Filtering and the First Amendment

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When is it okay to block speech online?
By Deborah Caldwell-Stone

In the decade since the Supreme Court upheld the implementation of the Children's Internet Protection Act (CIPA), internet filtering has become a frequent practice in public libraries. It has also become the primary strategy for managing students' internet access in school libraries. Debate over filtering became muted as libraries receiving e-rate funds moved to comply with CIPA's mandates. While researchers counted the number of libraries and schools using filters, little inquiry was made into how institutions were implementing CIPA or how filtering was affecting library users.

Recent court filings, news reports, and online posts, however, have begun to shine a spotlight on libraries' filtering policies and practices. According to legal complaints, some libraries are denying users access to websites that discuss Wicca and Native American spirituality; blacklisting websites that affirm the lesbian, gay, bisexual, and transgender (LGBT) communities while whitelisting sites that advocate against gay rights and promote "ex-gay" ministries; and refusing to unblock webpages that deal with youth tobacco use, art galleries, blogs, and firearms. School librarians, teachers, and even Department of Education officials are openly complaining that the overzealous blocking of online information in schools is impairing the educational process.

Why are we seeing more and more instances where public libraries and schools are actively engaged in censoring online information, despite the library profession's commitment to intellectual freedom, First Amendment rights, and free and open access to information?

Often, it is because the institutions and individuals responsible for implementing these policies misunderstand or misinterpret CIPA and the Supreme Court decision upholding the law. Among these misunderstandings is a belief that an institution will lose all federal funding if it does not block all potentially inappropriate sites to the fullest extent practicable, or that the Supreme Court decision authorized mandatory filtering for adults and youths alike. Another mistaken belief is that it does not violate the First Amendment to impose restrictive filtering policies that deny adults full access to constitutionally protected materials online.

This confusion over CIPA's requirements and the Supreme Court's opinion can lead to overly restrictive filtering that denies library users their First Amendment right to receive information. Given these circumstances, it is worthwhile to review just what the law *does* require regarding internet filtering in libraries.

What CIPA requires

CIPA's authority to govern internet filtering policies in public schools and public libraries draws on the power of Congress to attach requirements to the funds it distributes. Because there is no requirement that a school or library accept federal funds, CIPA applies only to the schools and libraries that choose to accept e-rate discounts or Library Services and Technology Act (LSTA) grants for their internet access.

CIPA's basic requirements are simple: Schools and libraries subject to CIPA must certify that the institution has adopted an internet safety policy that includes use of a "technology protection measure"—filtering or blocking software—to keep adults from accessing images online that are obscene or child pornography. The filtering software must also block minors' access to images that are "harmful to minors," that is, sexually explicit images that adults have a legal right to access but lacking any serious literary, artistic, political, or scientific value for minors.

Institutions subject to CIPA's mandate must place filters on all computers owned by the school or library, including those computers used by staff. A person authorized by the institution may disable the filter or unblock a website for an adult user to enable access for bona fide research or for any other lawful purpose. An authorized person may also unblock, for users of all ages, appropriate sites that are wrongfully blocked by the filtering software.

Schools and libraries obligated to comply with CIPA must adopt a written internet safety policy that addresses the online safety of minors. Before adopting the policy, the institution must hold, after reasonable notice, at least one public hearing

or meeting to address the proposed policy. Schools are also required to establish a policy that addresses educating students about appropriate online behavior, including cyberbullying and interacting with others on social networking websites and in chat rooms.

What CIPA does not require

CIPA does not require schools or libraries to block online text, nor does it authorize blocking access to controversial or unorthodox ideas or political viewpoints. Guidance issued by the Federal Communications Commission (FCC), the agency charged with enforcing CIPA, states that online social media sites like Facebook do not fall into one of the categories of speech that must be blocked under CIPA, and that these sites should not be considered harmful to minors under the law. Regarding privacy, CIPA contains an express provision stating that the law does not authorize any tracking of the internet use of anyone in an identifiable manner. When the law calls for monitoring, it means supervision, not the adoption of software or other tools to track users' web-surfing habits.

Enforcement of CIPA is the responsibility of the FCC and is a civil, not criminal, matter. The sole penalty for failing to fully comply with CIPA is reimbursement of any government monies received by the school or library as an e-rate discount or LSTA grant during the period of noncompliance. It should be noted that the only obligation established by the FCC is the requirement that the school or library file a certification of compliance. The agency has refused to establish specific criteria for what constitutes effective filtering and has never found a school or library out of compliance since CIPA first went into effect in 2001. Schools and libraries should be confident about their ability to craft internet filtering policies that comply with CIPA's directives while allowing users the freedom to explore ideas and access a diverse range of online information.

The Supreme Court weighs in

Confusion about CIPA's statutory requirements has been amplified by misunderstanding and misinformation arising from the Supreme Court's 2003 decision upholding the law against a constitutional challenge brought by the American Library Association and a coalition of librarians and library users (*AL,* Aug. 2003, p. 12–16).

Some observers argue that CIPA's being upheld means that public libraries can filter even constitutionally protected content for adults and youths alike. However, the High Court ruling was in fact a narrow plurality decision, with multiple justices writing opinions. No single opinion received a majority of the court's votes.

The plurality ruled that the First Amendment does not prohibit Congress from requiring public libraries to use internet filters to control what library users and staff access online, as long as adults can ask that the filters be disabled without having to justify their request. The decision thus upheld the text of CIPA, not any specific application of the law. As Justice Kennedy explained, so long as libraries unblock or disable the filter for adult users without delay, there is no basis for a constitutional challenge to CIPA. But if libraries cannot disable the filter for adult users in a timely fashion, or if the rights of adults to view material on the internet are burdened in any other way, it could give rise to a claim in the future that CIPA is unconstitutional as applied.

Clearly, the Supreme Court recognized that overly restrictive internet filtering can infringe upon the rights of adult library users to access protected speech. When the use of blocking software is mandated by Congress as a condition for funding, the requirement that libraries unblock websites or disable filters for adult users functions as a First Amendment safety valve.

Selection or censorship?

In April 2012, a federal district court in Spokane, Washington, issued a decision that brought all the misunderstandings and confusion about CIPA to the forefront. The lawsuit, *Bradburn et. al v. North Central Regional Library District,* was filed by patrons who said the library refused to unblock websites containing legal information about tobacco use, art galleries, and general-interest blogs. The court's ruling upheld the library's policy of selectively allowing or refusing adult users' requests to unblock filtered websites, even when the sites contain constitutionally protected speech that is legal for adults to view. US District Judge Edward Shea agreed that the library could employ filtering as a form of content selection and said that the library's policies were justified by the conditions imposed by CIPA.

Does CIPA itself, or the 2003 Supreme Court opinion, actually authorize a library to limit an adult's access to constitutionally protected speech? A close reading of the district court's opinion reveals that it fails to address the Supreme Court's directive: Libraries subject to CIPA should disable filters for adult users to assure their First Amendment rights. Nor does Judge Shea's opinion explain how CIPA's specific mandate to block only images that are obscene or child pornography authorizes the library to selectively censor adults' access to legal, general-interest online information.

Theresa Chmara, general counsel for ALA's Freedom to Read Foundation, has explained why librarians and trustees should not rely on the *Bradburn* decision for guidance in crafting their internet policies. Nevertheless, the *Bradburn* decision illustrates the misunderstandings that lead schools and libraries to adopt restrictive internet filtering policies that do not conform to the law or to the Supreme Court's opinion.

A balancing act

CIPA and the 2003 Supreme Court decision upholding it require librarians and trustees alike to make a difficult choice between the profession's core values of intellectual freedom and equity of access, and the acceptance of federal funds that enable the library to receive internet access discounts in exchange for filtering that access. The challenge is to comply with CIPA and the Supreme Court's decision while at the same time fulfilling the library's mission to provide content, not suppress it, and to increase access, not restrict it.

Meeting this challenge requires a commitment on the part of librarians and trustees to thoroughly understand the requirements of the law and its constitutional application in the public library. Consulting with experts within librarianship, as well as independent legal counsel dedicated to the best interests of the library and its users, are a crucial part of this process. A further commitment to ensuring that the library's internet filter and filtering policies are as friendly to the First Amendment as possible will help public libraries avoid infringing on their users' constitutionally protected right to access online information.

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CIPA-Compliant Filtering That's First Amendment–Friendly

What constitutes First Amendment–friendly filtering under CIPA? It is filtering (or a filtering policy) that incorporates and emphasizes the core values of intellectual freedom and equity of access embodied in the Library Bill of Rights and the ALA Code of Ethics. Utilizing these principles, there are many steps that libraries and schools subject to CIPA can take to minimize the use of filters, ensure that filters are not blocking legally protected material, and educate patrons about best practices and acceptable use policies.

1. **Develop a well-crafted internet use policy.** CIPA requires libraries to write and adopt an internet use policy that addresses minors' safety online and incorporates use of a "technology protection measure." When writing the policy, libraries should include trustees, legal counsel, and library staff in the process. They should also ensure that the guidelines, rules, and procedures are reasonable, nondiscriminatory, viewpoint-neutral restrictions on internet access and computer facilities.
   The policy should advise internet users of their rights and responsibilities. It should also describe unacceptable behaviors, what the penalties are for violations, and how to appeal. It should also include a clear, transparent, and timely procedure for asking that the filter be disabled and that constitutionally protected content be unblocked. The governing boards of libraries and schools should encourage public participation in the process when creating and adopting policies that address public access to information. Once adopted, policies should be easily available for review, and all staff should be trained in appropriate implementation.

2. **Exercise care in choosing filtering software.** Select filtering software that is transparent in its classification system and that allows the library to fine-tune the categories of content that are blocked. Also, ensure that people, not just automated algorithms, regularly review and analyze the software's blocking criteria. Establish a clear, transparent, and timely process for reviewing and revising blocking criteria as requested by users, and for unblocking constitutionally protected content systemwide.
   It is important to understand the vendor's philosophy about content filtering. Some vendors are affiliated with religious organizations or espouse particular partisan or doctrinal views. Favor vendors who do not design their software to advance their own values. Additionally, be sure that the library can switch off or opt out of viewpoint- or content-based criteria that may run afoul of the First Amendment.
   When installing the filtering software, adjust blacklist criteria to minimize the blocking of constitutionally protected speech. Library staff should be able to disable or unblock the technology at workstations and/or move the user to an unfiltered station as needed.

3. **Employ and promote filtering alternatives.** Careful arrangement of computer stations, designated areas for families and children, and the use of privacy screens or devices can ensure user privacy and a comfortable environment for all library users.

With or without the use of filters, the best protection that libraries can employ is a good education and communication program that informs users of all ages about safe searching, identity protection, and managing access to unwanted materials. A strong education program will offer resources for safe and responsible internet use and include information about what filters can and cannot do.

Snapshot of Filtering in School Libraries

By Helen R. Adams

Since 2001, school districts that receive discounts on internet access or internal connections as part of the e-rate program are required by CIPA to use "technology protection measures" (filters) to block visual images that are obscene, child pornography, or harmful to minors. However, anecdotal information indicates that many local school districts have been filtering far beyond what the law mandates for more than a decade.

The 2012 School Libraries Count! national longitudinal survey, conducted by ALA's American Association of School Librarians (AASL), reveals that 98% of schools use multiple approaches to filter internet content: 94% use filtering software, 87% have adopted an acceptable use policy, and 73% supervise students when they are online.

The survey, which analyzes data provided by 4,299 respondents, further shows that 100% of student content is filtered and that 73% of school librarians reported no differentiation in filtering levels based on the age of students.

Not surprisingly, four types of content are heavily blocked: social networking sites (88%), IM/online chat (74%), online games (69%), and video services such as YouTube (66%). Among schools that allow students to bring their personal devices to school, 51% use some type of filtering for these devices, with 48% also relying on acceptable use policies, 47% require students to log on to a school network (26% requiring these students to use a "guest" network), and 28% require a classroom teacher to give permission and monitor use.

While 92% of respondents said that 92% of can ask to have wrongly blocked sites unblocked, but responsiveness to their requests varies greatly. Unblocking might take a few hours (27% of schools), one to two days (35%), between two and four days (17%), or one week or longer (20%).

According to survey respondents, the impact of filtering on student learning is clear. Filters:

- inhibit student research (52%),
- ignore "the social aspects of learning" (42%), and
- discourage collaboration (25%).

Although 50% of respondents noted that filters lessened online distractions and 34% reported that they decreased the need for monitoring, the survey clearly shows that librarians find restrictive filtering to be inconsistent with best practices regarding access to information and advancing digital citizenship. See the complete 2012 School Libraries Count! survey results for details.

"The results of the AASL survey on the filtering of legitimate educational sites and useful social networking tools are cause for great concern, as our students and teachers are increasingly reliant on access to digital content and resources," said AASL President Susan Ballard. "The survey results created a heightened awareness and resolve that we must continue to educate all members of our school learning communities—including policy-makers, administrators, and parents—that overly restrictive practices diminish our work to help students become thoughtful, ethical, and informed digital citizens."

One of AASL's responses to restrictive filtering was its creation in 2011 of the first-ever Banned Websites Awareness Day (BWAD), which is now observed annually during Banned Books Week. BWAD draws attention to overly restrictive filtering of useful educational websites, the academic value of social media tools, and the impact of filtering on student learning.

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Resources

"Internet Filtering" by Sarah Houghton-Jan, *Library Technology Reports* (Nov./Dec. 2010): 25–33

"FAQ on E-rate Compliance with the Children's Internet Protection Act and the Neighborhood Children's Internet Protection Act" (PDF file) by Bob Bocher, Wisconsin Department of Public Instruction

FCC Report and Order 11-125, August 21, 2011 (report and regulations implementing CIPA) (PDF file)

The Children's Internet Protection Act (PDF file)

"Straight from the DOE: Dispelling Myths about Blocked Sites" by Tina Barseghian, NPR affiliate KQED–Northern California

"The Libraries and Internet Toolkit," American Library Association

United States v. American Library Association (June 23, 2003)

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