisions on any legal definition of obscenity or even on the parameters of defendant's Policy."[56]

B. Kern County, California Library Case

In 1996, the Kern County Board of Supervisors, in California, passed a resolution to "prevent disruption of the educational purpose and atmosphere of the public libraries of Kern County through the display of sexually explicit material and to restrict access by minors over the Internet at County public libraries to harmful material as defined in the California Penal Code."[57] Following the resolution, Kern County signed a contract with the N2H2 software company to supply BESS Internet filtering software for over fifty computers in the County's libraries. The Director of Libraries requested that N2H2 customize the blocking software so that it block only material defined as harmful to minors by the California Penal Code, in accordance with the clause in the resolution stating the intention to filter this type of content "to the maximum extent possible, consistent with constitutional principles and available technology."[58]

In the fall of 1996, N2H2 president Peter H. Nickerson informed Kern County that his company would be unable to customize the BESS filtering software to block out material based on the definitions of the California Penal Code, partly because "it seems that this is . . . a legal matter and we do not have the legal expertise in house to make that judgment" as to which websites did or did not meet the

56. *Id.* at 569.

57. Kern County Board of Supervisors, *Resolution 96-341*, http://www.kerncountylibrary.org/using_policy_internet_resolution.html (July 30, 1996).

58. *Id.*

legal criteria for "harmful matter."[59] Despite this clearly stated inability to tailor the software to block only illegal material, Kern County installed BESS filtering software on all computers in all libraries with access to the Internet.[60]

Concerned with the inability of "BESS or any other software program to make distinctions between protected and unprotected speech" and the use of filtering software to prevent some library patrons from being offended by material accessed by other patrons, the ACLU claimed that the County knowingly denied access to "many sites on the Internet that are valuable and constitutionally protected both for adults and for minors."[61] The County counsel repeatedly made assurances that the Internet policy did not violate the First Amendment, while the ACLU argued that the technical limitations of the filtering software created the danger of censorship. Noting the American Library Association's opposition to blocking software in libraries[62] and recent policy decisions in San Jose and Santa Clara refusing to install filters on library computers, the ACLU's Ann Beeson wrote a letter demanding that Kern County remove the Internet filters on library computers within ten days or face a legal challenge in federal court.[63] Ms. Beeson added a threat: the county would be liable for the ACLU's substantial attorneys' fees if the ACLU prevailed in its claims, and removing the filters was the only way the County could avoid costly litigation. The ACLU's demands were not qualified in any way. Rather than calling for the removal of filters from certain computers that would be accessible only to adults or for differing levels of filtering depending upon the age of the patron, the ACLU demanded that filtering software be removed from all computers.[64]

59. Letter from Ann Beeson, National Legal Dept., ACLU, to B.C. Barmann, Office of the County Counsel, County of Kern, http://archive.aclu.org/issues/cyber/kerncodemand.html (Jan. 21, 1998).

60. *Id.*

61. *Id.*

62. The ALA has released a statement on the use of filtering software:

> The use in libraries of software filters to block constitutionally protected speech is inconsistent with the United States Constitution and federal law and may lead to legal exposure for the library and its governing authorities. The American Library Association affirms that the use of filtering software by libraries to block access to constitutionally protected speech violates the *Library Bill of Rights*.

American Library Association Intellectual Freedom Committee, *Statement on Library Use of Filtering Software*, http://www.ala.org/alaorg/oif/filt_stm.html (July 1, 1997).

63. Beeson, *supra* note 59.

64. *Id.*

Although the County could have refused to comply with the ACLU's demands, it would then have faced a lengthy and expensive legal battle. Under these pressures, the Kern County Board of Supervisors decided to "resolv[e] any constitutional concerns or any intention of initiating litigation,"[65] and in January of 1998 it directed all Kern County libraries with only one terminal with Internet access to disable the filters and only enable them if requested to do so by a patron, noting that the County intended to install a second computer in these branches within two weeks. Branches with two or more online computers were ordered to disable filters on half of their terminals. But all patrons, both children and adults, had the choice whether or not to use the filtered or unfiltered computer.[66] The ACLU hailed this as a victory that would "allow *all* adult and minor patrons to decide for themselves whether to access the Internet with or without a filter."[67]

C. *Children's Internet Protection Act*

In 1996, several programs were established to make public funds available to schools and libraries to allow them to purchase computers and provide Internet access. The E-rate program, which was established by the Telecommunications Act of 1996 and administered by the Federal Communications Commission, enables eligible schools and libraries to receive discounts on telecommunications and Internet access services. The Library Services and Technology Act ("LSTA") provides grants, administered at the state level, for the purchase of computers used to access the Internet, or to pay for direct costs associated with accessing the Internet.[68]

In 1999, Senators John McCain (R-AZ) and Fritz Hollings (D-SC) sponsored the Children's Internet Protection Act ("CIPA"),[69] which was passed by Congress as part of an omnibus bill and signed by President Clinton in December 2000.[70] It requires schools and li-

65. Letter from Bernard C. Barmann, Sr., Kern County Counsel, to Ann Beeson, ACLU Foundation, http://archive.aclu.org/news/n012898d.html (Jan. 27, 1998).

66. Memorandum from Marje Rump to all Kern County Library Branches, *Internet Public Access*, http://archive.aclu.org/news/n012898d.html (Jan. 27, 1998).

67. Letter from Ann Beeson, ACLU National Legal Department, to Bernard C. Barmann, Sr., Kern County Counsel, http://archive.aclu.org/news/n012898d.html (Jan. 28, 1998) (emphasis added).

68. *See* 20 U.S.C. § 9141 (2000).

69. S.97, 106th Cong. (1999).

70. Pub. L. No. 106-554, 114 Stat. 2763A-335 (2000); *see also* Press Release, Senator John McCain, Congress Passes Internet Filtering For Schools, Libraries,

braries that receive federal discounts on Internet access or public funding for computers to install "technology protection measure[s]" (*i.e.* filtering software) to block out material deemed to be "obscene," "child pornography," or "harmful to minors."[71]

CIPA defines minors as individuals under the age of seventeen and the phrase "harmful to minors" as

> any picture, image, graphic image file, or other visual depiction that (A) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (B) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.[72]

CIPA's scope is rather modest. It does not impose a control on schools and libraries in general; it merely sets conditions for those schools and libraries that seek to use federal funds to connect to the Internet, which includes some 4,500 libraries and a large number of public schools across the United States.[73] To obtain these funds, a school or library must prepare a request that includes numerous details, and CIPA merely adds the one additional requirement that they commit to installing filters. Those schools and libraries choosing not to comply with CIPA, as well as those not demonstrating a good faith effort at compliance within a year and a half of the enactment of the law, will no longer receive the said discounts or subsidies.[74]

The ACLU and ALA joined to bring a legal challenge against CIPA, which was heard by a special three-judge panel in Philadelphia in March of 2002.[75] The ACLU and ALA contended that available filtering technology is not sophisticated enough to block only unprotected material and that even if it were, requiring it to be installed on all computers linked to the Internet without first going through the

http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.Viewpressrelease&Content_id=872 (Dec. 15, 2000).

71. CIPA § 1703(b)(1), 114 Stat. at 2763A-336.

72. *Id.* at § 1703(b)(2).

73. Peg Brickley, *Internet Decency Standards Pose Ethical and Financial Problems for Many Companies, Schools and Libraries*, CORP. LEGAL TIMES, Oct. 2001, at 80.

74. CIPA § 1712 (f)(1), 114 Stat. at 2763A-340.

75. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002); *see also* John Schwartz, *Law Limiting Internet in Libraries Challenged*, N.Y. TIMES, Mar. 25, 2002, at A18. Other plaintiffs include the Multnomah (Ore.) County Public Library system, librarians, patrons, website providers and Jeffrey L. Pollock, a Republican candidate for Congress who was a proponent of mandatory filtering software until he learned that his campaign website was blocked by a popular filtering program.

proper procedures for determining what materials can be lawfully blocked constitutes "prior restraint."[76] According to the plaintiffs' pretrial brief, CIPA was "lacking both narrow and reasonably defined standards, and without adequate (or, in fact, any) procedural safeguards."[77] They further alleged that the blocking programs are both over- and under-inclusive: they block constitutionally protected, but perhaps controversial, speech or websites containing arbitrary keywords[78] while allowing through vast quantities of the materials they claim to block.[79] They argued that CIPA also passed the buck on censorship to private companies that design and sell filtering programs. Decisions about which keywords to use and which sites to block were made by third-party, non-government entities, a fact which does not, they contended, exempt the restrictions of expression from constitutional scrutiny.[80]

Furthermore, the plaintiffs contended, CIPA's provisions for disabling the filtering software for adults allowed for, but did not require, librarians to approve exceptions for "bona fide" or other lawful research and contained no definition of the these terms, leaving the decision to unblock software at the discretion of the librarian or administrator.[81] The ALA argued that, *de facto* if not *de jure*, this policy restricted the options of all patrons, leaving them with the choice of a computer with blocking software or no computer at all. In addition, the ALA argued, CIPA offered no such research exceptions to minors wishing to access constitutionally protected but technologically blocked material and speech in libraries that received E-rate funds.[82]

76. Plaintiffs' Joint Pretrial Brief at 8, Am. Library Ass'n v. United States, 201 F.Supp. 2d 401 (E.D. Pa. 2002) (Nos. 01-CV-1303, 01-CV-1322), *available at* http://archive.aclu.org/court/pretrial_brief.pdf [hereinafter ALA/Multnomah County Joint Pretrial Brief].

77. *Id.* at 11.

78. *Id.* at 9–10. For example, filters have blocked websites such as www.the-strippers.com (wood varnish removal service), www.muchlove.org (a non-profit organization dedicated to rescuing animals), and that of House Majority Whip Richard "Dick" Armey. *See id.*; Amy Keller, *Dick's Quandary?*, http://politicsonline.com/coverage/rollcall2/ (Oct. 5, 2000).

79. ALA/Multnomah County Joint Pretrial Brief, *supra* note 76, at 8–9.

80. *Id.* at 9.

81. CIPA §§ 3601(a)(1), 1712(f)(1), 114 Stat. at 2763A-337 to 2763A-340 (codified at 20 U.S.C. § 9134 (2000) and 47 U.S.C. § 254(h) (2000)).

82. ALA/Multnomah County Joint Pretrial Brief, *supra* note 76, at 10. Although CIPA allows a research exemption for all patrons at schools and libraries receiving Museum and Library Services Act funds and Secondary Education Act funds, 20 U.S.C. § 9134(f)(3) (2000), it allows only exemptions for adults in libraries receiving E-rate funds, 47 U.S.C. § 254(h)(6)(D) (2000).

Finally, the plaintiffs pointed out that CIPA mandated that all patrons—both adults and minors—of the public libraries receiving discounts on Internet access view only material suitable for children.[83]

The government's simple answer to the problems civil libertarians had with CIPA was: if you don't like it, don't apply. Therefore the government could tell any library that disagreed with CIPA conditions that it was free to decline acceptance of federal subsidies. It is not discriminatory to ask that "federal money . . . [not] be used to give kids access to dirty peep shows," argued Janet LaRue, senior director of legal studies at the Family Research Council.[84] Donna Rice Hughes, a member of the Child Online Protection Commission and author of *Kids Online: Protecting Your Children In Cyberspace*,[85] agreed, stating, "If they don't want to use protection tools, fine. Then they don't get federal money for Internet access."[86] Indeed, installation of the filters was not wholly mandatory or compulsory; each library system could make its decision on an individual basis. Recipients of putative federal subsidies do not have the right to demand a subsidy, much less the right to demand that a subsidy be granted unconditionally.

The ACLU and ALA contended that the government's arguments ran contrary to the E-rate program's mission to "bridge the 'digital divide' between those people with easy access to the Internet and those without."[87] Libraries in areas with wealthier and more liberal residents willing to forgo federal subsidies in favor of First Amendment principles could do so and still find the funds to remain open. Libraries in poorer areas, however, would be all but compelled to install filters or face losing what, for some, constitutes a majority of their budget. Judith Krug, director of intellectual freedom at the ALA, argued that this makes CIPA more than a poorly worded policy—it makes it discriminatory.[88]

Ultimately, many supporters of CIPA see the court case not as a dispute about legal precedent, but as a fundamental disagreement

83. *See* Robert O'Harrow Jr., *Curbs on Web Access Face Attack: Content Filters for Children Also Restrict Adults, Groups Say*, WASH. POST, Mar. 20, 2001, at A4.

84. *Id.*

85. DONNA RICE HUGHES, KIDS ONLINE: PROTECTING YOUR CHILDREN IN CYBERSPACE (1998).

86. John Schwartz, *Internet Filters Used to Shield Minors Censor Speech, Critics Say*, N.Y. TIMES, Mar. 19, 2001, at A15.

87. Brickley, *supra* note 73.

88. Bob Keaveney, *Not Even Dick Armey Can Get Through Some Internet Filters*, DAILY REC., Mar. 9, 2002, at 13A.

about society's role in protecting children. They hold that civil libertarians err too much on the side of protecting spillover into the First Amendment rights of adults at a heavy cost to children and allow for ideology to reach extreme levels. In an e-mail debate with the ALA's Judith Krug, Mike Millen, an attorney affiliated with the Pacific Justice Institute, opined that

> [f]or reasons that are mystifying to most of America, these anti-filtering groups will not come out and say, 'Yes, hard-core pornography in the hands of young children is harmful, wrong and ought to be stopped.'... While the American Library Association may not endorse children viewing obscene materials, it also refuses to condemn or do anything about it.[89]

Another CIPA co-sponsor, Rep. Ernest Istook (R-OK), concurs, writing in a letter to Congressional colleagues, "They [civil libertarians] treat it as 'someone else's problem' and falsely label it 'censorship' if they're not permitted to expose our children to the very worst things on the Internet, *using federal tax dollars to do so*."[90]

Lawmakers and advocates argue that it is irresponsible not to attempt to protect children from harmful materials that are available at the click of a mouse in a local library, and they see no realistic solutions being offered by an opposition that is focused only on First Amendment rights. Mr. Millen sums up their position as follows:

> I think our philosophical difference is again playing itself out here. If you believe that numerous children are being harmed daily by exposure to hard-core porn on the Internet, the trade-off of a child occasionally losing access to a blocked site (or having to ask for parental help to have it unblocked) is well worth having. However, if you believe that library-accessible porn doesn't hurt kids, then of course the balance would tip in favor of unfettered access. Most parents believe the former.[91]

In May 2002, the three-judge panel ruled against CIPA, and the Supreme Court heard arguments on the case in spring of 2003. The judges in Philadelphia justified their ruling in a 195-page opinion that focused on content for all, but not on the question of the extent of minors' First Amendment rights—a bias which is a clear result of

89. *Should Libraries Pull the Plug on Web Site Obscenity? Kids, Porn and Library Censors*, S. F. CHRON., Aug. 5, 2001, at D4, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/08/05/IN195749.DTL (debate between Judith Krug of the ALA and Mike Millen of the Pacific Justice Institute).

90. Ernest J. Istook, Jr., *Protect Our Children from Internet Obscenity!*, http://www.house.gov/istook/CIPADearColleague.pdf (last visited Oct. 22, 2003) (emphasis in original).

91. *Should Libraries Pull the Plug on Web Site Obscenity?*, *supra* note 89.

CIPA seeking filtering for all patrons rather than only for minors.[92] The ruling barely mentions minors, and the legal examination deals merely with First Amendment rights in general. Even when the Court discusses group-specific blocks, it briefly covers blocks on all kinds of content—racially offensive material, material that offends the employees of the library, or material that the librarians consider inappropriate (such as dating sites). The First Amendment rights of children were not the focus, although the protection of children is the purpose of the Children's Internet Protection Act.

The Court was impressed by the list of wrongly blocked sites provided by the plaintiffs, which included numerous websites for churches, health-related sites on topics ranging from allergies to cancer, and the websites of several political figures. Hence, the Court stated that filtering programs are

> blunt instruments that not only 'underblock,' *i.e.*, fail to block access to substantial amounts of content the library boards wish to exclude, but also, central to this litigation, 'overblock,' *i.e.*, block access to large quantities of material that library boards do not wish to exclude and that is constitutionally protected.[93]

Proponents of the filters argued that they are getting better all the time and that they are more than 99% accurate.[94]

The Court recognized but dismissed the argument that when one goes to a library one does not find all materials that are "protected" speech either—such as *Hustler* magazine or XXX-rated video tapes—on the grounds that providing Internet access is more akin to opening up a public forum than to the process by which the library actively selects books to purchase. Once such a public forum is provided, the library cannot selectively exclude certain speech on the basis of its content without subjecting the exclusion to strict scrutiny.[95] I note that the court also disregarded another issue: were a child to check out a pornographic library book, he would need to ask a librarian to retrieve it and would leave a record when he checks it out, thus creating a kind of barrier that does not exist when accessing information on computers.

92. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

93. *Id.* at 406.

94. David Burt, spokesman for the N2H2, Inc. software filtering company, claims that his company's filters have a "99-plus percent accuracy rate." John Schwartz, *Court Blocks Law That Limits Access to Web in Library*, N.Y. TIMES, June 1, 2002, at A1.

95. *Am. Library Ass'n*, 201 F. Supp. 2d at 409.

The U.S. Department of Justice decided to appeal the court ruling and prevailed in the Supreme Court. In June 2003, the Court ruled 6–3 to overturn the lower court decision, thus allowing CIPA to stand. The statute views only pornography as harmful to children, ignoring gratuitous violence. The Court disregarded the fact that CIPA is unnecessarily burdensome on adults; for adults to have to ask librarians to unlock filters entails a considerable violation of their privacy, and it is sure to have a chilling effect on their speech rights.[96]

D. Restrictions on Tobacco Advertising

It is not only violent and pornographic material from which parents, activists, and legislators have sought to shield children; the advertising of harmful products to minors has also been subject to regulation and subsequent debate and has raised First Amendment issues. (A wit once suggested that tobacco was pornographic because it has no redeeming social merit.) The marketing of tobacco products, in particular, has come under intense scrutiny, as new information about "Big Tobacco's" media campaigns aimed at children has come to light. RJ Reynolds Vice President of Marketing C.A. Tucker made the tobacco industry's desire to reach this audience abundantly clear in a presentation to the RJR Board of Directors in 1974, stating, "This young adult market, the 14–24 group . . .represent(s) tomorrow's cigarette business. As this 14–24 age group matures, they will account for a key share of the total cigarette volume for at least the next 25 years."[97] A document from Phillip Morris was uncovered providing information about how the company placed products in child-oriented entertainment like *Who Framed Roger Rabbit?* and *The Muppet Movie*.[98]

Given that 80 percent of adult smokers started smoking before they were eighteen,[99] addicting youngsters is of great interest for the industry in a period when adults have curtailed their smoking habits. Moreover, ads are a significant factor in promoting smoking among

96. The reasoning of the Justices' opinions needs to be further explored on another occasion.

97. National Association of Attorneys General, *Tobacco Settlement Agreement at a Glance*, http://www.naag.org/issues/tobacco/msa_at_a_glance.php (Nov. 6, 1998) [hereinafter NAAG Tobacco Settlement Summary].

98. *Id.*

99. Centers for Disease Control and Prevention, Tobacco Use Among Middle and High School Students—United States, 1999, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4903a1.htm (Jan. 28, 2000).

minors; it is not peer pressure alone that pushes minors to smoke, and the content of the peer pressure itself is influenced by ads.[100] Statistics indicate a strong correlation between certain tobacco advertisements and the numbers of young people who smoke. A study by the FDA found not only that "cigarette and smokeless tobacco use begins almost exclusively in childhood and adolescence,"[101] but also that there is "compelling evidence that promotional campaigns can be extremely effective in attracting young people to tobacco products."[102] Reports by the Surgeon General and the Institute of Medicine stated that "there is sufficient evidence to conclude that advertising and labeling play a significant and important contributory role in a young person's decision to use cigarettes or smokeless tobacco products,"[103] noting that kids smoke a smaller number of brands than adults and that "those choices directly track the most heavily advertised brands, unlike adult choices, which are more dispersed and related to pricing."[104] A 1991 study published in the *Journal of the American Medical Association* found that "30% of 3-year-olds and 91% of 6-year-olds could identify Joe Camel as a symbol for smoking."[105] Another study revealed that "[t]he largest increase in adolescent smoking initiation was in 1988, the year that the Joe Camel cartoon character was introduced nationally."[106]

In 1997, the Federal Trade Commission filed a complaint against RJ Reynolds Tobacco Company, charging that the company's deliberate attempts to target younger smokers in their advertising constituted a violation of the Federal Trade Commission Act and calling on the company to "cease and desist from advertising to children"

100. For a discussion of the importance of the content of peer pressure, see AMITAI ETZIONI, A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS 279–302 (revised ed. 1975).

101. Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44619, 45239 (Aug. 28, 1996) (capitalization omitted) [hereinafter Nicotine in Cigarettes].

102. *Id.* at 45247.

103. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 558 (2001) (quoting Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41314, 41332 (Aug. 11, 1995)).

104. *Id.*

105. Nicotine in Cigarettes, 61 Fed. Reg at 45246 (*citing* Fischer, Schwartz & Richards, *Brand Logo Recognition by Children Aged 3 to 6 Years, Mickey Mouse and Old Joe the Camel*, 266 J. AM. MED. ASS'N 3145 (1991)).

106. National Center For Chronic Disease Prevention and Health Promotion, *Trends in Smoking Initiation Among Adolescents and Young Adults*, http://www.cdc.gov/tobacco/research_data/youth/ythstart.htm (July 21, 1995).

through the Joe Camel character or others like it.[107] The FTC had considered banning Joe Camel as early at 1993, but free-speech concerns raised by civil libertarian groups led to the matter being dropped.[108] However, in 1994, four states sued the tobacco companies for reimbursement of healthcare expenses resulting from tobacco use. These states were gradually joined by others, until forty-one states had filed lawsuits against the tobacco companies. In 1997, a group of state Attorneys General drafted a settlement proposal that they hoped would settle all the suits. Soon after, Senator McCain drafted legislation attempting to make the proposed settlement law. In addition to requiring the companies to make payments to the states, this bill would have placed limitations on cigarette advertising.

As class-action lawsuits, litigation by states looking to recoup lost healthcare costs from smoking-related illnesses, and Congressional legislation to increase the price of tobacco products through taxes and restrict marketing practices all loomed in 1997, the tobacco industry sought to broker a deal with state governments to stem the oncoming tide.[109] The terms of the 1998 settlement (after the initial 1997 proposal fell apart) specified that Big Tobacco pay states in excess of $240 billion over twenty-five years, embark on a $1.7 billion campaign to study youth smoking habits and fund anti-smoking advertising, and accept limitations on advertising practices that appeal to children. Among the tobacco industry's self-imposed restrictions, according to the 1998 settlement, are a complete ban on the use of cartoon characters in the advertising, promotion, packaging, or labeling of tobacco products; a ban on tobacco industry brand name sponsorship of events that have a substantial youth audience or of team sports (*e.g.* basketball, baseball, and football); and substantial restrictions on outdoor advertising, with the substitution of existing product advertisements with anti-smoking campaign material (on billboards and other displays).[110]

Civil libertarians came out against the terms of the settlement, decrying the efforts to eliminate the marketing of tobacco products to

107. Complaint at 5, *In the Matter of R.J. Reynolds Tobacco Company* (Federal Trade Comm'n Docket No. 9285), *available at* http://www.ftc.gov/os/1997/05/d9285cmp.htm (May 28, 1997).

108. Paul Farhi, *Push to Ban Joe Camel May Run Out of Breath*, WASH. POST, Dec. 4, 1993, at C1.

109. *Justice Dept. Suing Tobacco Firms*, USA TODAY, Sept. 22, 1999, *at* http://www.usatoday.com/news/smoke/smoke287.htm.

110. NAAG Tobacco Settlement Summary, *supra* note 97.

youth as a violation of freedom of speech. The ACLU has stated that "[w]e [should] allow consumers to make decisions for themselves and stop government from deciding for us what speech we should be free to hear about legal products."[111] They also claimed that restrictions on advertising to minors "effectively suppresses a large amount of speech that adults have a constitutional right to receive."[112] Robert Levy of the Cato Institute went even farther, calling the restrictions on marketing contained in the settlement "ridiculous" and "draconian." Levy testified before Congress that "there is no evidence" establishing a link between advertising and the decision of minors to begin smoking.[113]

E. V-Chips and Labeling

Several measures have been introduced—either by law or by various industries under government or public pressure—to help parents and educators protect children from violent and pornographic materials. In the media, these include the ratings and labeling systems adopted by the movie, television, and music industries. The Motion Picture Association of America appoints a ratings board to set ratings (PG-13, R, etc.) for movies, and the National Association of Theater Owners supports these ratings by asking theaters to bar admittance of those under the recommended age limit.[114] In 1990, the Recording Industry Association of America introduced a uniform labeling system to inform parents if an album contains sexually explicit lyrics or foul language. Some stores voluntarily refrain from selling music with such labels to minors.[115]

111. American Civil Liberties Union, *Paternalism and the Harkin-Bradley Bill: Proposal on Tobacco Advertising Would Violate the First Amendment*, http://archive.aclu.org/news/n032195.html (Mar. 21, 1998).

112. American Civil Liberties Union, *Testimony of the American Civil Liberties Union for the Senate Commerce, Science and Transporation Committee Tobacco Hearing on Advertising, Marketing and Labeling*, http://archive.aclu.org/congress/t030398a.html (Mar. 3, 1998) [hereinafter ACLU Testimony].

113. Statement of Robert A. Levy, Senior Fellow in Constitutional Studies, Cato Institute, before the Committee on the Judiciary, United States Sentate, http://www.cato.org/testimony/ct-bl071697.html (July 16, 1997).

114. Classification and Ratings Administration, *Questions & Answers: Everything You Always Wanted to Know About the Movie Rating System*, http://www.filmratings.com/questions.htm (last visited Oct. 22, 2003) [hereinafter CARA Q&A].

115. American Civil Liberties Union, *Popular Music Under Siege*, http://archive.aclu.org/library/pbr3.html (1996).

Though the ratings system for movies has been in effect since the 1960s,[116] television ratings did not exist until recently. The Telecommunication Act of 1996 set requirements that all new television monitors of a certain size be built with V-chip technology. V-chips allow a user to block all programming that carries a certain rating. The law also gave the FCC the power to set guidelines for rating television programs and to require broadcasters to transmit these ratings in such a way that individuals would be able to block programs with a certain rating using V-chip technology.[117] Since the law gave the television industry a year to enact a voluntary ratings system before the FCC would begin to set the ratings itself,[118] the National Association of Broadcasters, the National Cable Television Association, and the Motion Picture Association of America jointly created the *TV Parental Guidelines*, a voluntary rating system. Following criticism by advocacy groups, the associations revised the ratings system, which the FCC found to be acceptable.[119]

Though the rating system was voluntarily adopted by the industry, and blocking could only be activated by individuals who chose to use their V-chip and were free to determine what setting to use, civil libertarians were still not satisfied. The ACLU initially protested the Telecommunications Act's provision that could have allowed the FCC to set guidelines because government-set labels on TV programs would force "private individuals and companies to say things about their creative offerings that they have no wish to say, and even puts words into their mouths." They feared that FCC-prescribed ratings would "have the unconstitutional purpose and effect of restricting expression because it is unpopular or controversial."[120] When the industry released its voluntary ratings system, the ACLU called it "government-coerced censorship" and said it was "another example of the government's heavy-handed effort to dictate the use of our remote controls." They also objected to voluntary labeling of music albums

116. CARA Q&A, *supra* note 114.

117. Telecommunications Act of 1996 § 551(b)(1), Pub. L. No. 104-104, 110 Stat. 56, 140 (codified as amended at 47 U.S.C. § 303(w) (2000)).

118. *Id.* at § 551 (e)(1)(A), 110 Stat. at 142.

119. Federal Communications Commission, *Commission Finds Industry Video Programming Rating System Acceptable; Adopts Technical Requirements to Enable Blocking of Video Programming (The "V-Chip")*, http://ftp.fcc.gov/Bureaus/Cable/News_Releases/1998/nrcb8003.html (Mar. 12, 1998).

120. American Civil Liberties Union, *Reply Comments In the Matter of Industry Proposal for Rating Video Programming*, http://archive.aclu.org/congress/l050897a.html (May 8, 1997) [hereinafter ACLU Comments on Ratings].

on similar grounds, asserting that "even 'voluntary' labeling is not harmless" and arguing that labeling provides no help to parents.[121]

The ACLU also opposed the V-chip[122] as "a heavy-handed attempt by federal bureaucrats to control what is aired on television"[123] and worried that it would censor such important works as *Schindler's List*, *Roots*, and *Gone With the Wind* because they contain violence, and would "empower bureaucrats and television executives to make decisions for parents."[124] Marjorie Heins, formerly with the ACLU and now with the Free Expression Policy Project, claimed that there is no evidence "that explicit sex information and even pornography . . . by themselves cause psychological harm to *minors of any age*."[125] The ACLU also argued that the V-chip would be an "electronic babysitter" that robs parents of their ability to make choices for their children and to discuss programming with them.[126] Similarly, Rhoda Rabkin, arguing against government enforcement of age-graded ratings systems, contends that "parents know better than anyone else the level of maturity of their children and are therefore best equipped to judge the appropriateness of books, television shows, music, movies, and games."[127]

Civil libertarians have even criticized measures in which the government has no involvement whatsoever, such as the existence of commercial software programs like Cybersitter and Cyber Patrol that allow parents to block out harmful content on the Internet. Though the ACLU admits that it prefers such programs to ratings systems or

121. American Civil Liberties Union, *Revised TV Ratings System is Product Of Government-Coerced Censorship, ACLU Charges*, http://archive.aclu.org/news/n071097a.html (July 10, 1997); *Popular Music Under Siege*, *supra* note 115.

122. Aside from the reasons discussed in the text, the ACLU also opposed V-chips as forms of government censorship. Though the government requires that the V-chip be built into televisions, it is voluntarily activated and used.

123. American Civil Liberties Union, *FCC Gives Final Approval To V-Chip Technology*, http://archive.aclu.org/news/n031298a.html (Mar. 12, 1998).

124. American Civil Liberties Union, *ACLU Expresses Concerns on TV Rating Scheme; Says "Voluntary" System is Government-Backed Censorship*, http://archive.aclu.org/news/n022996b.html (Feb. 29, 1996).

125. Marjorie Heins, *Screening Out Sex: Kids, Computers, and the New Censors*, AM. PROSPECT, July/Aug. 1998, at 38, 41 (emphasis added); *see also* Marjorie Heins, *Rejuvenating Free Expression: An Argument for Minors' First Amendment Rights*, DISSENT, Summer 1999, at 43.

126. Paul Farhi, *FCC Set to Back V-Chip*, WASH. POST, Mar. 6, 1998, at G3.

127. Rhoda Rabkin, *Guarding Children: No Need for Government Censorship*, CURRENT, May 2002, at 16, 19.

statutes restricting speech, it says they "present troubling free speech concerns."[128]

III. LESSONS: FIRST APPROXIMATION

In the first three cases discussed above, neither the courts nor civil libertarians have focused directly on a key question that policymakers (and the society at large) face, namely the subject of this examination: how to protect children from harmful cultural products.

In the Loudoun County, Kern County, and CIPA cases, this question was overshadowed by concerns over the extent to which the measures violated the First Amendment rights of *adults*. Hence, the relevant lessons must be drawn from secondary considerations. The Loudoun case, in which the Board of Trustees sought to ban access to pornography (and not just child pornography or obscenity, which are deemed unprotected by the Constitution) for everyone, not only for children, reflects—whether deliberately or inadvertently—a socially conservative position. In recent decades, the courts have tended to overthrow such restrictions.[129]

The Board of Trustees in Loudoun County retested, in effect, some of the issues raised by the CDA when it required that filters be installed on all computers and demanded gross violations of privacy for adult patrons who wished to access materials screened out by the filters (*e.g.*, an adult wishing to read about anal intercourse and HIV would have to fill out a form giving his name, address, and the topic he wished to explore, then submit it to a librarian). If this policy would not have a chilling effect on adult access to speech, it is hard to imagine what would. Moreover, under the Loudoun County policy, the librarians—who are, given that we are dealing with public libraries, effectively government agents—would be free to determine whether or not such a request would be granted, without having to be accountable for the criteria used or subject to challenge. No wonder the question of children's rights was barely broached.

In Kern Country, the Library Board initially formulated a similar policy. Although it tried to limit the extent to which protected speech was blocked by seeking filters specially designed to screen out only unprotected speech and speech considered harmful to minors under

128. American Civil Liberties Union, *Fahrenheit 451.2: Is Cyberspace Burning?*, http://archive.aclu.org/issues/cyber/burning.html (Aug. 7, 1997) [hereinafter Fahrenheit 451.2].

129. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 882 (1997); ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999); Am. Library Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997).

California law, it did not provide separate computers for adults and children, but, as in Loudoun County, installed filtering software on all computers. The main issue was again whether the curbs are constitutional for anyone. When the County was challenged, it in effect swung to the opposite extreme, removing filters from half the computers and allowing all patrons—minors included—to choose whether to use a filtered computer or an unfiltered one, rather than attempting to distinguish between the First Amendment rights of adults and minors.

CIPA similarly fails to draw a distinction between the access of adults and children, requiring that filters be placed on *all* computers in a school or library, regardless of the age of the patrons who would use them. Civil libertarians smartly challenged its use in public libraries, where adult patrons would have their access curbed, without mentioning schools, in which the issue of children's rights would have come into focus. The ruling against CIPA could have direct implications for the voluntary use of filters by public schools as well. Nancy Willard points out that the factual findings and analysis provided by the courts raise significant questions regarding the constitutionality of the use of these products in public schools.[130]

In dealing with these cases, the courts have focused first on whether the suggested curbs limit the access of adults to blocked materials that are constitutionally protected, and second on whether the proper (and rather strict) procedures to determine that the material was unprotected were followed. Given the inherent difficulties in sorting out which speech is or is not protected[131] and the high procedural hurdles, such curbs have been found lacking, not only by their critics, but also by the courts.

The courts have not pointed the legislature (or any other party) toward a third approach that would filter neither everything nor nothing, but would provide *separate computers for children and adults*. The courts either ruled in favor of the civil libertarians (as in the Loudoun County case) or were indirectly used to intimidate other libraries (as in the Kern County case), resulting in a situation where children were allowed the same rights as adults in choosing whether or not the use a filter. CIPA initially was faulted for the same weak-

130. NANCY WILLARD, THE CONSTITUTIONALITY AND ADVISABILITY OF THE USE OF COMMERCIAL FILTERING SOFTWARE IN U.S. PUBLIC SCHOOLS 7, http://netizen.uoregon.edu/Constitutionality.pdf (2002).

131. This problem of distinguishing protected from unprotected speech was discussed eloquently by Justice Brennan in his dissenting opinion in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73–74 (1973).

ness.[132] The decision mentions briefly such a possibility, but places it among several other remedies, including the curious idea of librarians warning those looking at inappropriate material with a "tap on the shoulder."[133]

The first lesson that appears from the cases at hand, albeit indirectly, is that if the goal is to protect children and not to curb adult access to speech, the government should urge or require libraries to have *separate computers for children and adults* (the way many libraries have special sections for children's books or the way video rental stores have separate X-rated sections for adults only). Those computers set aside for children would be equipped with filters, while the others could provide unencumbered access to adults, or contain filters set to a different, much less stringent level (for example, to block only illegal materials, such as child pornography, to the extent technically possible). If a library has only one computer, there could be set-aside times for children and for adults. We shall refer to this as the *child-adult separation approach.* Such separation greatly reduces the conflict between protecting free speech and protecting children, although it leaves open the question of the scope of the harm done to children by the said material and what their own free speech rights are, issues I address below.

We must take into account two different situations. In one, whatever curbs are mandated are strictly for children, for example, filters on computers in a primary school (to keep the case pure, let's say the computer in the teachers' lounge is left unfiltered). In the other situation, full separation of children and adults is not practical, hence any curbs advanced for children might limit the access of adults. (For example, if there are children's hours on the one computer at a library, the amount of time adults may have unencumbered access may be limited.) Eugene Volokh uses the term "spillover" to describe such a situation. He correctly points out that the proper way to frame the issue is not to ask whether there is any spillover, but to examine how significant the spillover is. Spillover rarely can be avoided completely.[134] The assumption is (as the courts have recognized) that there is a compelling public interest in protecting children from harmful material; thus, if a protective measure can be introduced that has minimal spillover, that small amount might be a price worth paying.

132. For a full discussion of the CIPA ruling, see *supra* notes 92–96 and accompanying text.
133. Am. Library Ass'n v. United States, 201 F.Supp. 2d 401, 423–24 (E.D. Pa. 2002).
134. Volokh, supra note 34.

This issue was not tested in the first three cases examined here because civil libertarians could argue that the spillover on adults was so considerable that even if there were benefits for children, the situation was not acceptable. (They did not have to unveil their argument that these materials do not harm children, a position that they correctly realize is much more difficult to sustain.) *So far, I have suggested that the best public policies provide for full child-adult separation so that limitations on children's access will not spillover to adults; next best are those that* minimize *spillover to adults.*[135] (In contrast, measures that involve significant spillover, especially if the gain to children is limited, are unacceptable.) Such balancing is commonly found constitutional in other areas in which two major values come into conflict, for instance privacy and the public interest.[136]

The restrictions imposed on tobacco advertising cast additional light on the criteria that might be applied in sorting out the First Amendment rights of children. The ACLU objected to these restrictions, arguing, "adults cannot be reduced to reading only what is fit for children"[137] and "attempts to reduce the exposure of minors to tobacco advertisements cannot avoid restricting the same information for the adult population."[138] In Justice Frankfurter's inimitable phrase, such limitations "burn the house to roast the pig."[139] But one may wonder if there will be a shortage of material enticing adults to smoke if cartoon characters especially seductive to children would no longer be used and if tobacco ads would be excluded from a few magazines popular with minors. The ability of adults to access information about tobacco products is thus not limited in any meaningful way.

From a constitutional viewpoint, it is important to take into account the *type* of speech being limited. Tobacco ads concern commercial speech, not speech that has political or social content, and therefore fall in the category of speech that the courts generally have recognized as having a lower level of First Amendment protection.[140]

135. Such an assertion is supported by the ruling in *Ginsberg v. New York*, 390 U.S. 629 (1968).

136. For an in-depth discussion of the balancing of privacy with various public interests, see AMITAI ETZIONI, THE LIMITS OF PRIVACY (1999).

137. American Civil Liberties Union, *ACLU Joins Opposition to Tobacco Pact; Says Speech Limits are Unconstitutional*, http://archive.aclu.org/news/n032498b.html (Mar. 24, 1998).

138. ACLU Testimony, *supra* note 112.

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

140. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 (1976).

Finally, there is the matter of who enforces the limitations. The restrictions on tobacco ads reflect an agreement reached between tobacco companies and state governments, not limitations legislated by the government.[141] It follows that *when speech is commercial and when the curbs are at least semi-voluntary*, such measures should be more readily acceptable than curbs on other speech, for which children may not be ready (*e.g.* Mapplethorpe's photographs).

Labeling, the V-chip, and privately marketed Internet filtering software allow further examination of the question of whether we can do without government intervention. These devices provide a continuum of the levels of voluntarism. Movie ratings and labeling on music are akin to tobacco ads in that they have been voluntarily introduced, but under considerable government pressure. Moreover, the criteria for what rating or label a film or album receives are set by the industry, and their use and standards are enforced by the industry, to the extent that they are enforced at all. Thus, unlike tobacco ads, which were part of a legal agreement and could therefore be enforced, the government does not determine what is labeled PG-13 versus R or force movie theaters to card teenagers or otherwise pay mind to the age of theatergoers. Still, they system is not fully voluntary.

The government did require that the V-chip be built into all TV sets.[142] But all that V-chips do is provide parents and educators with a tool for controlling what their charges may watch and the choice of whether or not to use it. The use of V-chips is not required or even actively fostered by the government through educational campaigns[143] (despite the fact that most people seem unaware of the chip or how to use it) or by any other means. Nor is the government monitoring who activates their chips and who neglects to do so. Nor is the government involved in either setting the ratings on specific programming or de-

141. One can fairly argue that this voluntary agreement was achieved under economic pressures exerted by the government. The same applies to poor neighborhoods that might find it more difficult than richer ones to pass up E-rate funds in order to avoid the restrictions included in CIPA. However, if one could deem any contract or voluntary agreement coercive any time there is an economic incentive for one of the sides to enter it, or the parties are not economically equal, there would very little left in American society that would be voluntary—and by ACLU and ALA lights, constitutional.

142. Actually, a previous law required that decoder circuitry be built into all television sets to allow closed captioning, and nobody objected at the time. Television Decoder Circuitry Act of 1990 § 3, Pub. L. No. 101-431, 104 Stat. 960 (codified as amended at 47 U.S.C. § 303(u) (2000)). The Telecommunications Act of 1996 required that this circuitry also be fashioned so it could block programs based on content codes. Telecommunications Act of 1996 § 551(c), Pub. L. No. 104-104, 110 Stat. 56, 141 (codified as amended at 47 U.S.C. § 303(x) (2000)).

143. Information about the V-chip and its use is available at http://www.fcc.gov/vchip, but the government is not actively promoting it through such means as advertisements or brochures.

termining at what level an individual V-chip is activated, which in turn determines what is screened out.[144]

Finally, screening software that is sold on the free market, purchased at will by parents, and activated in line with their educational preferences is completely voluntary. Such software provides an ideal test of the issue at hand because no First Amendment rights are involved. Free-speech rights are claims people have against their government, not claims children have against their parents. When a parent tells a child that he or she is not ready to read *Lady Chatterley's Lover* or *Mein Kampf*, the parent may be ill advised, but he or she is not violating anyone's rights. On the contrary, parents and other educators are discharging a duty in this situation that is not subject to First Amendment claims.[145]

Civil libertarian objections to many of these voluntary devices, including labeling and television ratings, are difficult to fathom and draw heavily on such rhetorical devices as claiming that they constitute "censorship"[146]—a claim that makes people see red, even when no censorship is actually involved. (To be accurate, there is one form of voluntary filtering that even the ACLU does not mind: in the Multnomah County library system, a person turning to use a public computer would first be asked if he wants to use a filter or not. ACLU attorney Chris Hansen, who is a member of the CIPA plaintiff's legal team, simply allowed, "We don't have a problem with that.")[147]

144. In 1999 the FCC established a V-chip Task Force to ensure correct implementation of FCC rules regarding the V-chip and television ratings. The Task Force was also charged with gathering information on the "availability, usage and effectiveness of the V-Chip." Federal Communications Commission, *FCC Chairman William E. Kennard Establishes Task Force to Monitor and Assist in the Roll-out of the V-Chip To Be Chaired By Commissioner Gloria Tristani*, http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1999/nrmc9026.html (May 10, 1999). The Task Force has not yet released a report on the effectiveness of the V-chip or the current ratings system, as the author was unable to find any outside report on this matter.

145. Though public school teachers are government actors, meaning the First Amendment does technically apply, there is Supreme Court precedent that allows teachers and administrators to limit a student's speech rights under certain circumstances. In *Tinker v. Des Moines Independent Community School Disrict*, the Supreme Court held that First Amendment protection does not extend to student speech which "materially disrupts class work or involves substantial disorder or invasion of the rights of others." 393 U.S. 503, 513 (1969). Later, in *Bethel School District No. 403 v. Fraser*, the Court held that a *student's* right to speech must be "balanced against the society's countervailing interest in teaching *students* the boundaries of socially appropriate behavior." 478 U.S. 675, 681 (1986) (emphasis added).

146. *Popular Music Under Siege*, *supra* note 115; ACLU Comments on Ratings, *supra* note 120.

147. Brickley, *supra* note 73.

Does it follow that the best way to proceed is to rely merely on systems that are voluntary and thus avoid the constitutional issues involved? Few would disagree that voluntary treatments are preferable to government interventions that contain coercive elements and public costs. Persuasion is clearly more effective than imposition of mores—if it can be made to work. However, when it comes to the protection of children from harmful cultural materials, voluntary protections are highly ineffectual. Most parents and educators do not activate the V-chips in their televisions;[148] movie theaters, and most assuredly CD shops and video rental stores, often do not enforce the rating and labeling systems in place;[149] and only a minority of parents purchase protective filtering software for their home computers.[150] One may argue that a major educational campaign could alter this behavior, but experience with other such campaigns suggests that one cannot avoid the question of whether or not additional measures are justified.

To review the discussion so far: the courts ruled that *there is a compelling public interest to protect children from harmful cultural products which should remain freely accessible to adults.*[151] *(This, in turn, implies that children have lesser free speech rights than adults.) However, they found that controlling content does not allow the desired separation between children and adults.*[152] *Separation of access should avoid this issue. If complete separation is not possible, systems that have little spillover on adult access seem justified, while those that have significant spillover may not. Voluntary measures are to be preferred* per se, *even if enhanced, but do not provide adequate protection of children.* Therefore, government interventions are needed.

IV. THE SCOPE AND NATURE OF THE HARM

The examination so far has taken for granted that the courts correctly ruled that there are cultural products that harm children. The

148. Jim Rutenberg, *Survey Shows Few Parents Use TV V-Chip to Limit Children's Viewing*, N.Y. TIMES, July 25, 2001, at E1.

149. Andy Seiler, *Movie Theaters Vow to Enforce Ratings*, USA TODAY, Nov. 7, 2000, at 1D.

150. According to a Princeton Survey Research Associates poll, only 38 percent of the parents of children who use the Internet polled said they had software on their home computers that prevents users from accessing certain types of material. Roper Center at the University of Connecticut, *accession number 0383943, question number 028* (July 20, 2001) (on file with Chicago-Kent Law Review).

151. *See* Ginsberg v. New York, 390 U.S. 629 (1968).

152. *See* Reno v. ACLU, 521 U.S. 844, 882 (1997).

discussion now turns to the relevant evidence addressing not merely the scope, but also the nature, of that harm. A recurrent theme running through civil libertarian arguments is that exposure to cultural materials causes no discernable harm—while limiting access does. For instance, in response to efforts to label music with offensive lyrics, the ACLU asserted that "[n]o direct link between anti-social behavior and exposure to the content of any form of artistic expression has ever been scientifically established."[153] Although the ACLU recognizes the existence of social science studies showing harm, it challenges or attempts to invalidate these studies and argues that they do not justify regulating television.[154] For instance, arguing against the voluntary ratings system for television, the ACLU testified that "the social science evidence is in fact ambiguous and inconclusive" and that "the effects of art and entertainment on human beings are more various, complex, and idiosyncratic than some political leaders or social scientists would suggest."[155]

The question of whether there are elements in our culture that harm children is the subject of a huge literature.[156] As far as one can determine, there is a considerable, although by no means universal, consensus among those who have studied the matter that significant harm is caused.[157] The next question is what specific items of culture cause significant harm. Here, social science evidence, the courts, and the legislators are at considerable odds. *While the courts and legisla-*

153. *Popular Music Under Siege, supra* note 115.

154. ACLU Comments on Ratings, *supra* note 120.

155. *Id.*

156. *See, e.g.*, F. Scott Andison, *TV Violence and Viewer Aggression: A Cumulation of Study Results 1956–1976*, 41 PUB. OPINION Q. 314 (1977); Eric F. Dubow & Laurie S. Miller, *Television Violence Viewing and Aggressive Behavior*, *in* TUNING IN TO YOUNG VIEWERS: SOCIAL SCIENCE PERSPECTIVES ON TELEVISION 117–47 (Tannis M. MacBeth ed., 1996); Leonard D. Eron et al., *Does Television Violence Cause Aggression?*, 27 AM. PSYCHOLOGIST 253 (1972); Richard B. Felson, *Mass Media Effects on Violent Behavior*, 22 ANN. REV. OF SOC. 103 (1996); L. Rowell Huesmann et al., *Intervening Variables in the TV Violence-Aggression Relation: Evidence from Two Countries*, 20 DEV. PSYCHOL. 746 (1984); NATIONAL INSTITUTE OF MENTAL HEALTH, TELEVISION AND BEHAVIOR: TEN YEARS OF SCIENTIFIC PROGRESS AND IMPLICATIONS FOR THE EIGHTIES (David Pearl et al. eds., 1982); John L. Sherry, *The Effects of Violent Video Games on Aggression: A Meta-Analysis*, 27 HUMAN COMM. RES. 409 (2001); Stacy L. Smith & Edward Donnerstein, *Harmful Effects of Exposure to Media Violence: Learning of Aggression, Emotional Desensitization, and Fear*, *in* HUMAN AGGRESSION: THEORIES, RESEARCH, AND IMPLICATIONS FOR SOCIAL POLICY 167–202 (Russell G. Geen & Edward Donnerstein eds., 1998).

157. See *supra* notes 119–131 and accompanying text.

tors focus almost exclusively on pornography[158]*—by far the strongest data concerns the effects of depictions of violence.*

In response to the few state statutes attempting to limit the access of minors to depictions of violence,[159] the courts have explicitly held that cultural images of violence are protected by the First Amendment.[160] To wit: In the case of *Video Software Dealers Association v. Webster*,[161] which challenged a Missouri statute prohibiting the sale or rental to minors of videos containing violent material,[162] the district court stated that "violent expression is protected by the First Amendment."[163]

In contrast, researchers have much stronger evidence about the harms caused by violence depicted in the media and on the Internet than they do on the harms of pornography. While they commonly and wisely reject simplistic notions that the media is "the" cause of vio-

158. Though *Ginsburg v. New York* recognizes in general the duty of legislators in "safeguarding minors from harm," it discusses only the availability and possible harm of "sex material." 390 U.S. 629, 640–41 (1968). Similarly, the current California Penal Code defines "harmful material" as matter that "appeals to the prurient interest" and "depicts or describes in a patently offensive way sexual conduct." CAL. PENAL CODE § 313(a) (West 2003).

159. MO. REV. STAT. § 573.090 (2003); TENN. CODE ANN. § 39-17-911 (2002); COLO. REV. STAT. ANN. § 18-7-601 (West 2003). For further discussion, see Jessalyn Hershinger, Note, *State Restrictions on Violent Expression: The Impropriety of Extending an Obscenity Analysis*, 46 VAND. L. REV. 473 (1993).

160. For further discussion of this issue, see Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107 (1994).

161. 773 F. Supp. 1275 (W.D. Mo. 1991), *aff'd*, 968 F.2d 684 (8th Cir. 1992).

162. MO. REV. STAT. § 573.090 (1993) provides:

Video cassettes, morbid violence, to be kept in separate area—sale or rental to persons under seventeen prohibited, penalties

1. Video cassettes or other video reproduction devices, or the jackets, cases or coverings of such video reproduction devices shall be displayed or maintained in a separate area if the same are pornographic for minors as defined in section 573.010, or if:

(1) Taken as a whole and applying contemporary community standards, the average person would find that it has a tendency to cater or appeal to morbid interest in violence for persons under the age of seventeen; and

(2) It depicts violence in a way which is patently offensive to the average person applying contemporary adult community standards with respect to what is suitable for persons under the age of seventeen; and

(3) Taken as a whole, it lacks serious literary, artistic, political, or scientific value for persons under the age of seventeen.

2. Any video cassettes or other video reproduction devices meeting the description in subsection 1 of this section shall not be rented or sold to a person under the age of seventeen years.

3. Any violation of the provisions of subsection 1 or 2 of this section shall be punishable as an infraction, unless such violation constitutes furnishing pornographic materials to minors as defined in section 573.040, in which case it shall be punishable as a class A misdemeanor or class D felony as prescribed in section 573.040, or unless such violation constitutes promoting obscenity in the second degree as defined in section 573.030, in which case it shall be punishable as a class A misdemeanor or class D felony as prescribed in section 573.030.

163. *Video Dealers Ass'n*, 773 F. Supp. at 1278.

lence and sexually inappropriate conduct,[164] they repeatedly and systematically find that unfettered exposure is "merely" one major cause for several forms of anti-social behavior.

While a large number of studies are simple one-time observations, several rigorous longitudinal studies have been conducted. For instance, the study conducted by Lefkowitz et al., determined that "[t]he relation between boys' preferences for violent television at age eight and their aggressiveness revealed itself *unequivocally in our study.*"[165] They also found that "*[t]he greater was a boy's preference for violent television* at age eight, *the greater was his aggressiveness* both at that time and *ten years later,*"[166] and later found greater incidents of serious crime at age thirty.[167] The results here are consistent with other studies that have shown aggressive tendencies in children who view violent material.[168]

In another study, researchers compared the aggression levels of children in three Canadian towns. The first town (Notel) had no television service due to its geographical location in a valley, the second town (Unitel) had received only one station for the last seven years, and the third town (Multitel) had received Canadian and American broadcast television for fifteen years.[169] The researchers found that following the introduction of television in Notel, both boys and girls at various age levels were more physically and verbally aggressive than they had been before the introduction of television.[170] Research-

164. *See* SISSELA BOK, MAYHEM: VIOLENCE AS PUBLIC ENTERTAINMENT 57 (1998).

165. MONROE LEFKOWITZ ET AL., GROWING UP TO BE VIOLENT: A LONGITUDINAL STUDY OF THE DEVELOPMENT OF AGGRESSION 115 (1977) (emphasis in original).

166. *Id.* at 115–16 (emphasis in original).

167. L. Rowell Huesmann et al., *Stability of Aggression Over Time and Generations*, 20 DEV. PSYCHOL. 1120 (1984). For criticisms of the methods and findings of this study, see MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH 248–250 (2001); Jonathan L. Freedman, *Effect of Television Violence on Aggressiveness*, 96 PSYCHOL. BULL. 227, 241–243 (1984).

168. *See, e.g.*, Albert Bandura, *Influence of Models' Reinforcement Contingencies on the Acquisition of Imitative Responses*, 1 J. PERSONALITY & SOC. PSYCHOL. 589 (1965); Edward Donnerstein et al., *The Mass Media and Youth Aggression*, *in* REASON TO HOPE: A PSYCHOLOGICAL PERSPECTIVE ON VIOLENCE AND YOUTH 219–250 (Leonard D. Eron et al. eds., 1994); *see also* SURGEON GENERAL'S SCIENTIFIC ADVISORY COMMITTEE ON TELEVISION AND SOCIAL BEHAVIOR, TELEVISION AND GROWING UP: THE IMPACT OF TELEVISED VIOLENCE (1972).

169. Tannis MacBeth Williams, *Background and Overview*, *in* THE IMPACT OF TELEVISION: A NATURAL EXPERIMENT IN THREE COMMUNITIES 4 (Tannis MacBeth Williams ed., 1986).

170. Lesley A. Joy et al., *Television and Children's Aggressive Behavior*, *in* THE IMPACT OF TELEVISION: A NATURAL EXPERIMENT IN THREE COMMUNITIES *supra* note 169, at 334–35.

ers also found that children in Multitel exhibited higher levels of both verbal and physical aggression than those in Unitel.[171]

A report by the Senate Committee on Commerce, Science and Transportation summarizes research in this area and concludes that watching significant amounts of televised violence negatively affects human character and attitudes; promotes violent behaviors; influences moral and social values about violence in daily life; and often results in a perception of a nastier world and an exaggerated probability of being a victim of violence.[172] On a similar note, University of Michigan psychologist Leonard Eron has testified that meta-analyses of current research estimate that "10% of all youth violence can be attributed to violent television."[173]

Several studies followed children into adulthood and concluded that viewing violent material increases the likelihood of aggressive behavior and, in some instances, criminal behavior. For example, one study found greater incidents of serious crime at age thirty in young people who watch violent television at age eight.[174] A recent study in *Science* comes to similar conclusions. Johnson et al., found that those who reported watching higher amounts of television in adolescence later reported higher rates of aggressive behavior in late adolescence and early adulthood. The authors also found a higher rate of aggressive acts at a mean age of thirty in those who reported heavier television viewing at a mean age of twenty-two.[175]

James P. Steyer, who examined well over a hundred studies conducted over thirty years, identified four particular ways that media violence has been shown to impact children, which he sums up in simple language as follows:

> It can make them fearful and lead them to believe that the world is a mean and violent place. It can cause some kids to act violently and aggressively toward others. It can teach them that violence is

171. *Id.* at 320–21.

172. EDITH FAIRMAN COOPER, TELEVISION VIOLENCE: A SURVEY OF SELECTED SOCIAL SCIENCE RESEARCH LINKING VIOLENT PROGRAM VIEWING WITH AGGRESSION IN CHILDREN AND SOCIETY, CRS Rep. 95-593, at 2 (May 17, 1995).

173. Testimony of Leonard D. Eron before the Senate Committee on Commerce, Science and Transportation Regarding Safe Harbor Hours in TV Programming, http://www.senate.gov/~commerce/hearings/0518ero.pdf (May 18, 1999).

174. Huesmann et al., *supra* note 167, at 1120–34.

175. Jeffrey G. Johnson et al., *Television Viewing and Aggressive Behavior During Adolescence and Adulthood*, 295 SCI. 2468, 2470 (2002).

> an acceptable way to deal with conflict. And it can desensitize them toward the use of violence in the real world.[176]

The effects of exposure to pornography on minors are much less established.[177] Ethical considerations prevent researchers from conducting experiments that directly test the effects of pornography on children. Even if correlative studies existed, they would not allow for causal inferences.[178] Because of the paucity of studies on the effects of pornography on children, those who make strong arguments about why it is undesirable to expose children to such materials must do so without evidence supporting their claims.[179] However, studies do exist on the effects of pornography on young, college-aged adults. Studies show that young adults exposed to pornography that is combined with violence hold more callous views towards rape and sexual coercion than those not exposed.[180] The report of the Surgeon General's Workshop on Pornography and Public Health hypothesized that "[i]t is certainly reasonable to speculate, however, that the results of such exposure on less socially mature individuals with less real world experience to counteract any influences of this [pornographic] material would be equally (or more) powerful than those seen in college students."[181] A meta-analysis of forty-six studies conducted between 1962 and 1995 on the effects of pornography on adults found that pornography is "one important factor which contributes directly to the de-

176. JAMES P. STEYER, THE OTHER PARENT: THE INSIDE STORY OF THE MEDIA'S EFFECT ON OUR CHILDREN 72 (2002).

177. Due to ethical considerations, one cannot expose minors to pornographic material in order to test its effects on them.

178. For further discussion of the issues involved in studying the effect of pornography on children, see COMM. TO STUDY TOOLS & STRATEGIES FOR PROTECTING KIDS FROM PORNOGRAPHY & THEIR APPLICABILITY TO OTHER INAPROPRIATE INTERNET CONTENT, NATIONAL RESEARCH COUNCIL, YOUTH, PORNOGRAPHY AND THE INTERNET (Dick Thornburgh & Herbert S. Lin eds., 2002); ALTHEA C. HUSTON ET AL., MEASURING THE EFFECTS OF SEXUAL CONTENT IN THE MEDIA: A REPORT TO THE KAISER FAMILY FOUNDATION, http://www.kff.org/content/archive/1389/content.pdf (1998) [hereinafter Kaiser Report].

179. The lack of social science findings on the matter did not stop the Supreme Court from issuing their ruling in *Ginsberg v. New York*. The Court notes:

> To be sure, there is no lack of "studies" which purport to demonstrate that obscenity is or is not "a basic factor in impairing the ethical and moral development of . . . youth and a clear and present danger to the people of the state." But the growing consensus of commentators is that "while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either."

390 U.S. 629, 641–42 (1968) (quoting Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7, 52).

180. Kaiser Report, *supra* note 178, at 13–14.

181. EDWARD P. MULVEY & JEFFREY L. HAUGAARD, REPORT OF THE SURGEON GENERAL'S WORKSHOP ON PORNOGRAPHY AND PUBLIC HEALTH at 23, http://profiles.nlm.nih.gov/NN/B/C/K/H/_/nnbckh.pdf (Aug. 4, 1986).

velopment of sexually dysfunctional attitudes and behaviours" and that "exposure to pornographic material puts one at increased risk for developing sexually deviant tendencies, committing sexual offenses, experiencing difficulties in one's intimate relationships, and accepting the rape myth."[182]

Overall, the social science data strongly support the need to protect children from harmful material, especially from exposure to violence in the media and on the Internet.[183] There is no reasonable doubt that exposure to a torrent of images of violence in the media harms children significantly. The evidence on pornography (which itself may contain violence) is less strong. *When considering how to protect children, the current preoccupation with curbing pornographic material and not violent material should be reversed.*

The reasons both civil libertarians and social conservatives tend to focus on pornography rather than on violence require a separate examination. Civil libertarians may realize that their case is much weaker when it comes to the effects of depictions of violence; social conservatives may associate violence with manhood. But these are merely speculations. Whatever the reasons, both sides push the public dialogue, legislators, and the courts to focus on the lesser harm, drawing attention away from the greater harm.

A colleague, reviewing a previous version of this Article, raised several cogent questions. How is violence defined? Should children be protected from all forms of violence? And would not such a ban prevent their being exposed to a large variety of novels, books of history, and even news? Defining violence is surely not more difficult than pornography, and is probably easier. Violence, for the purposes at hand, is best defined as the use of physical force with the intent to harm, maim, or kill. Which kinds and forms children should be protected from (and what difference age makes) is an issue we face only once we move away from the current position that all of it is free speech, including, say, showing a sadistic movie to children six years or younger. Once we are ready to curb access to violent content, sev-

182. Elizabeth Oddone-Paolucci et al., *A Meta-Analysis of the Published Research on the Effects of Pornography*, *in* THE CHANGING FAMILY AND CHILD DEVELOPMENT 52–53 (Claudio Violato et al. eds., 2000).

183. The argument that exposure to violence itself, in the home and in the streets, has a worse effect is a valid one, but it does not invalidate the additional harm done by the violence portrayed in cultural materials. Moreover, portrayals of violence in the media are one factor that breeds and nurtures actual violent behavior. *See supra* notes 164–176 and accompanying text. All this is not to suggest that pornography is not harmful; only that it seems—in the absence of evidence—less so than images of violence.

eral rules, often suggested before, come to mind. We can limit the showing of such material on television to late hours; we can discourage the use of gratuitous violence in the media as well as in video games; we can urge that its depictions be negatively framed; and so on. More details require and deserve a separate study.[184]

V. HISTORICAL CONTEXT

Societies tend to lose their balance between conflicting core values in one direction or another.[185] They then move to correct, often tilting too far in the opposite direction because they lack a precise guidance mechanism. Through much of American history, until the 1960s, rights were neglected, including those of women, minorities, and the disabled. However, communitarians have shown that during the next generation, rights were pushed to the point that the public interest and the moral culture were undermined.[186] As of the early 1990s, a counter-correction set in, which arguably went overboard in the opposite direction, especially in the wake of September 11, 2001.[187]

Viewed in this context, since the 1920s civil libertarians have worked to promote rights in general, and the right to free speech in particular, as profound self-evident truths. Typically, the First Amendment is presented as if it were semi-sacred, and any attempts to curb it as sacrilegious and outright offensive. Civil libertarians believe it self-evident that the right to free speech ought to trump all other considerations—or at least that the onus of proof is on those who seek to advance other values, and that the test for such proof should be set very high indeed. Moreover, the very suggestion that free speech (and rights in general) reflects but one set of societal values, albeit a very important one, and that there is such a thing as the common good (above and beyond that invested in rights), such as the well-being of children, may well seem strange, if not false, to civil

184. For a description of the role of violent content in determining television ratings, see http://www.mpaa.org/tv. For the criteria used in granting film ratings, see http://www.filmratings.com.

185. For a further discussion of this balancing and re-balancing, see THE NEW GOLDEN RULE, *supra* note 4, at 58–84.

186. For an excellent discussion, see MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

187. For further discussion, see Amitai Etzioni, *Implications of Select New Technologies for Individual Rights and Public Safety*, 15 HARV. J.L. & TECH. 257 (2002).

libertarians and others imbued with the values of a rights-centered society.[188]

Communitarians have repeatedly pointed out and documented that individualism has been excessive since the 1970s and the common good in general has been neglected.[189] In the same period, children's rights have been pushed too far. One sees that the time has come to restore a better balance between rights and the common good in general, and in matters concerning the balance between free speech and the protection of children in particular. To put it differently, *various measures to protect children become much more acceptable once one realizes that free speech can be highly valued even if one ranks it somewhat lower than it has been recently held and that children are now to be more highly regarded.* Free speech can be ranked a notch or two lower—as is the case in all democratic societies other than the USA—without that freedom being compromised or society becoming illiberal. Indeed, as Richard Abel shows in his outstanding book *Respecting Speech*, we often limit speech for other purposes, including commercial ones. One may ask, perhaps a bit too rhetorically: Are children less worthy than intellectual property?

In the same vein, the more value a society puts on the well-being of children, the more it would be willing to curb free speech under certain circumstances. The argument advanced here is not that American society does not value children highly, but that it arguably does not value them as highly as other liberal democratic societies do relative to other concerns. Not surprisingly, these societies have fewer difficulties introducing measures to protect children from violent and pornographic materials.[190] Surely childcare policies in the United States offer further support for this thesis.[191] As Eugene Volokh has

188. *See* GLENDON, *supra* note 186, at 1–17; *see also* AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA 164–166 (1993).

189. For further discussion, see ROBERT N. BELLAH ET. AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985).

190. Many European nations ban the broadcasting of certain material considered harmful to minors. In addition, associations of Internet Service Providers have established codes of conduct for protecting minors and have established an Internet Content Rating Association to develop an international ratings system. Christopher J.P. Beazley, Report of the Committee on Culture, Youth, Education, the Media, and Sport to the European Parliament, session document A5-0037/2002, http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//NONSGML+REPORT+A5-2002-0037+0+DOC+PDF+V0//EN&L=EN&LEVEL=3&NAV=S&LSTDOC=Y (Feb. 20, 2002).

191. For a survey of child care policies in other nations, see SHEILA B. KAMERMAN & ALFRED J. KAHN, CHILD CARE, FAMILY BENEFITS, AND WORKING PARENTS: A STUDY IN COMPARATIVE POLICY (1981).

noted, civil libertarians believe that "[p]erhaps children's increased vulnerability is a price worth paying for extra freedom for adults."[192]

America's rights-tilt, developed between 1960 and 1990, is gradually being corrected in response to communitarian urging.[193] Society has been willing to pay more mind to social responsibilities, the common good, and the moral culture than in the preceding decades.[194] *The attempt to better protect children from harmful material—as reflected in poorly drafted laws such as COPA and CIPA—fits into this societal agenda.* To put it differently, the Constitution is a living document, the understanding of which responds to the changing needs of the times, never has been fully specified,[195] and for which the implications are constantly being reinterpreted. The understanding of the First Amendment currently prevalent was fashioned largely after 1920, in response to Americans who were arrested for criticizing U.S. involvement in WWI—a drive led mainly by the ACLU, to its credit. Now that society has moved from too restrictive to too permissive, the time has come to realize that the First Amendment was not, in either text or spirit, intended to apply to both children and adults.

VI. THE CONSTITUTIONAL IMPLICATIONS OF AGE-GRADED PROTECTIONS

Are children entitled to the same First Amendment rights as adults, or are they entitled only to lesser free speech rights? This question is crucial because if children have the same rights as adults, none of the ideas of separation and spillover would apply. Practically no one would argue that minors have no free speech rights. Few, if any, would favor banning a seventeen-year-old from making a political speech at a Young Republican club meeting.[196] On the other extreme, however, some do hold that children of any age should have First Amendment rights identical to those of adults, including the right to be exposed to harmful cultural materials. The question hence

192. Volokh, *supra* note 34.

193. *See* THE NEW GOLDEN RULE, *supra* note 4, at 73–77.

194. *See* AMITAI ETZIONI, MY BROTHER'S KEEPER: A MEMOIR AND A MESSAGE (2003).

195. Richard A. Posner, *The Truth About Our Liberties*, 12 RESPONSIVE COMMUNITY 4 (2002).

196. In *Tinker v. Des Moines Independent Community School District*, the Court ruled against a high school's policy of expelling students for wearing black armbands to school in protest of the Vietnam War. 393 U.S. 503 (1969). The Court stated that, "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." *Id.* at 511.

stands as to the scope of protected speech when we deal with children. Or, conversely, from what speech are they to be protected—and in what manner?[197]

One's response is greatly affected by how one perceives children in general. There are greatly different views, historically and culturally, as to whether childhood should be considered a unique category, or whether children are "mini-adults" able to make their own decisions. There is also disagreement as to what age childhood concludes and children are able to act as autonomous adults.[198]

In further discussion of this matter it is crucial to distinguish between several terms often used interchangeably—minors, children, and teenagers—each of which has rhetorical consequences. Those who favor full First Amendment rights for children of all ages tend to use the term "young people," "youngsters," or "students" and point to examples of the harm done when teenagers access to information about, say, HIV or abortion is limited.[199] Those who favor controls tend to call all minors "children" and point to the harm done to toddlers when they are exposed to pornographic or violent material on television.

To allow for a clearer discussion, from here on the following terms will be used: *children* refers to those twelve and under and *teenagers* refers to those between the ages of thirteen and eighteen. *Minors* is used to refer to both groups together. The age at which a person reaches majority differs for different matters, such as being eligible to drive or to vote, although in the US eighteen is often considered the age at which one becomes an adult. However, there would be nothing sociologically shocking to set a different age, say seventeen, as an age for less-protected cultural access. The age-differentiated approach is at the heart of this matter.

The discussion so far has followed the way the issue is typically discussed by both sides: with relatively little attention to age differ-

197. In his discussion of children's rights, Harry Brighouse considers the types of rights children have, rather than the extent of their rights. He distinguishes between welfare rights (which pertain to the direct well-being of the child) and agency rights (which involve the right to make choices about how to act) of children. He argues that if children do not have the same rational capacity of adults, providing for the welfare rights of children often means curtailing their agency rights. His full discussion of this matter can be found in Harry Brighouse, *What Rights (if Any) do Children Have?*, *in* THE MORAL AND POLITICAL STATUS OF CHILDREN 31–52 (David Archard & Colin Macleod eds., 2002).

198. For an excellent history of how ideas about childhood have evolved, see PHILLIPPE ARIÈS, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (Robert Baldick trans., 1962).

199. *See, e.g.*, Heins, *Rejuvenating Free Expression*, *supra* note 125, at 43–49.

ences among minors. Although rating systems are age-graded and parents are free to set their V-chips to age specifications, government-set protections are not usually age-specific. CIPA requires filters on all computers, whether used by adults or children, as do the policies that were implemented in Loudoun and Kern counties. Nor are the curbs on tobacco ads age-graded.

Civil libertarians demand not only the removal of various protective devices for teenagers, but also unencumbered access for children of all ages—as if they were adults. (Social conservatives, in turn, want to treat all minors—and sometimes adults—as children.) Writing on the outcome of the battle over filters in Kern County, Ann Beeson, an ACLU National Staff Attorney, praised the County's decision to "allow all adult *and minor* patrons to decide for themselves whether to access the Internet with or without a filter."[200] In its basic charter, the American Library Association ("ALA") demands that "the rights of users who are minors shall in no way be abridged," in regard to Internet access.[201] This position is based on the Library Bill of Rights, which states, "A person's right to use a library should not be denied or abridged because of origin, age, background, or views."[202] Any age. It leads to a position most people would consider not only unreasonable, but also unbelievable for any serious professional association. According to the ALA, if a child of age seven loses a library book, the parents are responsible for replacing it. However, if the parents wonder which book their child has lost, the library should not (according to ALA recommendations) disclose this information.[203]

One may argue that such a policy is concerned with the child's privacy rather than with First Amendment rights. Disregarding the question of whether children have privacy rights against their parents, there is a connection. The ALA fears that if parents can find out what

200. Beeson, *supra* note 67.

201. American Library Association, *Access to Electronic Information, Services, and Networks: An Interpretation of the Library Bill of Rights*, http://www.ala.org/alaorg/oif/electacc.html (Jan. 24, 1996).

202. AMERICAN LIBRARY ASSOCIATION, LIBRARY BILL OF RIGHTS § V, http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/Intellectual_Freedom3/Statements_and_Policies/Intellectual_Freedom2/librarybillofrights.pdf (adopted June 18, 1948; amended February 2, 1961 and January 23, 1980; inclusion of "age" reaffirmed January 23, 1996 by the ALA Council).

203. The ALA advises its members that: "Librarians should not breach a child's confidentiality by giving out information readily available to the parent from the child directly. Libraries should take great care to limit the extenuating circumstances in which they will release such information." American Library Association, *Questions and Answers on Privacy and Confidentiality*, http://www.ala.org/alaorg/oif/privacyqanda.html (Jan. 22, 2003).

their children read, this may "chill" the children's choices and thus undermine freedom of speech. Children may fear to access material their parents find objectionable. Indeed, this is a matter of concern for teenagers, especially older ones, but not for those twelve or younger. Laura Murphy, the director of the Washington, D.C. office of the ACLU evoked the case of a twelve-year-old who wants to read about homosexuality or HIV but fears to do so at home. Let's grant that there are some such cases. But it does not follow that millions of children ought to be harmed by unlimited exposure to all manner of sexually explicit material in order to accommodate these few cases. Such children should be encouraged to discuss the matter with a school nurse, a public clinic, or some other source which will help them get the information they need without exposing all others to objectionable material.

Nor did the ACLU ever suggest or hint, as it was fighting CIPA and two previous attempts to protect children from Internet pornography using Internet filters, that it would accept them if they were limited to schools or even to only primary schools. On the contrary, in other situations, civil libertarians state the opposite position quite explicitly. The ACLU has written that "[i]f adults are allowed access, but minors are forced to use blocking programs, constitutional problems remain. Minors, especially older minors, have a constitutional right to access many of the resources that have been shown to be blocked by user-based blocking programs."[204] The same position was struck by the ACLU when it charged the Loudoun County Library Board of Trustees in Virginia of "'removing books from the shelves' of the Internet with value to both adults *and minors* in violation of the Constitution."[205]

These positions are difficult to entertain, as minors clearly are developmental creatures whose capabilities change a great deal as they mature. Children—according to practically all of a huge social science literature and elementary common sense—are different from adults in that they have few of the attributes of mature persons that justify respecting their choices. Children have not yet formed their own preferences, have not acquired basic moral values, do not have the information needed for sound judgments, and are subject to ready manipulation by others. In the same vein, parents and educators are

204. Fahrenheit 451.2, *supra* note 128.

205. American Civil Liberties Union, *ACLU Enters VA Library Internet Lawsuit on Behalf of Online Speakers*, http://archive.aclu.org/news/n020698a.html (Feb. 6, 1998) (emphasis added).

discharging their social duties when they shape the cultural environments in which children develop, which includes choosing the material to which children are exposed. The underlying assumption is developmental. Children begin life as highly vulnerable and dependent persons, unable to make reasonable choices on their own. Stanford Law Professor Michael Wald writes, in reference to the social science findings on the subject,

> younger children, generally those under 10–12 years old, do lack the cognitive abilities and judgmental skills necessary to make decisions about major events which could severely affect their lives. . . . Younger children are not able to think abstractly, have a limited future time sense, and are limited in their ability to generalize and predict from experience.[206]

As children develop they gradually become capable of making moral judgments and acting on their own, and only then are they ready to be autonomous. As Colin Macleod and David Archard put it: children "are seen as 'becoming' rather than 'being'" and "[t]he basic idea that children must be viewed as developing beings whose moral status gradually changes now enjoys near universal acceptance."[207]

The Constitution basically deals with adults. Its application to children needs to be specifically worked out, rather than assumed to apply to them in the same way. Otherwise, a police officer who asks a child wandering in the streets where he is going could be charged with a violation of privacy (or maybe with age-profiling). Thus, to stop an adult a cop would need "reasonable suspicion." A young child roaming the streets alone, however, is unusual enough to provide reasonable suspicion in and of itself. This issue has been visited explicitly in *Horton v. Goose Creek Elementary School District*.[208] Although the court ruled that students should not be considered to have lower expectations of privacy, and that "society recognizes the interest in the integrity of one's person, and the fourth amendment applies with its fullest vigor against any intrusion on the human body,"[209] it also recognized that standards of reasonableness differ for children and adults.[210] There seems no reason to treat the First Amendment otherwise. The same point is also evident when it comes to "unlawful de-

206. Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 274 (1979).

207. David Archard & Colin M. Macleod, *Introduction*, *in* THE MORAL AND POLITICAL STATUS OF CHILDREN, *supra* note 197, at 2, 4.

208. 690 F.2d 470 (5th Cir. 1982).

209. *Id.* at 478.

210. *Id.* at 481–82.

tention;" it hardly applies to parents keeping their kids at home or sending them to their rooms.

To put it differently, whatever one considers the purpose and merit of the First Amendment—whether to ensure a free exchange of ideas, to maintain liberty, to enrich one's life, and so on—none of this applies to toddlers. To speak of the right to free speech of a two-year-old is ludicrous, but that is precisely what happens when one speaks of all minors as if they are of one kind. One may say that it is obvious that when one talks about "minors" one does not mean to encompass toddlers. Still, the term avoids engaging the question of the age at which children command First Amendment rights, and what the scope of those rights is. One should assume that those who are somewhere between infancy and age thirteen have much lower capacities to contribute to and benefit from speech and are more vulnerable to harm from certain materials.

Since one's ability to deal with certain types of material increases as one grows older and develops, protections of minors should be age-graded. Ideally, there would be many different types of labels and screening software that could take into account age differences (as well as other factors, such as the values of those who issue them.) Some might be issued by teacher's colleges, some by religious groups, and some by the media, leaving parents and educators free to choose among them. (Given that age is merely a reasonable approximation for maturity, some parents may choose protections that have been prepared for somewhat older or younger children.)

When it comes to government-introduced measures, which I argued are needed at least for now, such complexity may not be possible. *Hence, a minimum of two gradations should be provided to take into account gradual maturing: one for children and one for teenagers.* It is difficult to justify treating high school students the same way as children in primary schools and kindergartens, and *vice versa*. But in no case should children or teenagers be treated simply as adults.

VII. ROOTS IN LIBERALISM

To understand the underlying assumptions of civil libertarians' case against protective measures, one needs to examine the roots of these assumptions in political theory and social philosophy. The tendency of civil libertarians to treat children as adults when it comes to First Amendment issues is not accidental. It is rooted in contemporary liberal political theory, especially in its more extreme libertarian

version. It clearly differs from the classical liberal theorists. John Locke, writing in his Second Treatise on Government, noted, albeit somewhat reluctantly: "Children, I confess are not born in this full state of Equality, though they are born to it. Their parents have a sort of Rule and Jurisdiction over them when they come into the World, and for some time after."[211] He goes on to comment later, "Children being not presently as soon as born, under this Law of Reason were not presently free."[212]

Nathan Tarcov notes that Locke's concept of "parental power" derives from parental duty to take care of children, which extends until children become capable of taking care of themselves.[213] Until a child reaches an "Age of Discretion," when he has acquired reason, "some Body else must guide him, who is presumed to know how far the Law allows a Liberty."[214]

Similarly, John Stuart Mill immediately follows his assertion that "[o]ver himself, over his own body and mind, the individual is sovereign," with the qualification that

> this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.[215]

This is not a text embraced by contemporary liberals or libertarians. Most avoid the issue by simply not discussing children from this viewpoint, as the indexes to scores of their books show.[216]

Contemporary liberals, especially libertarians, hold that we are to honor people's choices and avoid paternalism because it is the individual who must live with the consequences of his or her own actions. But children are not prepared to assess the consequences of their choices, and families are deeply affected when kids abuse drugs, shoplift, or are dehumanized by harmful material. Paternalism means treating adults like children, not treating children as children. Pater-

211. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 322 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (emphasis removed).

212. *Id.* at 323 (emphasis removed).

213. NATHAN TARCOV, LOCKE'S EDUCATION FOR LIBERTY 71–73 (1984).

214. LOCKE, *supra* note 211, at 325.

215. JOHN STUART MILL, ON LIBERTY 48 (Alan Ryan ed., Norton & Company 1997) (1859).

216. To take just one example from among many, the index to Ronald Dworkin's Taking Rights Seriously includes neither "children" nor "minors." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 291–92 (1977).

nalism is exactly what the law and society expects from parents, and we hold them accountable when they fail. Of course, as children grow older, they can and ought to be given more leeway to learn and to exercise their own judgment—with parents and other educators looking over their shoulders until they learn to fly solo.

Ultimately, the reason liberals shy away from dealing with children in political theory and social philosophy is that children threaten the very foundations on which their theory rests. Once one grants that they are human beings whose preferences are deeply affected by outside agents, including culture and values, in ways that they are unaware—that there are individuals who can be influenced, persuaded, or swayed by peers and leaders—it is hard to respect their choices as truly their own. Such cultural and social influences do not suddenly vanish when a minor achieves a given age and is called an adult. Thus, children point to the need for a social theory that can accommodate the role of profound external influences on individuals much better than liberalism does.

It also follows that dropping all protections from harmful cultural material is not justified even for adults, as is certainly the case with child pornography. So far the legal justification for banning child pornography has been that "the distribution network for pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled."[217] The 2002 decision in *Ashcroft v. Free Speech Coalition,* in which the Supreme Court overturned the Child Pornography Protection Act, weakened this precedent by allowing the distribution of "virtual" child pornography because no "real" children were harmed during its production.[218] However, virtual child pornography causes real harm by normalizing the kinds of behaviors it portrays, which would be illegal if carried out by real people, and thus I argue that there are grounds for banning child pornography, both real and virtual, based on its effects. Determining how and in what way to limit the access of adults—and determining what material should be limited—is a subject for another discussion altogether.[219]

217. New York v. Ferber, 458 U.S. 747, 759 (1982) (prohibiting not only the production of child pornography, but also the distribution or possession of child pornography).

218. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

219. For an additional discussion, see AMITAI ETZIONI, *Privacy as an Obligation, in* THE COMMON GOOD (forthcoming 2004).

VIII. WHOSE STANDARDS?

Finally, I address the difficult question of how to go about determining what specific cultural materials are so harmful that we must block them for children. One argument against protecting children from harmful material is the lack of consensus regarding what is offensive. Although there were shared, historically fashioned community standards in the past, our current pluralistic society is said to preclude widespread agreement about what is objectionable. Jeffrey Narvil writes, "American notions of nudity as inherently indecent are strikingly ethnocentric," and "traditional, historical notions of propriety . . . may not exist in an increasingly diverse and multi-ethnic society."[220]

The concept of "contemporary community standards" was introduced in the 1957 case *Roth v. United States*,[221] in which the Supreme Court established a test for determining what is obscene and therefore outside the protection of the First Amendment.[222] This test was modified in *Memoirs v. Massachusetts*[223] and then in *Miller v. California*.[224] The test established by *Miller*, and then tweaked in numerous succeeding cases,[225] included the yardstick of whether "'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."[226]

The crux of civil libertarian objections to "contemporary community standards" lies in the argument that, although a community might be able to limit its own members based on what is agreed to be unacceptable in that community, in the cases at hand the limitations are set nationally. As the Supreme Court pointed out in its ruling striking down the CDA, when "community standards" are applied to something like the Internet, which is viewed by members of many communities, they will reflect the views of those with the lowest threshold of offense, thereby limiting the access of those in other

220. Jeffrey C. Narvil, *Revealing the Bare Uncertainties of Indecent Exposure*, 29 COLUM. J.L. & SOC. PROBS. 85, 90, 111 (1995).

221. 354 U.S. 476, 489 (1957).

222. *Id.*

223. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 418 (1966).

224. 413 U.S. 15, 24 (1973).

225. *See, e.g.*, Pope v. Illinois, 481 U.S. 497 (1987); Smith v. United States, 431 U.S. 291 (1977); Jenkins v. Georgia, 418 U.S. 153 (1974); Hamling v. United States, 418 U.S. 87 (1974).

226. *Miller*, 413 U.S. at 24 (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).

communities who would not be offended by the same materials.[227] Thus the ACLU defended the song "Cop Killer" (in which rap artist Ice-T fantasizes about killing a police officer) as reflecting "a radical attitude held by some inner city residents" and said that it is "impossible to know exactly what message a particular listener takes" from it. They further charged that voluntary plans to label music were an attempt to "impose on all Americans the tastes and values of political powerbrokers who don't connect with the experiences and concerns of the young, the alienated, and minorities."[228]

A similar argument involves the global nature of the Internet. Kelly Doherty writes that

> [t]he community standard is extremely difficult to apply to the Internet because the Internet's reach is worldwide. When someone in a country with a conservative community standard receives sexually explicit material via the Internet from a country that permits and encourages bigamy or nudity, for example, it becomes difficult to determine which community standard should govern.[229]

Phillip Lewis goes farther, arguing that for the Internet "[s]uch communication would be impossible, or at the very least, greatly restricted, by the application of the arbitrary and antiquated 'community standard' that Congress has advocated in its two attempts at Internet regulation (the CDA and the COPA) thus far."[230]

These arguments, when critically examined, seem unsustainable. First, in reference to the notion that "as goes the Internet so goes the world," one notes that the Loudoun and Kern County public libraries, and most others, are still very much local institutions. So are schools and many other institutions. Community standards are by no means merely historical relics, non-applicable to the Internet, as the Supreme Court just reminded us in its partial ruling on COPA.[231]

Nor are we without national standards. Justice O'Connor, writing in concurrence with the COPA ruling, countered skeptics who believe that a national standard is "unascertainable," noting, "It is true that our Nation is diverse, but many local communities encompass a similar diversity. . . . Moreover, the existence of the Internet, and its facilitation of national dialogue, has itself made jurors more aware of the

227. Reno v. ACLU, 521 U.S. 844, 877–78 (1997).

228. *Popular Music Under Siege*, *supra* note 115.

229. Kelly M. Doherty, Comment, WWW.OBSCENITY.COM: *An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 AKRON L. REV. 259, 286 (1999).

230. Philip E. Lewis, Comment, *A Brief Comment on the Application of the "Contemporary Community Standard" to the Internet*, 22 CAMPBELL L. REV. 143, 166 (1999).

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

views of adults in other parts of the United States."[232] Most relevant, the very Constitution and its First Amendment that liberals rise to defend reflect national values that some communities may well not endorse if left to their own devices, but we hardly exempt those communities from abiding by it. Of course, Congress is an institution authorized to speak for nationwide preferences and values. So is the Supreme Court.

Aside from upholding national standards in the protection of minors, communities should be given some leeway, in grey areas, to add some standards of their own. The term "grey areas," to be defined by Congress and the courts, is used to indicate that communities would not be free to ignore the First Amendment, but only to add some measures or provide further definitions, for instance what they consider harmful, which movies should receive an R rating, and whether moviegoers should carded before entrance. And, just as local governments can ban people from drinking alcohol in public or running around nude, they should also be allowed to ban the rental of XXX-videos to children in their libraries. Those who argue that the Internet makes it impossible to impose local standards should take heart from the fact that it is technically possible. At least they should agree that if possible, the Internet should not be given license to expose children in ways no other institution is allowed. *In short, if there are any reasons to refuse better protection of children in the media and on the Internet from harmful material, the lack of standards cannot be counted among them.*

IN CONCLUSION

The position that children have full speech rights is untenable in the face of the intentions and interpretations of the First Amendment. Our laws in general do not mechanically extend to children, but take into account that their capacities are still developing. There is no reason the right to free speech should be treated any differently. Children are clearly developmental creatures. Initially, they have few if any of the attributes of mature persons. For children to develop properly, parents and educators, and society at large, have not merely a right but a duty to shape the cultural environment in which they grow. Unbounded exposure to harmful cultural material undermines their proper development, especially, as data show, representations of

232. *Id.* at 588–89 (O'Connor, J., concurring).

violence (aside from violence itself). As children grow older and their capacities increase, they are entitled to broader speech rights, but they still require some protections. Thus, protections of children (and, to a lesser extent, of teenagers) are best set in ways that separate the various limitations by age, and that "spillover" as little as possible onto the access of adults. However, if protecting children requires some limitation on adults, especially their commercial speech, then these measures are justified when the harm is substantial and well documented. We see this more clearly once we recognize that the First Amendment does not trump all other considerations, and begin to value children more than we may have in the recent past.

Mr. SMITH. Thank you, Dr. Etzioni.
Mr. Valenti?

STATEMENT OF JACK VALENTI, PRESIDENT AND CHIEF EXECUTIVE OFFICER, MOTION PICTURE ASSOCIATION OF AMERICA

Mr. VALENTI. Thank you, Mr. Chairman. First I really want to thank you. I was deeply moved by what you said, and I'm grateful to you and Congresswoman Lofgren as well. These are trying times for me right now.

But this Committee has been the great protector of intellectual property, which I need not point out to this Committee, is America's greatest trade export, producing great surplus balances of payment while we're bleeding from trade deficits.

I want to thank you, Mr. Chairman, the Ranking Member, Mr. Berman, for 4077, H.R. 4077, which is I think one of the best measures that's come out of this Committee, and I hope it becomes law. Thank you for that.

And finally, Mr. Chairman, before I begin my pathetically ineloquent comments, I come before you with great reluctance. You've been a great champion and a great friend, and I find myself quite hesitant in trying to take issue with you on anything, so I hope you'll allow me to do this, because I really believe in what I'm about to say, but I do regret very much that we're on different sides on this. Please forgive me.

What I want to say here is simple and straightforward, and it's this, that it rests on two very impressive premises. And one of them is that the right to make derivative works, whether fixed or nonfixed, from a copyrighted work, is under law, under copyright law, a fundamental right that is exclusively the right of the copyright owner. And to change it, to diminish it, to shrink it, I think is not in the long-range interest of this country. And the second is, my second premise is, it is the marketplace, not the Congress, that ought to deal with these commercial disputes, and that's what they are. And before I finish here, I will tell you I think we're on our way to having it done in the proper way.

Now, what this law tells us, I think with great clarity is, as I've said, that only the copyright owner has the right to determine who changes, produces a derivative work from his copyrighted work. Now, this movie filtering bill, I think would so seriously erode that, that allows somebody making money off of skipping scenes or dialogue, which disfigures the original vision of the creator who spent a year or two working on this movie, and it cost $100 million to make, and somebody somewhere in a back room—we don't know who they are—really makes these kind of cuts. And Ms. Peters, in her comments, points out that even that is awkwardly done, and it doesn't even get the job done. So there's some kind of a misfigurement going on. It's not what the creator had in mind.

I fought for 38 years to both defend the first amendment and to make sure that artistic integrity could be preserved in this country. I think it is valuable, and I think in any way to dishonor it, is not good for this country.

Now, let me go on to what I think is important. I don't have any objection, nor do I think the creative people have, in people's homes

to do what they choose to do with the technology, fast forwarding and all the stuff that they do, nothing wrong with that. But somebody, for profit, to come in and make these judgments, and then to display it and deploy it to the known western world is not right, it is just not right.

One objection is this, our objection is, I think for the Congress to give political and legal cover to companies who do this, by offering a disfigured version of a movie without regard to the creative vision of the director and approval of the studio just doesn't make any sense.

That brings me to my second issue, my second premise. I would hope that this Committee would allow the parties to negotiate. Now, you know this has been going on for some time, Mr. Chairman, and you rightly said it's a long time. But I am not part of these negotiations because antitrust law prevents the MPAA from getting involved. So I can only tell you what I have been told and do in part believe. And that is that these negotiations are complex, multi-faceted, multi-tiered, and that these are negotiations that take both sides to agree. Now, what has happened is, that I've been told that the prospect of having victory handed to them, without having to go through these negotiations, is causing on the other side a diminishing incentive to negotiate.

I don't blame ClearPlay. Frankly, if I was in their shoes, I'd be doing exactly what they're doing, talk, talk, talk, but don't make a deal. Let Congress do it for you. You get everything free. Why negotiate? And I think that's pretty smart tactics on their part.

And therefore, Mr. Chairman, I think you should know that the studios, I am told, also are negotiating with another company providing the same services, called Trilogy. And Trilogy has sent a letter to this Committee saying, "We believe the marketplace ought to decide this, as it has to do." This is a business agreement that Congress has no expertise in.

Now, I want to finish by saying—before that red light is going on, and dismays me considerably, I might add——[Laughter.]

But I want to finish as I began, Mr. Chairman. I endorse your objectives, and that is to have more family friendly movies in choices for America, and we're doing that. All you have to do is go down and look at the top grossing pictures every week, and you will see increasingly at the top of the list the G and the PG rated films. Now, the reason why they're there is because they're a complete narrative. Other pictures are not a complete narrative, because if ClearPlay has its way, you will see something in there that will not only dismay you, it will puzzle you, because the conversation, the dialogue, the scenes that have been taken out, which rips apart the journey of the dramatic narrative. So I think with great passion, Mr. Chairman, I believe if you could go back and say, "Negotiate now, it's going to be business negotiations, not a congressional law to do this," it will get done.

Thank you.

[The prepared statement of Mr. Valenti follows:]

PREPARED STATEMENT OF JACK VALENTI

Chairman Smith, Mr. Berman, distinguished Members of the Subcommittee:

This Committee stands in the vanguard of the protectors of copyright and intellectual property in this country. You, Chairman Smith and you, Ranking Member Ber-

man, both introduced H.R. 4077, which can be justly hailed as a valuable and important measure that protects copyrighted works. All those who work and create in the intellectual property community—America's greatest trade export—have deep gratitude for your championing of copyright. Which is why it is with deeply profound reluctance that I must testify in opposition to the movie filtering bill called the "Family Movie Act."

My brief here is simple and straightforward. It rests on two impressive premises. The first is that the right to make "derivative works" from a copyrighted work is, under copyright law, a fundamental property right belonging exclusively to the copyright owner, and should be preserved else copyright begins to decay. The second is that the marketplace, not Congress, is the best place to resolve the type of commercial dispute that gives rise to this legislation.

The law tells us, with great clarity, that the *owner* of a copyrighted work—and only that owner—has the authority to decide if someone else may produce a product derived from that copyrighted work. The title deed of this valuable principle has solid congressional roots. It is enshrined in Section 106 of the Copyright Act. It means that no one may usurp your right to prepare and sell, for example, an abridged version of your book, song, or movie because they think that some members of the public might pay for a version that eliminates certain parts of that creation.

The movie filtering bill would seriously erode that core right by legalizing businesses that sell technology, for a profit, which can "skip and mute" scenes or dialogue to create an abridged version of a movie, as long as no "fixed copy" of the altered version is created. Of course, we understand that the purpose of the bill is to come to the aid of commercial services that, without permission of the owners of the copyright, use this technology to create so-called "family friendly" versions of movies. These versions delete scenes or mute dialogue that the service's employees deem too violent, too coarse, too suggestive, or otherwise may be objectionable to some members of the American public.

But the legislation is in no way cabined to permit *only* such services to flourish, and, consistent with the First Amendment, probably could not. Anyone could use this statute to go into business to sell abridged versions of movies for any purpose: to skip every part of the movie *except* the violent scenes; to remove any reference to, say, interracial dating; or simply to offer a one-hour version of a classic movie like "Saving Private Ryan," eliminating all the parts somebody thought were nonessential. And while this legislation is confined to movies, is there any principled difference between businesses that make their money offering edited versions of someone else's movies and those that would offer edited music or books distributed in digital form?

The inroads into copyright law allowed by this bill could have other unhappy consequences. Failure to adequately protect the exclusive right of copyright owners to authorize the making of derivative works and the rights of authors would violate U.S. obligations under the Berne Copyright Convention. Moreover, a breach of the obligation relating to derivative works would be actionable under the WTO TRIPS provisions.

The future of our creative industry, and its spectacular nourishment of the U.S. economy, depends on the ability of U.S. trade negotiators to persuade other nations to respect our copyrights by strictly complying with their international obligations under the Berne Convention and the WIPO Copyright Treaty. I ask you to consider this *indisputable truth:* if the Congress enacts a law that is inconsistent with our international obligations, our ability to insist that our trading partners comply with their obligations to us is severely undermined.

It is obviously in our companies' interests to produce movies that appeal to a large number of people of all ages, call them 'family friendly' or however you describe them. And we do not, of course, object to people in their homes for our own personal tastes fast forwarding through scenes they might not want to watch, or might not want their children to watch. Our objection is simply to Congress providing legal cover to companies that want to make a profit by offering an edited, abridged version of a movie without regard for the wishes of the director who created the movie or the studio that owns the copyright to the movie.

That brings me to my second point: I ask you to allow the parties and the market to sort this out without any legislation. Is that not a sensible, reasonable suggestion?

As you know, Mr. Chairman, there is pending litigation in the court that will decide the dispute between the parties. This litigation includes the commercial concerns that sell a variety of kinds of "movie filters," the movie studios that own the copyrights, and the directors who created the movies being abridged. More importantly, there are also ongoing productive negotiations between individual studios

and the editing services to try to resolve this dispute through licensing agreements acceptable to all sides. The essence of this solution would involve the studios, in consultation with the directors, creating "airplane-like" versions of popular movies. The commercial editing services would use these versions as templates from which to prepare their alternative versions.

These negotiations are complex, multi-issued, and multi-sided. These are not negotiations that the antitrust laws permit to be carried out by the MPAA, operating as an association. Instead, each studio must discuss the terms and conditions of any licensing agreements individually with each of the film filtering firms. I am, therefore, not privy to the exact details of the negotiations between the individual studios and the filtering companies. I do understand that substantial progress has been made, and there is hope for a light at the end of the tunnel.

However, I am also hearing that the prospect of having victory handed to them by legislation may have dampened the enthusiasm of one side to come to fair terms. It is self-evident that if a party believes that it will obtain everything that it wants for free, there is less incentive to bargain in good faith.

I hold out great hope that agreements can be hammered out that would result in acceptable commercial and artistic choices for everyone. Any settlement agreed to among the parties is far more likely to accommodate all the interests concerned than any legislative solution imposed upon them. This is a decision that needs to be developed in the marketplace between commercial firms, and is unsuitable to being judged and decided by legislation.

I know that this has taken time. But give us the chance we need to attempt to work this out. We all know that the threat of potential legislation will continue to hang in the air. We just ask that a clear message be sent to all sides: "Work this out as business groups do every day, by negotiation, not by legislative threat."

Mr. Chairman, I have no quarrel with your objective: to increase choices for families who want to watch our movies. We want the same. But, with much passion, we believe that goal has to be achieved through business agreements that make sense in the marketplace. Pushing this legislation through now will not, I fear, be seen in the fullness of time as a boost for America's parents, but as a unnecessary blow to the first principles of copyright.

Thank you, Mr. Chairman, and your colleagues on the Committee.

Mr. SMITH. Thank you, Mr. Valenti.

Ms. Nance.

STATEMENT OF PENNY YOUNG NANCE, PRESIDENT, KIDS FIRST COALITION

Ms. NANCE. Thank you, Mr. Chairman and Members of the Committee, and it it's not fair that I have to go after the charming and eloquent Mr. Valenti, but I'll try my best.

My name is Penny Young Nance, and I'm the President of the Kids First Coalition. We're a nonprofit educational and advocacy group that I founded with the goal of protecting children and advancing pro-family legislation. I sit before you not only as a pro-family advocate, but also as a very concerned mother of two young children.

Today I'm here to represent members of my organization, mostly moms who downgraded professional careers to stay home full time, or like I do, part time with their children, as well as countless parents across the country that seek to protect their children from graphic sexual images and violence which unmistakably damage our children.

The Kaiser Family Foundation reports that 95 percent of children, ages 0 to 6, live in a home where there's a VCR or a DVD player. They say that on average these kids watch just the VCR or DVD player—this is not totaling in television time—40 minutes a day. And of course, we all know that not everything viewed by these children is age appropriate. Recent studies by the American Psychological Association and the American Academy of Child and

Adolescent Psychiatry, both say that the major effects of seeing violence on TV or movies are children may become less sensitive to the pain and suffering of others, children may be more fearful of the world around them, or even worse, children may become more likely to behave in aggressive or hurtful ways toward others.

On the issue of a child's exposure to viewing graphic sex, Donna Rice Hughes' group, Enough is Enough, has found that kids exposed to the viewing of graphic sex scenes begin to view sex without responsibility as acceptable and even desirable. And no big surprise, in the long range with this kind of view inculcated in their little hearts, often leads to damaging behavior and STDs and early teen pregnancies. It's a problem. Even without the science, which overwhelmingly concurs, parental instinct and basic common sense tell us to shield our kids from graphic sex and violence on TVs and movies.

I'm not an expert on copyright issues, and nor does my organization take any kind of a position, except to say that stealing is wrong, and parents need to teach their children to respect other people's property. On the other hand, I don't believe that the entertainment industry should try to keep helpful technology, such as ClearPlay, from parents.

As a parent I welcome all technology that gives parents options to protect their kids, and I even challenge the entertainment industry to work with technology leaders, families and parents groups, to develop even more market-based approaches.

Ultimately I think this will help the industry by opening up new markets, and I'll give you an example of how from my own experience. As I mentioned earlier, I'm the mother of two young children, and my son loves Spiderman. I was shopping recently in Target, with about, you know, 200 other women just like me, walking through the aisle, and I came across a kiosk with the Spiderman DVD. In fact I have it here today. Now, at that time I did not purchase it. I paused in front of the kiosk. I toyed with buying it. I wanted to get it for him because he loves it so much. He's so interested in super heroes, and I wanted to buy it. But ultimately I walked away. I didn't purchase it because it's too violent for him, it's too dark. He could not see it.

Fast forward a week or two. I went out and purchased a DVD player with the ClearPlay technology. I also purchased at the same time the Spiderman DVD, and I brought it home, I hooked it up, with some help from my husband, actually. [Laughter.]

I was able to choose to filter, out of 14 different categories, that I could choose from and decide what was appropriate for my children and what was not.

I have included in my testimony all of the categories, but the main areas were violence, language, sex and nudity, and even drug use. Using all of the filters I screened the DVD, and now I feel comfortable with allowing my children to view at least part of it. I mean it's a dark movie, so a little bit goes a long way, but now they can see it, and I bought it because now I am confident.

Without ClearPlay I would not have purchased the DVD. What a great tool to help me to protect my kids. And I hear this, you know, from moms as I do call-in, you know, talk radio shows, callers call in. Just from my own experience as a soccer mom, one of

the top concerns of American women is how do we protect our children from being inundated with scenes of graphic violence and sex and language. How do we protect our kids?

So we are thrilled to have any kind of new technology that helps us. We can't put them in a bubble. They live in the world that we live in. There's lot of images every day that they're inundated with.

Now, not all movies are appropriate for kids, and again, parents still have to use discretion, but it's just great to have one more tool. New technology is so valuable to us as a country, but with it comes challenges and responsibilities. I always tell parents that they must be the first line of defense and remain vigilant against all threats. ClearPlay or any other technology is simply a tool and not a substitute for parental oversight. If there's a question, I still watch the movie first to make sure the material is age appropriate even with the filtering system. Even as adults it's important to be cognizant of what we feed our minds. There are certainly DVDs I'll feel more comfortable buying now or renting for my husband and I with the use of ClearPlay.

There's a biblical proverb that says: As a man thinks in his heart, so is he. And the secular version is: garbage in, garbage out. So it's good for all of us.

In closing, the Kids First Coalition is grateful for new technologies like ClearPlay that support parents and protect kids.

Thank you for allowing me to testify before you today with just such a great group of people here.

[The prepared statement of Ms. Nance follows:]

PREPARED STATEMENT OF PENNY YOUNG NANCE

Hello, my name is Penny Nance and I am the President of Kids First Coalition, which is a non-profit educational and advocacy group I founded with the goal of protecting children and advancing pro-family legislation. I sit before you not only as a pro-family advocate but also a very concerned mother of two young children.

Today, I am here to represent the members of my organization, (mostly moms who have downgraded professional careers to raise kids) as well as the countless parents in this country who seek to protect their children from graphic sexual images and violence which unmistakably damage children.

The Kaiser Family Foundation contends that about 95% of American children ages 0–6 live in homes with a VCR or DVD player. They say that these kids watch a DVD or video about 40 minutes per day. We of course all know that not everything viewed by these kids is age appropriate.

Recent studies by the American Psychological Association and the American Academy of Child and Adolescent Psychiatry both say that the major effects of seeing violence on TV or movies are:

- Children may become less sensitive to the pain and suffering of others
- Children may be more fearful of the world around them
- Children may be more likely to behave in aggressive or harmful ways toward others

On the issue of a child's exposure to the viewing of graphic sex, Donna Rice Hughes' organization Enough is Enough has found that kids exposed to the viewing of graphic sex scenes begin to view sex without responsibility as acceptable and desirable. No big surprise, these attitudes can often lead to teen pregnancy and sexually transmitted diseases.

Even without the science, which overwhelmingly concurs, parental instinct and basic common sense tell us to shield our kids from graphic sex and violence on TV and movies.

I am not an expert on copyright issues nor does my organization take a position except to say that stealing is wrong and parents need to teach children to respect other people's property. On the other hand, I do not believe that the entertainment industry should try to keep helpful technology such as ClearPlay from parents. As

a parent I welcome all technologies that give parents options to protect their kids. I even challenge the entertainment industry to work with technology leaders, families and parents groups to develop even more market based solutions. Ultimately, I think this will help the industry by opening up new markets. I will give you an example of how.

As I mentioned earlier, I am the mother of two young children. My son loves Spiderman. A couple of weeks ago I was shopping in Target and I paused in front of the Spiderman DVD. I toyed with buying the DVD but I decided against it because it is just too violent for him. Last week, I bought a new DVD player with ClearPlay and a Spiderman DVD. After hooking up the new DVD player I was able to specifically choose to filter out fourteen categories of material and then password protect my choices. I have included all the categories with my written testimony but the main areas were violence, language, sex and nudity and illicit drug use.

Using all the filters, I screened the DVD and now I feel comfortable allowing my children to view at least part of the movie. Without ClearPlay, I would have not purchased the DVD. What a great tool to help me protect my kids. Of course even with this new technology, not all movies are appropriate for kids. Again, parents still need to use discretion but its great to have one more tool.

New technology is so valuable to us as a country, but with it comes new challenges and responsibilities. I always tell parents that they must be the first line of defense and remain vigilant against all threats. ClearPlay or any other technology is simply a tool not a substitute for parental oversight. If there is a question, I still watch the movie first to make sure the material is age appropriate even with the filter system. Even as adults it's important to be cognizant of what we feed our minds. There are certainly DVD's I will feel more comfortable buying or renting for my husband and I with the use of ClearPlay. There is a biblical proverb that says, "as a man thinks in his heart so is he." The secular version of that saying is garbage in garbage out.

In closing, the Kids First Coalition is grateful for new technologies like Clear Play that support parents and protect kids. Thank you for allowing me to testify before you today.

ClearPlay Filter Settings

There are 14 different ClearPlay Filter settings. Each of these settings can be turned on or off. This allows for over 16,000 potential user configurations.

1. **Strong Action Violence:** Filters excessive or repeated violence, including fantasy violence.
   - Strong Fantasy/Creature Violence
   - Sustained/Repetitive Violent Actions
   - Crude Comic Violence
2. **Gory/Brutal Violence:** Filters brutal and graphic violent scenes.
   - Fierce, Brutal Violence
   - Graphic/Bloody Violence
   - Rape/Rape Scene
   - Torture
3. **Disturbing Images:** Filters gruesome and other disturbing images.
   - Macabre Images, Dead/Decomposing Bodies
   - Bloody/Horror Imagery
   - Gruesome/Disturbing Imagery
4. **Sensual Content:** Filters highly suggestive and provocative situations and dialogue.
   - Highly Sensual Dialogue and Situations
   - Highly Provocative and Revealing Clothing
   - Highly Provocative Innuendo
5. **Crude Sexual Content:** Filters crude sexual language and gestures.
   - Overt Crude Sexual Language
   - Overt Crude Sexual Actions or Gestures
   - Crude Sexual Slang or Idiomatic Expressions
6. **Nudity:** Filters nudity, including partial and risqué art nudity.

- Rear Nudity
- Topless/Front Nudity
- Partial Nudity/Veiled Nudity
- Nude Photos/Art

7. **Explicit Sexual Situation:** Filters explicit sexual dialogue, sound and activity.
   - Sex Scenes
   - Sex Related Sounds
   - Sexually Explicit Actions/Images/Dialogue
8. **Vain Reference to Deity:** Filters vain or irreverent references to God or a deity.
9. **Crude Language and Humor:** Filters crude language and bodily humor.
   - Crude Scatological Word/Sound
   - Crude Scatological Image
10. **Ethnic and Social Slurs:** Filters ethnically or socially offensive insults.
    - Racial Slurs
    - Social Slurs
11. **Cursing:** Filters profane uses of hell and damn.
12. **Strong Profanity:** Filters swearing and strong profanities.
13. **Graphic Vulgarity:** Filters harsh and vulgar words and phrases.
14. **Explicit Drug Use:** Filters vivid scenes of illegal drug use.
    - Drugs being used in a vivid/graphic manner.

Mr. SMITH. Thank you.

Ms. Peters, let me direct my first question to you. You said in your written testimony, "I believe that, on balance, parents and other consumers should be able to purchase products that allow them to mute and skip past audio and visual content of motion pictures that they believe is objectionable." And you said that, "It seems reasonably clear that such conduct is not prohibited under existing law." And in your oral testimony a few minutes ago, you were less than, say, absolute in your feeling that this is legal. You mentioned authorities, in fact, on the other side.

My question for you is, yes, we do have a court case in Colorado; we know how you think it is going to rule. But we really do not know how other courts across the country might rule, and there is such a thing as forum shopping. You have Members of Congress, including at least one individual here today, who is opposed. So there is opposition. There are other individuals, including panelists, who feel that copyright law is being infringed.

Why, then, shouldn't we inject some certainty into the equation and pass legislation so that there is not this uncertainty and so that you have more confidence in your statement as well?

Ms. PETERS. I do have confidence in my statement. Obviously, people see things differently, and I have spent the better part of the last 2 weeks asking many academics and people in the copyright industries how they perceived this issue.

I believe very strongly that the view I expressed is, in fact, the correct view, and I think that is the view that the court is going to reach. So——

Mr. SMITH. Well, I hope you are right, but you cannot guarantee that any court where a suit is brought——

Ms. PETERS. I can never guarantee any court will ever do anything that I think is right.

Mr. SMITH. And that is my point. I think that is a good reason for the legislation, but thank you.

Dr. Etzioni and Ms. Nance, both of you all came to the same conclusion, though from different perspectives. Dr. Etzioni's was more of an analytical approach. Ms. Nance, you are the only mother present, and that was a personal approach. But your conclusion was that children are harmed. More specifically—Dr. Etzioni, let's begin with you—how are children harmed by this culture issue of violence?

Mr. ETZIONI. Well, you choose the social science measure, if it is more a predisposition to crime, more likely to act out aggressively in school, doing less well on academic tests. You choose the measurement, and there is a strong correlation, like also to science studies. We could spend a week arguing about chi squares and such. But at the end of the day, every time—there have been done what we call mega-reviews that has summarized the study of the 1,100 relevant studies—we come to the same conclusion. There is a strong correlation between exposure and antisocial behavior.

I would very briefly mention one study because it is particularly telling. There were three Canadian villages who were behind a mountain at an earlier age before we had cable and all that. And, therefore, they could not get a TV signal. Then, finally, they were "blessed" and they got TV signal. There was a significant rise in crime in the months and year that followed, but all the other villages stayed at the same level. This is just one of the many studies.

Mr. Chairman, if you will allow me one other comment, as to the notion which was just explored that the bill may be in some way redundant, let me say it is very important for Congress to express its values even if it is redundant, especially given that previous bills which dealt not directly with this technology but this issue, like CIPA and COPA, did not cover violence. Their only concern is pornography, which the evidence is there, but not nearly as compelling as violence. So I congratulate you on helping us have a technology which will also protect our children from violence.

Mr. SMITH. Okay. Thank you, Dr. Etzioni.

Ms. Nance?

Ms. NANCE. Well, Mr. Chairman, many of you will remember, some of you have small children, but children are basically sponges. They absorb so much more than we do. They are taught by so many different sources than just parents. We as parents wish that we were the only place that they took information from, but that's not the case. And we know from just, you know, our daily interactions with our kids that they're very affected by what they view, what they watch.

I read something that Parents Television Council put out not too long ago about some interviews and a study they had done with teachers, and they noticed—these parents—or, excuse me, these teachers had noticed on the playground that on Monday morning, or whatever day it was, that the kids were particularly violent—fighting, kicking. You know, it seemed like this one day of the week they had more problems than any other time.

They started digging and trying to decide, you know, what was the problem, what was happening. They discovered that on this particular night before school they were watching WWF

Smackdown, which is Worldwide Wrestling Federation Smackdown. It was the violent images were affecting their behavior directly the next day.

That's not shocking. Moms know that. And my own child, you know, we don't even have cable in our house. That's how careful I am. My child was watching a show on Saturday morning, and I noticed—you know, she's only 7, but she was using very sort of teenager slang to me and being slightly disrespectful. And I suddenly put two and two together. She was imitating what she was hearing these older kids say.

What they watch affects them deeply.

Mr. SMITH. Thank you, Ms. Nance.

Without objection, I'm going to recognize myself for an additional 30 seconds, and that's to ask Mr. Valenti a question. Mr. Valenti, your testimony expressed some concern about the commercialization of these movies that might have been filtered. I am hoping to reassure you, in our legislation we explicitly say that it is for private home viewing, we use one phrase, and private use as well. We do not endorse nor contemplate the sale or commercialization of movies that have been filtered. We're talking about private home, individual parent and child-parent relationship. Is that reassuring to you that we're keeping it within those confines?

Mr. VALENTI. I wish I could say yes, but the answer is no, because ClearPlay is a commercial company. It's selling this, and I guess it hopes to increase its sales exponentially over the years. So——

Mr. SMITH. But, actually, the sales of movies might increase as well if families were reassured by the content not being offensive.

Mr. VALENTI. I'm not going to quarrel with that because the family must purchase, so it's not a question of loss of revenue. But I think of something just as valuable. It's the loss of creative integrity; it's the loss of dramatic narrative. It's somebody, as I said earlier, that works a year, 2, 3 years on a project, a movie, and then have it disfigured in a way that is contrary and despoiling of the creative vision of not only the director and his creative team but the copyright owner as well.

Mr. SMITH. Okay. As you said, this is one of the few times where we disagree, but I thank you for your comment.

Mr. VALENTI. Thank you.

Mr. SMITH. My time has expired, and the gentleman from California is recognized.

Mr. BERMAN. Thank you very much, Mr. Chairman.

First, I want to differentiate—I want to just not take exception, but your conclusion about my position, the notion that I would have an informed opinion about whether ClearPlay's technology violates copyright law gives me a level of credit for knowledge that I do not deserve. I have no idea—I mean, I'm interested in the different arguments. I think we have a court that's going to make that decision. I am interested in the Register's opinion of the issue, and I'd like to ask Ms. Peters just a couple of questions.

The bill essentially says copyright law isn't violated in the making of limited portions of audio or video content of a motion picture impresentable—imperceptible by or for the owner of an authorized copy of that motion picture. So that would be Ms. Nance in her

home, the owner of an authorized copy, showing it in her home using this filtering technology to make the scenes that she wants to help keep her child from seeing imperceptible.

If the maker of the film in selling the DVD or the videocassette or the digital transmission makes as a matter of contract law a limitation that says you are not authorized to filter out frames that you don't like, under this bill as written now would the owner of this copy be allowed to use this filtering technology?

Ms. PETERS. My understanding, at least at present, is that where there are exceptions in copyright law, they do not trump contractual provisions.

Mr. BERMAN. That's right.

Ms. PETERS. And, therefore, the issue is whether or not it's a contract of adhesion that would not be basically upheld. So—but my guess is that the answer would be that the contract, if it wasn't a contract of adhesion, would have to be honored.

There's a separate issue with regard to enforcement, because the truth of the matter is that would only apply to the purchaser of the DVD, not to ClearPlay.

Mr. BERMAN. So the irony is that if it is not a contract of adhesion, if it's clear and done in a way to make sure that it avoids that particular problem, your view of existing law would give the parent freer reign under the present system than this bill, if enacted as it's presently written, would provide for the case where a contract would trump.

Ms. PETERS. Maybe yes.[1]

Mr. BERMAN. All right. Dr. Etzioni talks about—and, I mean, I think this is a very important issue, this question of—I don't know the answer to it. I hear his study of the three Canadian villages. I also am told that no place in the world is the level of violence in videos greater than in Japan, a country with a substantially lower rate of violent crimes than the United States. I mean—I mean, people agree or disagree, and I truly, just like I can't—I wouldn't pretend to know just how copyright law should be interpreted. I wouldn't pretend to fundamentally know what the answer to this question is, but I think it's certainly a legitimate area. But I would like to ask Dr. Etzioni how—what he thinks of somebody who developed a filtering technology that took any of his many articles or 24 books and, without his consent, eliminated a variety of different positions in those books, and then through that filtering technology allowed people to read something very different than he wrote or consented to.

Mr. ETZIONI. On the first point, Congressman Berman, without going into Japan and Indonesia and all the other variations——

Mr. BERMAN. Canada is okay but Japan is not?

Mr. ETZIONI. No, I am happy to go country by country, but I want to suggest a shortcut. If you're willing to rest the case on any panel of social science—the National Academy of Science, the American Association of Psychiatry—you choose the panel who reviewed these data, and you're willing to abide not by my or somebody else's summary but by the six panels of experts, this bill will

[1] See letter dated July 6, 2004, in the Appendix, p. 89, from the Honorable Marybeth Peters, for clarification of answer to question posed by Subcommittee Member.

be welcomed by all of them because there have been endless reviews of the literature. And you're right, there's a study here that shows that when they're all put together, they leave no doubt.

Mr. BERMAN. All right. Well, I think there's a case to be made, and that's why we have ratings, and Mr. Valenti is responsible for that rating system. That's why we generally agree that parents should keep their kids from seeing certain things, certain movies, reading—certain video games, certain books at a particular point in life.

What about my second question?

Mr. ETZIONI. Right. Anytime you find in any of my books anything which would be offensive or hurtful or harmful to children, please tear out that page. And I'll provide the scissors. There is no question that we're not talking about disfiguring anything. That movie is the same. It is not changed one iota after children be protected from its scenes.

There is no parent alive who will think that everything we allow adults to view should be also exposed to minor children.

Mr. BERMAN. But the bill——

Mr. SMITH. The gentleman is recognized for an additional minute.

Mr. BERMAN. Thank you. The bill you are embracing, I mean, you made a comment—and I congratulate you, Mr. Chairman, for not just including—allowing filtering out of pornographic scenes but of violent scenes. This bill doesn't talk about pornography and violence. It talks about filtering anything that the designer of the software wants to provide a filter for and then the parent chooses, including some of the scenes that you resent that I referenced. That's your right. But the bill is totally neutral on the issue of what things ClearPlay can design filters for, not pornography and violence but anything. You can design it to enhance the level of violence by eliminating the non-violent scenes and the non-pornographic scenes. You can distort this any way you want as you improve this technology.

Mr. ETZIONI. Your distortion is my protection of my children. But I'm delighted to hear that it can be used for other purposes. If I'm a devout religious person and there's a movie which my children are asked to view for school next week, and I believe that most of it is of great merit but there is some scene that offends my religion, I'd very much like to have a technology to protect them from it up to a certain age, say up to age 12, we can argue. And so the fact that it allows additional filtering is extremely welcome.

Mr. SMITH. Thank you, Mr. Berman.

The gentleman from California, Mr. Keller, is recognized for his questions.

Mr. KELLER. Thank you, Mr. Chairman. From Florida, but I appreciate that.

Mr. SMITH. What did I say?

Mr. KELLER. You said California.

Mr. SMITH. I'm sorry. I know better. The gentleman from Florida. One of those States on the ocean, right.

Mr. KELLER. A lot of people confuse me for Arnold Schwarzenegger with our physiques. It happens all the time. [Laughter.]

Listening to this—and I swear on my life that I'm objective here and in the middle—it seems to me that there may have been a major strategic error in the directors adding ClearPlay to the suit. That's just what it seems like to me, and I'll tell you why, and I certainly think there's some merit to the suit and I can understand why it was filed. There are companies out there who break encryption codes, and they change words and they blur nudity and they reproduce edited versions of a DVD on another DVD. That seems to me a crystal-clear violation of copyright law, and I can understand why that suit was brought.

But adding ClearPlay, which doesn't do any of that—and they merely sell the consumer a filter which the consumer chooses to buy or not buy, and then goes to Blockbuster and puts that in and skips over certain objectionable words or scenes, and then sends back to Blockbuster the movie in the exact same condition—is all that ClearPlay does here.

And when I hear that, well, we shouldn't act and just let the parties negotiate, I can certainly understand that, you know, you have the Register of Copyright Office saying ClearPlay is not doing anything wrong and that's all they're doing, yet this company has been in a suit for 2 years, had to spend over $1 million. Summary judgment has been pending for 6 months, and we know after that that at the end of it, whoever loses is going to go up on appeal, and there's going to be millions and millions of more dollars. And that's a lot to ask a small company who most folks think are not doing much wrong.

Again, I'm not trashing the suit. There's a good reason for the suit with these other folks. But I'm wondering—let me start with Mr. Valenti—if that's essentially the case, is there any hurt at all to the financial bottom line of the movie companies based on the technology filters that ClearPlay is selling?

Mr. VALENTI. I don't know about what financial losses or gains are there because this is a new technology. I don't think it—it's had only a minuscule entry into the marketplace to this hour.

Mr. KELLER. Okay, because from what I hear, there are different objections raised by your side, and I say "your side," the studios and directors collectively. The financial one doesn't seem to have much merit to me at this point. The one that seems to carry weight is, hey, I'm Steven Spielberg, and I directed this "Jaws" movie, and I don't want you taking out this scene with Jaws coming onboard, and that's a critical part of the movie. That makes some sense to me, and I'm sympathetic to that. But the financial side, I haven't seen the testimony in two hearings to support that.

Ms. Peters, did I characterize your testimony about accurately there?

Ms. PETERS. Yes, you did.

Mr. KELLER. Okay. And you're the one who said what you said, but yet you still feel we should wait because what they're not doing is not illegal in your view. Can you understand in light of the resources of this little company being depleted, which it looks like, at least in some people's mind, like they're not doing anything wrong but they may not have years and years to go, you know, paying over $1 million a pop to defend this litigation.

Ms. PETERS. I understand, I do understand that concern. But that's true for all small companies and start-up businesses. So the question is: You as policymakers, at what point do you step in to put an end to the problem? For me, it's very difficult here because the court has not even ruled on—at this moment, I understand that there may be a cloud and there may be the appeal hanging. But there is no injunction out there stopping them from doing this.

I think the law—that it will come out that it will deny summary judgment because they have not embodied any of the audiovisual content of the motion picture. It's software that operates to bring about a certain result. But it doesn't violate the derivative work right as it exists today. And as I said, my big fear about legislation is unintended consequences. I have no problem with this particular scenario. I do have problems with a lot of the scenarios that Mr. Berman suggested. And I do very strongly believe in the integrity of the final product that is the result of the creators being totally distorted. And I'm worried as a—working in a library, about what is history. So I have real reluctance to go jumping in with legislation now.

Now, maybe you can craft a bill that is narrow enough. I do think that technology is going to cause huge issues for the future, and I think one of them is going to be on whether or not you need fixation in order to have a violation of the derivative work right. And I would like the Copyright Office to look into that.

Mr. KELLER. Okay. Thank you.

Mr. Chairman, I yield back.

Mr. SMITH. Thank you, Mr. Keller.

The gentlewoman from California, Ms. Waters, is recognized for questions.

Ms. WATERS. Thank you very much, Mr. Chairman.

I'd like to thank our panelists for being here today, and I would like to just reiterate probably what has been said over and over again, that we're all very much concerned about our children and what they have access to and the impact that movies have on our children. And no matter what our approaches are, we all share that same very basic concern.

Mr. Chairman and Members, I'm very concerned at this point about whether or not the hearings that we're holding are timely or whether or not this hearing or the possibility of legislation like this bill can be used as a club to influence settlement negotiations between the movie studios and ClearPlay in the Federal court litigation pending.

Mr. Valenti, you referred to this, you alluded to this, I think, in your statement. Could you expand on this a bit and help me to understand whether or not what we're doing at this particular time makes good sense in light of what is going on right now with the litigation?

Mr. VALENTI. Congresswoman Waters, the negotiations have been going on for some time. It's very difficult to negotiate when one side believes, as I said in my testimony, that legislation is going to favor them and if they just hold on and not make any final negotiations, they will get everything they want because of legislation.

Keep in mind also the Directors Guild has made two proposals, I have been told, to ClearPlay. At this point, ClearPlay has not made any proposals. As a matter of fact, I have been told—and, again, I can't certify this—that they have stiffened their position.

I believe that the Directors Guild have said that they would have license—they would agree to licensing agreements by the copyright owners if they took the airline version of a film, which has been edited by the director or with his consultation so that he approves of what has been done to that movie so it doesn't destroy the dramatic narrative. That's what this is about. This can be done.

Our companies, the seven member companies, are not against the proposition of licensing to ClearPlay. It's doing it on a basis that both sides will agree to. I believe if ClearPlay understood that this legislation was going to wait for another year, or whatever, I think there would be an end to this negotiation, and an end that both sides would accept. I truly believe that.

Ms. WATERS. Thank you, Mr. Valenti, for expanding on that discussion that you initiated in your testimony. And I'd like to direct my remarks now to my colleagues and to our Chairman.

I have come to understand, despite the fact that I'm viewed as a liberal or a progressive, that Government can't solve everything and there are times when Government should just hold and allow those who are involved in negotiations, certainly in litigation, to see what they can get done. I would hope that I am not—no one is attempting to use me or this Committee or this Congress to threaten or intimidate or to be leveraged in an effort to have their way. And I would hope that we would be wise enough to allow the negotiations to continue and to say to both parties, you better go solve it, that it is not in the best interest of any of us for the Congress to jump in and try to determine the outcome.

There are a lot of issues at stake here, certainly issues about freedom of speech, issues about how we basically decide what is the proper direction in protecting our children, and whether or not in this atmosphere and environment that we're in now, where all kind of rights are being threatened, whether or not we take advantage of this atmosphere at election time and all of that to look as if we are better than others because we care more about the children than others. I think it's time for us all to cool out and let the negotiations go forward.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Ms. Waters.

The gentleman from Virginia, Mr. Forbes, is recognized for questions.

Mr. FORBES. Thank you, Mr. Chairman, and let me just echo my appreciation to all the members of the panel and the Members of this Committee for both their questions and comments, and then to tell you a "but," and the "but" is I think most of it is irrelevant, and let me just tell you why. I've never seen a subject that probably has more red herrings than this one does in my life, and let me just lay them out because, like Mr. Keller, I am legitimately trying to get to the fundamental issues that we have here.

On the one side, there are those who will say the legislation might put pressure on one side to settle or to do something they otherwise would not do. Yet we also have one side saying that the

cost ligation and the delay in the litigation may force one company out of business and put pressure on them to settle.

I hear today testimony that this is not a net loss of revenue; it's about creative integrity. I don't think there's anybody in here that believes this issue is about "Schindler's List." You know, even in protecting children, that's important and I agree with the testimony that's there. But I think at the core of this legislation are certain fundamental rights in our copyright law. One of them we always support is financial protection for the creators of works. We want to do that, but that's not the issue here. And I think the core issue here is more what my rights are as a consumer once I have purchased a product.

You know, let's go back to a book, because I am legitimately trying to find this out. If I purchase a book, there is no one in here, no author in here that's going to come in and tell me that I don't have the right to go through that book and block out phrases that I don't want to see.

Now, most of us in here, you're like me, whether it's now I'm in Congress or before when I was practicing law, I'm going to have staff that go through and—that I hire to go through and block out those phrases if I don't want to read them or I don't want to see them. Technology has moved us another step. Most of the time now, instead of holding a book in my hand, I have a computer disk that I put into the computer, and I may block out phrases.

But let me flip it around the other way. Suppose instead of blocking out phrases, my question is that I only want to read certain things. Let me give you an example. I just got back from Normandy and read a number of books on Normandy. And I might want to only read about the 29th Division at Normandy. Nobody in here tells me that if I want to read Steven Ambrose's book about D-Day that I've got to read the whole book. I can just say to my staff member or anybody else, "I only want to read the sections about the 29th Division." Give me 20 books, have a computer program that picks out for me everything about the 29th Division. That's all I want to see. I don't care—you know, the author may tell me, "You've got to read the whole thing, the whole book to get the whole flavor of what I wanted to communicate." But I think my right as a consumer is that I don't have to do that. I can just say, "No, I want to read about the 29th Division."

And so I guess my wrestling with this is it looks like to me that's the core of this issue. It is whether or not as a consumer in my home I can buy a product that doesn't, as Mr. Keller says, transform or change the original creative right, but does the author of that work have the creative integrity, ability, right to mandate that I've got to read everything in there? It may not be that I have objections to it because of religious reasons or anything else. I might just not have the time. But I ought to have the ability—or the interest. But I ought to have the ability, it would seem to me, to be able to say I don't want to see this and I want to see something else.

And so my question to the panel is: Why shouldn't I have that fundamental core right as a consumer to either say give me all of the 29th Division clips from a movie that I want to find or, reverse, take out all the sexual items in that movie? Why don't I as a con-

sumer have that right? And that's what this legislation to me is all about. That's the fundamental——

Mr. BERMAN. Would the gentleman yield for a question?

Mr. FORBES. Sure.

Mr. BERMAN. I think you're absolutely right. But should a company be able to market without the consent of Steven Ambrose or the authors of those other 29 books a technology that sells excerpts of great books on the 29th Division?

Mr. FORBES. Well, and I'm glad you said that. The answer would be, no, they couldn't market a book that has the excerpts because you would be changing and creating a new product. But I believe very much, just as I could hire my staff—and, Mr. Chairman, my time is out.

Mr. SMITH. Without objection, the gentleman is recognized for an additional minute.

Mr. FORBES. But just as I could hire my staff to come in and say, "I want you to find everything on the 29th Division," I believe they could give me a computer program or technology that I could plug in that wouldn't change the original works of art, but it would find for me clips about the 29th Division or, the reverse, take out things that I didn't want to see. It's not changing, and that's the real essence of this legislation. We're not talking about changing that work and putting a different work. We're talking about a technology that has outstripped where we were before, that basically says this is a way that I can find the scenes or the phrases that I want, or I can not have to read the other ones that I don't want to read. I don't see the difference between the two and——

Mr. BERMAN. Well, would the gentleman yield for one more question?

Mr. FORBES. If the Chairman will give me the time, I'll yield.

Mr. SMITH. You've still got the time, Mr. Forbes.

Mr. BERMAN. It is a way to read portions of 29 books without buying them when you get that computer program.

Mr. FORBES. Well, you're talking about two different things. If you're talking about stealing copyrighted material, that's a whole different issue. What I'm talking about here is when I have legitimately purchased the material and I walk in—and that's what we're talking about. We're not talking about anybody who's stealing one of these movies. They think they should be prosecuted. We're talking about an individual who legitimately purchases the movie and walks in but doesn't way to see everything in it or perhaps wants to find certain—suppose—suppose I'm a critic, suppose I just want to see certain scenes and see how they were. Why shouldn't I be able to buy technology that's going to just give me those things?

Mr. BERMAN. Would the gentleman yield?

Mr. SMITH. The gentleman's time has expired.

Mr. FORBES. Thank you.

Mr. SMITH. The gentleman, the other gentleman from Virginia, Mr. Goodlatte, is recognizes for his questions.

Mr. GOODLATTE. Well, thank you, Mr. Chairman. I have a statement I'd ask be made a part of the record, and I want to thank you first for holding this hearing and for your leadership in attempting to resolve this issue, because I think it is an issue well

worth resolving, both for the motion picture industry and for consumers.

I also want to thank you for assembling an incredibly impressive panel. Marybeth Peters is well known to this Committee. Dr. Etzioni has been around almost as long as Jack Valenti. [Laughter.]

I read his sociology books when I was in college 30-plus years ago. And Ms. Nance and her organization are an important group that have worked with the entertainment industry on a number of occasions to promote kid-friendly entertainment, and I think that's a valuable asset, both for, again, families and the entertainment industry.

And, finally, Jack Valenti. I have on a number of occasions enjoyed at Disney-MGM Studio in Florida the Great Movie Ride or Great American Movie Ride. No one—no one—has had a greater movie ride than Jack Valenti. And I thank you for what you've done for decades to promote a great industry, and the corollary to that has been your championing of intellectual property rights. And the work not only in this country but around the world to protect them has been very important, not just for the movie industry but for establishing the principle that intangible property is every bit as important as tangible personal property when we protect those rights. So I certainly understand your perspective.

I also, though, very much understand that parent, because I have been in that situation with a child who knows about that latest, absolutely most popular movie that's out there and just demands day after day to see it, and you say, Well, you know, I know there's some stuff in there that I'd really not like to have my 7-year-old, my 10-year-old, or even my 12-year-old see that movie. But if I had the technology to be able to say you can see all of it except for these parts, even if it is not the perfect work—and I agree with you, it's not the perfect work when you take those out—that's a concern.

I also have a concern, on the other hand, dealing with what impact this on the Digital Millennium Copyright Act and the use of encryption that the industry has used to protect these materials. I was very involved in writing that Act. I know that one of the underpinnings of that Act is the prohibition against circumvention of copy protection technologies. Some have argued that these anti-circumvention measures should be weakened, but I believe that these measures are crucial tools to help content owners protect their intellectual property from piracy and unauthorized copies.

So as we work our way through this, I'd like to know, because I'm concerned that if movie editing technologies are using copy—devices to crack copy protection codes to break into a DVD, even to edit out certain offensive materials, that creates some concerns on my part and a slippery slope. While this legislation does not expressly allow the use of anti-circumvention technologies, it also does not expressly prohibit it. And I'd like to know both what the implications of that are and from each of you whether that would improve the legislation if there was a provision in there that would expressly prohibit editing tools that circumvent copy protection technologies.

We will start with Mr. Valenti.

Mr. VALENTI. Copy protection technology, Mr. Goodlatte, is at the forefront of how we enter the Digital Age. If we are not able to protect our movies in the Digital Age, we don't own anything. And, therefore, it is literally in the vanguard—and you, I must thank you, because you have been a champion of protection. Any piece of legislation that allows someone else to circumvent the encryption violates the DMCA. And I think that would be a terrible remedy to offer in any bill.

Now, do I think this bill ought to have a specific bar against decryption, circumvent encryption? I sure do, but that doesn't mean that I support the bill.

I think the essence here—and if I may spring from the rostrum of your question——

Mr. GOODLATTE. As long as you allow me time to let the other three answer the question.

Mr. VALENTI. Because the short answer is absolutely, we cannot allow anyone to circumvent encryption. That is going to be our technological salvation in the years to come, and without it, the whole world is going to be swarming all over our material.

But to leap from that rostrum to Congressman Forbes—and I understand where you're coming from. I understand where Congressman Goodlatte is. I am a father of three children, and I was very stern, my wife and I, when our kids were growing up. Even though I invented the rating system, I also observed it. And there were certain movies I wouldn't allow my children to see. I don't believe children ought to be able to see every movie they want to see. I think every now and then, to coin a phrase, "Just say no," which is what a lot of parents do. If parents have a casual regard for what their children see, then there's no way you're going to salvage that child's future conduct.

So I share everything you say, Congressman Forbes. I am with you on that.

Mr. SMITH. The gentleman from Virginia is recognized for an additional minute so the witnesses can respond.

Mr. GOODLATTE. Thank you, Mr. Valenti.

Ms. Nance?

Ms. NANCE. Well, I don't know that I have a comment necessarily on encryption, but, you know, I just want to—I just want to sort of point out here, this is the DVD that I bought. It's mine. I plugged it in, I used it. It didn't change it. It's exactly the same as I bought it. Even if I wanted to change it, it's mine once I own it. I shouldn't be stealing it. It belongs to me.

A couple of other things is there has to be a market for something for you to sell it. And while there's a huge market out there for parents to protect their kids from violence, graphic sex, nudity, profanity, there probably isn't much of a market to do all these other things that you're concerned about. And I understand, I can appreciate where you're coming——

Mr. GOODLATTE. Let me take back my time because I appreciate that, but indeed there is a huge market to do all these other things were concerned about. It's called KaZaA, Napster——

Ms. NANCE. Those are stealing, though.

Mr. GOODLATTE. Right. And we want to make absolutely sure that we don't do anything that would put us——

Ms. NANCE. I agree.

Mr. GOODLATTE.—on a slope toward telling the intellectual property community as a whole, including the motion picture industry, that we're going to have a situation where they begun the process of eroding their ability to protect their intellectual property——

Ms. NANCE. I completely agree with you. I've fought these peer-to-peer sites tooth and nail over pornography.

Mr. GOODLATTE. Ms. Peters?

Ms. PETERS. I'm an extremely strong supporter of technologies that are used by copyright owners to protect their works. As I understand the technology here, it does not implicate the anti-circumvention provisions.

Mr. GOODLATTE. That is good. So, in other words, if we were to put a provision in here to say that other people attempting to do other things could not invade the language of the DMCA, you would, A, agree with that and, B, feel that it would not be harming companies like ClearPlay to kind of do what they're doing.

Ms. PETERS. That's right.[2]

Mr. GOODLATTE. Dr. Etzioni?

Mr. ETZIONI. Thanks for not giving a number to my age. [Laughter.]

I see no reason these two concerns cannot be reconciled by allowing invasion for this purpose and not for sale or any other purpose, not setting a precedent for other violations.

Let me just add one sentence. Several times we heard about the right of the creator of those works as if one right is an absolute and trumps all other rights. Ninety-five percent of what we do in ethics and much of what we do in law is try to deal with conflicting rights. In this case, it's the right of parents to bring up decent citizens against the right of a creator of a work to insist that children will see all of it and not part of it.

Mr. GOODLATTE. Thank you for your forbearance, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Goodlatte.

Let me say to the panelists that several Members have questions they would like to submit to you in writing. Particularly Mr. Berman I know has some questions. And if you all can respond to those within 2 weeks, we'd appreciate it.

Further, the gentleman from California is recognized for a minute for some observations.

Mr. BERMAN. I simply didn't want to be the only person on this Subcommittee not to comment on Mr. Valenti's, Jack's appearance here. I myself, given the time between I first heard of his interest in moving on from MPAA to now, I've assumed that this will not be the last time you would be appearing before our—if the past is prologue, we will see you again. But I hope particularly that you will understand and know the admiration and warmth I feel for you and what you've contributed to the industry, to the protection of intellectual property, and to my own personal abilities as a legislator here, as well as to the country from your service.

Mr. VALENTI. Thank you.

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[2] See letter dated July 6, 2004, in the Appendix, p. 89, from the Honorable Marybeth Peters, for clarification of answer to question posed by Subcommittee Member.

Mr. SMITH. Thank you, Mr. Berman, and I thank all the Members for their attendance, and I thank the witnesses for their very, very informative and good testimony today. And we stand adjourned.

[Whereupon, at 11:35 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Letter from the Honorable Marybeth Peters

The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

July 6, 2004

Dear Chairman Smith:

I am enclosing my corrections to the transcript of the June 17, 2004, hearing on H.R. 4586, the "Family Movie Act of 2004."

After reviewing the transcript and carefully reading the questions, I have determined that I may not have completely understood two of the questions when they were asked. I therefore request that the record be corrected in the manner described in your letter of June 25, 2004, with the following explanations:

1. Page 45, line 948: My answer should have been:

> "I believe that the result would be the same if this bill were enacted as it would be under present law."

2. Page 66, line 1472: My answer should have been:

> "I do not believe that ClearPlay would be harmed by such a provision, but I do not believe that such a provision is necessary or advisable. The anticircumvention provisions of section 1201 apply even in cases where circumvention is carried out in order to engage in an act that is not an act of infringement under the copyright statute. The Family Movie Act, like other exemptions in the Copyright Act, would simply provide that it is not an act of infringement to engage in the conduct that we are discussing. To include in this new exemption a reference to section 1201 when none of the other exemptions in section 110 or elsewhere in the Copyright Act make such reference will imply that those existing exemptions also apply to liability under the anticircumvention provisions, when it should be clear that they do not.

Thank you for giving me an opportunity to express my views on H.R. 4586. As always, please feel free to call on me if I can assist you further in connection with this legislation.

Sincerely,

Marybeth Peters

Marybeth Peters
Register of Copyrights

Enc.

By Facsimile and Hand Delivery

The Honorable Lamar S. Smith
Chairman, Subcommittee on Courts,
the Internet, and Intellectual Property
351-A Rayburn House Office Building
Washington, D.C. 20515

cc: The Honorable Howard Berman
Ranking Member, Subcommittee on Courts
The Internet, and Intellectual Property
2221 Rayburn House Office Building
Washington, D.C. 20515

RESPONSES OF MARYBETH PETERS TO POST-HEARING QUESTIONS FROM REP. HOWARD BERMAN

1. You state that you would prefer not to address the merits of the litigation in Colorado, and have no desire to be drawn into it. Further, you admit to a sketchy understanding of the workings of the products that are the subject of the litigation. Unfortunately, some litigant is almost sure to argue to the court that your testimony represents a definitive opinion on the appropriate outcome of the Colorado litigation. Do you think you know enough about the facts of the case, the ClearPlay technology, and the other technologies involved to definitively state whether the Colorado court should find them infringing or non-infringing?

Answer: I do not pretend to know everything there is to know about the ClearPlay technology, or even to know what is in the record of the Colorado litigation; therefore, I have no views on how the court should rule on the facts of that particular lawsuit. In my testimony, I stated that the conduct that is described in the proposed Family Movie Act is not infringing under current law. If ClearPlay's technology does something other than that which is described in the legislation, then the court might well conclude that it is an infringer.

2. In your written testimony, you describe as "fairly benign" the filtering technology we have been discussing, and state your "conclusion that on balance, the conduct that is addressed by the Family Movie Act should not be prohibited." However, the filtering technology covered by the bill may skip everything but the violence in Gangs of New York, or may cut all references to the Holocaust from a World War II documentary. Do you believe such filtering technology is "fairly benign" when put to these uses? If not, why do you believe that, on balance, such filtering technology should be legal?

Answer: When I characterized the technology involved in one the this legislation as "fairly benign," I probably should have referred to the particular application of that technology that the legislation is intended to address, rather than to the technology itself. I do not believe that all of the uses permitted by the bill would be benign, and I certainly do not believe that the conduct you have described is benign. Certainly a technology that permits deletion of portions of a motion picture could be used in ways that no reasonable person could condone. That is one of the reasons why I oppose the legislation. However, I am not persuaded that use of such technology in such a fashion is unlawful under current law, and I would hesitate to say that it should be unlawful, since I do not believe the law should ordinarily discriminate among applications of technology based on the message that the person using the technology wishes to convey.

3. You say one reason you are comfortable with the conclusion that movie filtering technology should be legal is because "it is difficult to imagine any economic harm to the copyright owner." I don't have the same difficulty. If there is a market for movie filters, that means consumers are willing to pay something above and beyond the cost of a DVD for a sanitized version of the movie. Isn't the copyright holder, who has the exclusive right to reproduce and distribute sanitized versions, suffering economic harm when a filtering company captures that additional revenue?

Answer: Not unless that revenue is revenue that the copyright holder would have a reasonable expectation of capturing, and it does not appear that the motion picture studios currently have any intention to exploit the market for "sanitized" versions of their motion pictures. If motion picture studios do begin to offer such versions, then the case could well be made that the offering of filtering products is causing economic harm to the copyright owners. That is one of the reasons why I believe that if the Family Movie Act is enacted, it should include a sunset provision so that Congress can reevaluate the need for the legislation in a few years. One of the factors that Congress should evaluate at the time would be whether motion picture studios have begun to offer or license such versions of their motion pictures. Also, keep in mind that my interpretation of both current law and the bill preserves the copyright owner's exclusive rights over fixed copies of altered works, and the distribution of such copies may be a more convenient and successful business model for the consumer to obtain and enjoy such versions than the marketing of filtering software.

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Mr. Chairman,

I must express my opposition to the legislation before us today. Perhaps this hearing will convert me, but I doubt it. I have too many concerns about the nature and implications of this bill. Clever redrafting might address some of these concerns, but nothing can address my concerns about its basic premise.

While I believe parents should be able to protect their children from exposure to media they find offensive, I don't believe the legislation before us today will advance this goal. In some ways, it may have the opposite effect.

This legislation sends the wrong message to parents; namely, that technology can fulfill parental responsibilities. In our modern world, parents cannot control what their kids see and hear every minute of the day. Parents must, as Professor Heins testified on May 20, equip their children for exposure to offensive media, not just turn on the TV or movie filter and leave the room. Technology should not become an excuse for avoiding the hard work of parenting.

To be clear, I don't oppose the ClearPlay technology itself. Rather, I am opposed to legislation that benefits one particular business over its competitors, and abrogates the rights of copyright owners and trademark holders in the process. The marketplace is the proper forum for resolving this business dispute, not Congress. Congress should focus on encouraging the relevant copyright owners and trademark holders to work out a licensing deal for ClearPlay technology, not roil the waters with legislation that verges on a bill of attainder.

Unfortunately, the legislative activity on this issue appears to have already hampered the industry negotiations. I understand that, following the May 20 hearing, ClearPlay presented new demands that represented a significant departure from its previous position in the negotiations. In other words, the positions of the parties, which had been fairly close before the May 20 hearing, are getting farther apart as the prospects for legislation improve.

Since neither ClearPlay nor any of its competitors has been found liable for copyright or trademark infringement, this legislation addresses a hypothetical problem. While a federal District Court has before it a case raising these issues, it has not yet issued even a preliminary ruling. Furthermore, the Register of Copyright will apparently testify that ClearPlay is likely to succeed. In other words, there is no problem for Congress to correct. While legislation addressing hypothetical problems—like the law protecting fast food restaurants against obesity liability—is all the rage these days, it is not a trend with which I agree.

Most importantly, Congress should not give companies the right to alter, distort, and mutilate creative works, or to sell otherwise-infringing products that do functionally the same thing. Such legislation is an affront to the artistic freedom of creators, and violates fundamental copyright and trademark principles.

The sanitization of movies allowed by this legislation may result in the cutting of critically important scenes. For instance, the legislation legalizes the decision of a ClearPlay competitor to edit the nude scenes from Schindler's List—scenes critical to conveying the debasement and dehumanization suffered by concentration camp prisoners.

Further, a close reading of the bill reveals that it will also legalize editing that makes movies more offensive, more violent, and more sexual. Just as the legislation allows nudity to be edited out, it allows everything but nudity to be edited out. For instance, the legislation allows some enterprising pornographer to offer a filter that edits the movie Caligula down to its few, highly pornographic scenes, and endlessly loops these scenes in slow-motion. The legislation would also appear to legalize filters that make imperceptible the clothes of all actors in a movie. Do the bill sponsors really want to legalize all-nude versions of Oklahoma and Superman?

The types of edits legalized by this bill are limited only by editorial imagination. Anti-tobacco groups could offer a filter that strips all movies of scenes depicting tobacco use. Racists might strip Jungle Fever of scenes showing interracial romance between Wesley Snipes and Annabella Sciorra [SKEE-ORA], perhaps leaving only those scenes depicting interracial conflict. Holocaust revisionists could strip World War II documentaries of concentration camp footage. Fahrenheit 911 could be filtered free of scenes linking the Houses of Bush and Fahd.

Since the bill also applies to television programming, a number of troubling consequences may result. Digital Video Recorder services like TiVo, which enable their subscribers to digitally record TV shows for time-shifting purposes, might offer filters geared to those programs. This is not far-fetched: at least one DVR service has already tried to filter out all commercials. In the future, they might offer filters that

cleanse news stories of offensive content; for instance, by editing out comments critical of a beloved politician. In fact, under the bill the DVR service could unilaterally engage these filters without the permission of the TV viewer, and thus might choose to filter out stories helpful to a corporate competitor or critical of a corporate parent.

I know that these outcomes are opposite to the intent of the bill's sponsors, but they are the unavoidable outcomes nonetheless. And these are just a few of the problems that are apparent after just two days' reflection. Thus, I hope the Subcommittee will not rush to legislate in this area, and instead will allow the marketplace to address the legitimate concerns of parents.

I yield back the balance of my time.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

At the outset, I am embarrassed we are even considering this bill. The Republicans know full well that the directors and ClearPlay are engaged in settlement negotiations to resolve a lawsuit over copyrights; they are using this bill and this second hearing to pressure the directors and help the other side.

In my tenure in Congress, this is only the second time I can remember having a one-sided hearing involving on-going settlement talks; not surprisingly, the first was a few weeks ago on the same issue. *Our hearings should be reserved for public policy debates, not for strong-arming private litigants.*

It is more troubling considering that we are here to continue the Republican assault on the First Amendment and media content. In the past few months, we've seen Republican overreaction to a televised Superbowl stunt and to radio broadcasts. Now the self-proclaimed moral majority is turning to movies.

Censoring filmmakers would diminish the nature of this medium. Let us not forget that *Schindler's List* was on broadcast television completely uncut. The movie studio and the broadcasters knew the film could not convey its feeling and authenticity if it was edited. Despite this, the movie has been edited by censors to diminish the atrocities of the Nazi party. Traffic, an acclaimed anti-drug movie, has been edited in a way that makes drug use appear glamorous.

This is not to say that movie fans should be forced to watch the latest Quentin Tarantino movie. People looking for family-friendly fare have countless choices. Parents are inundated with commercials for the latest children's movies. Hollywood has its own ratings system that tells parents which movies are suitable for children and, over the past several years, has increased its output of G- and PG-rated films. Newspaper reviewers make specific mention of family-friendly films. Finally, organizations like Focus on the Family provide information on movies for parents who seek it. In short, there are options.

At the hearing on this bill, we heard our colleagues Rep. Randy Forbes (R-VA) and Rep. John Carter (R-TX) say the government has no business in this issue. The last time I checked, Congress was a part of the government. Having said that, there is a simple solution to this problem. It is a market-based solution that conservatives should like. If a family finds a particular DVD offensive, it should not buy it.