Library Filtering

AMERICAN CIVIL LIBERTIES UNION of WASHINGTON

Background & legal status

The Children's Internet Protection Act (CIPA) was signed into law in December 2000, and mandated the use of filtering technologies in schools and libraries that receive some federal funding. With respect to libraries, CIPA was immediately challenged in court and did not initially go into effect. In June 2003, the Supreme Court held that CIPA was constitutional in *United States v. American Library Association*. Accordingly, new regulations have been promulgated, requiring libraries to begin filtering Internet access or forgo federal funding.

CIPA does not actually require filtering *per se*. Instead, it requires the "operation of a technology protection measure" that limits access to prohibited material on the Internet. In practice, filtering software is the only measure that is believed to meet the requirements of CIPA, and it can safely be assumed that filtering must be used.

Not all federal funding is contingent upon filtering. CIPA applies only to E-rate discounts and Library Services and Technology Act (LSTA) funding, and only to the extent that those programs are used to facilitate Internet access. For example, a library is not required to filter if it receives E-rate discounts only for phones, or LSTA funding used only to purchase computers that are not linked to the Internet.

Very little material must be filtered

The type of material that must be filtered under CIPA is quite limited. Most significantly, only "visual depictions" must be blocked; there is no requirement of blocking text of any nature whatever, no matter how graphic or disgusting that text may be.

Adult restrictions

For adults, defined by CIPA as anybody 17 years or older, only two narrow categories of material must be blocked (and only visual depictions at that): obscenity and child pornography. Although the statutory definition of obscenity is a little murky, the courts have examined it in many cases, and determined that very few materials are objectionable enough to qualify as "obscene." Most pornography, even hard-core

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> *-Justice Kennedy*

pornography, is not obscene. A good rule of thumb is that if materials are easily available in your community, even in adult bookstores, the materials are unlikely to be found obscene.

Child pornography is easier to determine; it is defined as visual depiction of minors engaging in sexually explicit conduct. In practice there are few, if any, publicly accessible web sites that contain child pornography. It is certainly true that a number of arrests and convictions have resulted from people sharing child pornography over the Internet, but those involve well-hidden private file exchanges and chat rooms, not web sites. This is not surprising, since simple possession or viewing of child pornography is a serious felony – people don't casually post it on the Internet. And if filtering companies were to discover such a site, they would report it and it would be shut down.

Restrictions for minors

Some additional material must be filtered for minor patrons, those aged 16 or younger. For them, CIPA requires the filtering of visual depictions that are "harmful to minors." This term is even less well defined than "obscene," with many fewer legal cases clarifying it; in essence the definition is "obscene as applied to minors." This definition may encompass all so-called "adult" material, but it may instead be limited to hard-core pornography.

Overblocking: Library patrons must be able to view improperly filtered material

No filtering software can properly block all objectionable material without also blocking considerably more material improperly. Evidence presented in the legal challenge to CIPA demonstrated that the problem of "overblocking" is substantial, and exists in all filtering software. Part of the problem is due to the fact that no filtering program has categories that exactly correspond to CIPA's requirements (obscenity, child pornography, and "harmful to minors"), which is understandable since the legal definitions are murky at best. Another cause is pure and simple human error, with employees of filtering companies miscategorizing indisputably unobjectionable web pages. But the largest cause is inherent in the nature of the Internet – web pages are constantly changing, and the volume of information is so large that it is impossible for filtering companies to keep up.

The Supreme Court acknowledged that overblocking is an issue that could present constitutional difficulty if library patrons were unable to avoid it. However, in argument at the Supreme Court, the government asserted that librarians could disable filtering software at the request of a patron with no questions asked. This assertion was a key factor in the court's decision that CIPA complied with the First Amendment. Accordingly, we believe that entirely disabling filters for an adult patron upon request is a constitutional *requirement*. Similarly, there *must* be a mechanism for an individual library to promptly unblock an individual site that is erroneously blocked by the filtering

software. As Justice Kennedy said, “If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user’s election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge.”

Rights of minors unclear

Unfortunately, the Court did not clarify the rights of minors. Presumably a minor patron can request unblocking of an erroneously blocked site, just like anybody else. Beyond that, the situation is very murky. The CIPA statute itself explicitly allows a library to disable filters for a minor patron if the library receives only LSTA grants, but does not allow disabling for minors if the library receives E-rate discounts. Although we believe disabling upon request is constitutionally required for adult patrons, the Court gave no guidance as to whether disabling is required or even permitted for minor patrons. A good argument can be made that a minor has a First Amendment right to unfiltered access. Similarly, there is a good argument that parents have a constitutional right to make child-rearing decisions, which would include choosing to disable filters for their children. However, neither of these questions has been considered by a court, so there is no clear answer.