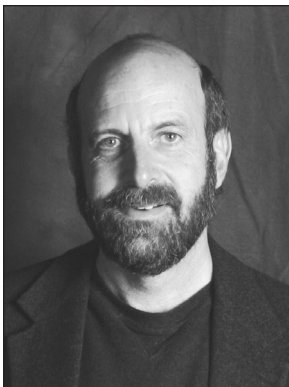


Internet Filters and Public Libraries

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I. Introduction

On June 23, 2003, the U.S. Supreme Court, in a 6-3 ruling, declared the Children’s Internet Protection Act constitutional.¹ CIPA conditions the receipt of federal funds by public libraries upon the installation of filtering software that blocks access to material that is “obscene,” “child pornography” or “harmful to minors.” Even as it recognized that “a filter set to block pornography may sometimes block other sites that present neither obscene nor pornographic material,” the Court ruled that CIPA does not violate patrons’ First Amendment rights.² The Court’s decision relied heavily on the “ease” with which patrons may have filtering software disabled and the capacity of libraries to permanently unblock any erroneously blocked site. The narrow focus of the Supreme Court ruling may set the stage for continuing controversy — and more litigation — as libraries across the country install filtering systems and respond to patron requests for access to blocked material.

II. Background

Beginning in the mid-1990s, as the Internet found its way into more and more homes and became increasingly popular in the workplace and public libraries,

some began to voice concern about the medium's unique ability to deliver a broad range of content to a general audience. Much of the concern involved material that was deemed to be inappropriate, even dangerous, for children. As pressure began to build for controlling online content, legislators responded at the federal and state levels. In 1996, Congress passed the Communications Decency Act.

The following year, the U.S. Supreme Court struck down the new law. In a landmark decision, the Court ruled that the Internet is entitled to the highest degree of free speech protection. Noting that "the content on the Internet is as diverse as human thought," the Court stated that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." The CDA — which sought to shield minors from "indecent" online communications and, in the process, limited adult access to a wide range of material — did not pass constitutional muster.³

III. The Debate Surrounding the Development of Internet Filters

The ink on the Court's pronouncement had barely dried when CDA supporters began devising new strategies. One approach was legislative: to craft a "Son of CDA" law that would omit several of the components that the Court had found most problematic, such as the vague indecency standard and the act's broad coverage of commercial and non-commercial speakers.

Another approach was technological: to develop rating systems and filtering programs that would facilitate voluntary efforts to prevent children from accessing material judged unsuitable. This latter approach found support among some who had opposed the CDA; they reasoned that a voluntary, industry-wide commitment to develop rating and filtering mechanisms would forestall what was perceived to be the more onerous, CDA-like legislative mandate already being planned by some members of Congress. Most free-expression advocates, however, recognized the potential danger of technological solutions to an extremely

How Internet filtering systems work

The filtering process involves classifying the content of Internet sites into pre-designated categories. The major software companies typically use 30-40 different categories. The software sorts Web sites into categories by making a value judgment about the site's content. This judgment is made manually, automatically or through a combination of both techniques. Automatic systems search and sort Web sites based on keywords.

If an individual requests a Web page, the filtering software compares the requested domain name or IP address against its control list database of Internet sites. These control lists generally have between 200,000 and 600,000 URLs. The software checks to see whether the Web page falls under a category that has been designated as blocked. If the page is on the "block list," the filtering software immediately denies the user access to the Web site and may notify the user that access has been denied.

Some filtering software enables users or system administrators, such as librarians, to add URLs to the block list, ensuring that certain URLs are inaccessible. Similarly, the software also may enable users to remove URLs from block lists.

There are two types of filtering systems: stand-alone systems and protocol-based systems.

In a stand-alone system, the filtering software vendors pre-designate which content will be filtered, and the user does not have control.

Protocol-based systems, on the other hand, do not determine in advance which content will be blocked. Rather, protocol-based systems can locate information on the Internet and, based on established standards, interpret the information to determine whether a particular page should be blocked.

Filtering software may be installed either on an individual computer or on a computer network.

complex and highly subjective issue. There has never been a consensus on the types of material that are unsuitable for minors. The critics of the technological approach argued that the same censoring technologies that a parent might voluntarily install on a home computer could just as easily be mandated by government.

The likelihood that the use of rating and blocking technologies would become mandatory was at the core of the opposition. The concern was best expressed in the following statement issued by members of the Global Internet Liberty Campaign, an international coalition of online rights advocates, in response to a Bertelsmann Foundation proposal for a worldwide, uniform content rating system:

Originally promoted as technological alternatives that would prevent the enactment of national laws regulating Internet speech, filtering and rating systems have been shown to pose their own significant threats to free expression. When closely scrutinized, these systems should be viewed more realistically as fundamental architectural changes that may, in fact, facilitate the suppression of speech far more effectively than national laws alone ever could. . . .

In sum, the establishment and widespread acceptance of an international rating and blocking system could promote a new model of speech suppression, shifting the focus of governmental censorship initiatives from direct prohibition of speech to mandating the use of existing ratings and blocking technologies.⁴

Many in the library community expressed concerns about filtering systems. On July 2, 1997 — less than a week after the Supreme Court’s CDA decision — the American Library Association (which had joined in the successful court challenge) approved a resolution on the use of filtering software in libraries. The ALA concluded that “the use in libraries of software filters which block constitutionally protected speech is inconsistent with the United States Constitution and federal law.”⁵

In an apparent effort to stake out a compromise, the Clinton administration

aligned itself with the voluntary filtering proponents. On July 16, 1997, the White House convened a meeting to discuss the need to develop content filters and unveiled its “Strategy for a Family Friendly Internet.” According to the White House proposal, a key component would be the promotion of labeling and screening systems designed to shield children from “inappropriate” Internet content. President Clinton stated that it “must be our objective” to ensure that the labeling of Internet content “will become standard practice.” Vice President Gore added, “Our challenge is to make these blocking technologies and the accompanying rating systems as common as the computers themselves.”

Major Internet industry players supported the White House initiative. Netscape and Microsoft, the leading developers of Web browsers, announced that they would include filtering technology in their products so that parents could “choose from a variety of ratings systems to block sites that are inappropriate for children.” The White House noted that “Microsoft and Netscape account for more than 90 percent of the browser market.”⁶ Five Internet companies involved in the distribution of content — CNET, Excite, Infoseek, Lycos and Yahoo! — supported the White House proposal backing a self-regulated rating system for content on the Web.

IV. The Case Against Internet Filters

In the midst of the momentum to develop and implement rating and blocking systems, research findings on the real-world impact of these technologies raised concerns within the free-expression community. On the eve of a White House-sponsored conference on Internet child protection, the Electronic Privacy Information Center released a report showing that a “family-friendly” search engine rendered more than 90 percent of otherwise available online content invisible.⁷ A series of studies conducted by the Censorware Project documented the over-inclusive nature of commercially available filtering systems. One such study found that the SmartFilter product, which was installed by the Utah public school system, denied access to more than 500,000 Web sites. Among the

blocked materials were the Declaration of Independence, the Bible, and all of Shakespeare's plays.⁸ Free-speech advocates warned that the proposed cure might be worse than the disease. For instance, a report by the National Coalition Against Censorship, which reviewed the findings of tests conducted on 19 of the most popular filtering systems, found extensive blocking of valuable online material and concluded that:

This problem stems from the very nature of filtering, which must, because of the sheer number of Internet sites, rely to a large extent on mindless mechanical blocking through identification of key words and phrases. Where human judgment does come into play, filtering decisions are based on different companies' broad and varying concepts of offensiveness, "inappropriateness," or disagreement with the political viewpoint of the manufacturer.⁹

As the evidence mounted that filtering systems might be clumsy tools that blocked access to vast amounts of useful and non-objectionable Internet content, such systems also proved to be ineffective in protecting against the enactment of new restrictive legislation. In 1998, Congress passed the Child Online Protection Act, which made it a crime for commercial Web sites to display material that was "harmful to minors" to anyone under the age of 17. Challenged on constitutional grounds by many of the plaintiffs who had succeeded in striking down the CDA, the new legislation was invalidated in February 1999 by a federal judge in Philadelphia, who noted that "perhaps we do the minors of this country harm if First Amendment protections, which they will inherit fully with age, are chipped away in the name of their protection."¹⁰ The Supreme Court has since considered and remanded the case in light of its narrow holding that relying solely upon "community standards" to determine what is "harmful to minors" does not render COPA unconstitutional.¹¹

V. The Drive for Mandated Internet Filters

While Congress and the courts grappled with the ramifications of the fact that the Internet made real the “marketplace of ideas” that had once existed only theoretically, libraries across the country were becoming ground zero in the culture wars of the Information Age. Just as they had lobbied for the enactment of criminal laws like the CDA and COPA, social conservative groups also rallied in support of filtering systems. Some of these groups sought to mandate the use of filtering systems in public libraries. An organization called Family Friendly Libraries identified its “top priority goal” as “protecting children from age-inappropriate materials.” In a February 1998 statement supporting the installation of filtering systems in public libraries, the group complained that “we now have the widespread availability of free Internet access for all ages in America’s public libraries including the full range of pornography found in cyberspace.”

Responding to the arguments of free-expression advocates, FFL said that filtering did not result in censorship: “Disappointed patrons can access what’s available on a computer in a private home or business, theirs included. All they have lost is free access to the missing sites, not the missing sites themselves. For the patron who wants everything on the net, library restrictions may be inconvenient, but not illegal.”¹² This claim soon would be tested.

In October 1997, the library board in Loudoun County, Va., adopted a “Policy on Internet Sexual Harassment” that called for the installation on all library computers of filtering software to block all sites displaying child pornography, obscene material and material deemed harmful to minors. The board asserted that the policy was designed to combat two distinct evils: the creation of a sexually hostile environment and the violation of child pornography, obscenity and harmful-to-minors laws. To implement the policy, the library board purchased X-Stop, a commercial site-blocking software product. Arguing that the use of the filtering system would deny adult library patrons access to constitutionally protected material, a group of local citizens challenged the policy in federal court. Several online publishers intervened in the case, asserting that the filtering system would also violate their right to disseminate information. In the first judicial

decision to consider the First Amendment implications of a library filtering policy, the U.S. District Court for the Eastern District of Virginia agreed with the challengers and invalidated the Loudoun County policy as an unconstitutional prior restraint.

In so finding, the court noted that, although (as is common with such products) the method by which X-Stop selected Web sites to block had been kept secret by its developers, “it is undisputed that it has blocked at least some sites that do not contain any material that is prohibited by the Policy.” Going to the heart of the library board’s claimed rationale for the installation of filters, the court reviewed the evidence presented by the board and said:

No reasonable trier of fact could conclude that three isolated incidents nationally, one very minor isolated incident in Virginia, no evidence whatsoever of problems in Loudoun County, and not a single employee complaint from anywhere in the country establish that the Policy is necessary to prevent sexual harassment or access to obscenity or child pornography.¹³

The court further agreed that the filtering policy would have the effect of denying adult patrons access to protected information: “It has long been a matter of settled law that restricting what adults may read to a level appropriate for minors is a violation of the free speech guaranteed by the First Amendment.”¹⁴ Addressing the library’s use of a commercial product to identify objectionable material, the court noted that “a defendant cannot avoid its constitutional obligation by contracting out its decision making to a private entity.” The court concluded that, “Although [the library board] is under no obligation to provide Internet access to its patrons, it has chosen to do so and is therefore restricted by the First Amendment in the limitations it is allowed to place on patron access.”¹⁵

More recently, a state appeals court in California ruled that a public library cannot be compelled to restrict the Internet access provided to minors, even where a parent alleged that her child had downloaded sexually explicit material on a library computer.¹⁶

In February 2000, voters in Holland, Mich., rejected a ballot measure that would have required the installation of Internet filters on public library computers. Filtering supporters had heavily outspent opponents — reportedly by a margin of \$45,000 (including \$35,000 from the American Family Association) to \$2,000. The pro-filtering campaign sent out at least three direct mailings and ran radio and cable television commercials in their unsuccessful effort.¹⁷

Despite such judicial and electoral setbacks, filtering proponents in Congress ultimately succeeded in requiring the installation of filtering systems in most public schools and libraries across the country. The effort began in 1998, when Sen. John McCain, R-Ariz., then-chairman of the Senate Commerce Committee, introduced legislation that would require any school or library receiving a federal “E-Rate” subsidy for Internet access to install on its computers “a system to filter or block matter deemed to be inappropriate for minors”.¹⁸ Explaining his motivation, McCain said, “While schools and libraries across the country increasingly use the Internet as a learning tool, we need to ensure that pervasive, obscene and violent material is screened out and that our children are protected.”¹⁹ The legislation was finally enacted into law as the Children’s Internet Protection Act in December 2000.²⁰ The legislation required schools and libraries receiving federal funds for Internet access to install filtering software to block obscene materials, child pornography or content judged harmful to minors in order to remain eligible for federal Internet subsidies.

VI. Questioning the Constitutionality of Mandated Internet Filters

In 2001, a coalition of plaintiffs led by the American Civil Liberties Union and the American Library Association challenged the constitutionality of CIPA’s filtering mandate, as applied to libraries. A special three-judge federal panel in Philadelphia held that CIPA violated the First Amendment because it restricted substantial amounts of protected speech “whose suppression serves no legitimate government interest.” The decision also noted that CIPA infringes upon the First Amendment right to anonymity because it forces patrons to reveal their

Excerpts from U.S. Supreme Court decision in *U.S. v. American Library Association*

Assuming that . . . erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled. When a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter. . . . The District Court viewed unblocking and disabling as inadequate because some patrons may be too embarrassed to request them. But the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment.

• • •

[Federal Internet subsidies] were intended to help public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes. Congress may certainly insist that these “public funds be spent for the purposes for which they were authorized.” Especially because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs. As the use of filtering software helps to carry out these programs, it is a permissible condition. . . .

Because public libraries’ use of Internet filtering software does not violate their patrons’ First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress’ spending power. Nor does CIPA impose an unconstitutional condition on public libraries.

— *Chief Justice Rehnquist* (plurality opinion)

Rather than allowing local decision makers to tailor their responses to local problems, the Children’s Internet Protection Act (CIPA) operates as a blunt nationwide restraint on adult access to “an enormous amount of valuable information” that individual librarians cannot possibly review. Most of that information is constitutionally protected speech. In my view, this restraint is unconstitutional.

• • •

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

removed. It is as though the statute required a significant part of every library's reading materials to be kept in unmarked, locked rooms or cabinets, which could be opened only in response to specific requests. Some curious readers would in time obtain access to the hidden materials, but many would not. Inevitably, the interest of the authors of those works in reaching the widest possible audience would be abridged. Moreover, because the procedures that different libraries are likely to adopt to respond to unblocking requests will no doubt vary, it is impossible to measure the aggregate effect of the statute on patrons' access to blocked sites. Unless we assume that the statute is a mere symbolic gesture, we must conclude that it will create a significant prior restraint on adult access to protected speech.

— *Justice Stevens* (dissenting opinion)

The question for me . . . is whether a local library could itself constitutionally impose these restrictions on the content otherwise available to an adult patron through an Internet connection, at a library terminal provided for public use. The answer is no. A library that chose to block an adult's Internet access to material harmful to children (and whatever else the indiscriminating filter might interrupt) would be imposing a content-based restriction on communication of material in the library's control that an adult could otherwise lawfully see. This would simply be censorship.

• • •

There is no good reason . . . to treat blocking of adult inquiry as anything different from the censorship it presumptively is. For this reason, I would hold in accordance with conventional strict scrutiny that a library's practice of blocking would violate an adult patron's First and Fourteenth Amendment right to be free of Internet censorship, when unjustified (as here) by any legitimate interest in screening children from harmful material. On that ground, the Act's blocking requirement in its current breadth calls for unconstitutional action by a library recipient, and is itself unconstitutional.

— *Justice Souter* (dissenting opinion)

identities in order to request that sites be unblocked.

The court rejected the government’s argument that “public libraries’ use of Internet filters is no different, for First Amendment purposes, from the editorial discretion that librarians exercise when they choose to acquire certain books on the basis of quality.”²¹ The court found that by providing patrons with Internet access, libraries create a “vast democratic forum, open to any member of the public to speak on subjects as diverse as human thought.”²² Any subsequent attempt to censor certain viewpoints out of such a broad public forum is subject to strict constitutional review, which current filtering methods fail to satisfy. The court determined that filtering technologies must necessarily resort to unconstitutionally overbroad methods because of the Web’s enormous size and rate of growth. Thus, the court found that CIPA’s requirement that libraries use inherently flawed filtering technology in order to receive federal Internet subsidies was an unconstitutional infringement on patrons’ free-speech rights.

On appeal, the U.S. Supreme Court reversed the federal panel’s decision and declared CIPA constitutional, thus requiring public libraries to install filtering software as a condition of federal support.²³ The Court ruled that public libraries must have broad discretion to decide what material to provide to their patrons in order to fulfill their traditional missions of facilitating learning and cultural development. In this context, the Court did not find a distinction between a library’s collection decisions regarding print materials or Internet materials. The Court determined that Internet access was not provided by a library in order to create a public forum for Web publishers to express themselves, but rather to facilitate research and learning.

Thus, the Court ruled that CIPA did not infringe any fundamental right to have access to constitutionally protected speech. Instead, CIPA allowed Congress, under its spending power, to choose not to subsidize unfiltered Internet access in libraries and to require that public funds be spent for the purpose for which they were authorized. The Court also dismissed concerns that filtering software erroneously blocked access to constitutionally protected speech, emphasizing what it characterized as the “ease with which patrons may have the filtering software

disabled.”²⁴ The Court assumed that librarians would automatically and unconditionally disable filters upon request by adult patrons and permanently unblock erroneously blocked sites. This assumption puts the burden of ensuring access to constitutionally protected speech upon librarians through a process that is complex and uncertain at best. Furthermore, the Court failed to confront the privacy implications and practical difficulties of such a disabling scheme.

VII. Conclusion

Technology has made real the First Amendment’s goal of unrestricted access to the full range of information. However, as Ithiel de Sola Pool warned in his 1983 book, *Technologies of Freedom*, government efforts to control new electronic media must be subject to close scrutiny. While new means of communication will “open wider the floodgates for discourse,” he wrote, “in fear of that flood, attempts will be made to shut the gates.” While de Sola Pool appears to have been prophetic in anticipating mandatory Internet content controls, it remains to be seen whether he was also correct in his conclusion that “as long as the First Amendment stands, backed by courts which take it seriously, the loss of liberty is not foreordained.” The Supreme Court’s recent CIPA decision casts doubt upon that assessment, but it appears likely that the final chapter on mandated content controls has not yet been written.

Endnotes

- ¹ U.S. v. American Library Association, No. 02-361 (June 23, 2003).
- ² *Id.*
- ³ Reno v. ACLU, 521 U.S. 844 (1997)
- ⁴ Global Internet Liberty Campaign Member Statement Submitted to the Internet Content Summit, Munich, Germany, Sept. 9-11, 1999 <<http://www.gilc.org/speech/ratings/gilc-munich.html>>.
- ⁵ American Library Association, “Resolution on the Use of Filtering Software in Libraries,” July 2, 1997, <http://www.ala.org/alaorg/oif/filt_res.html>.
- ⁶ “A Family Friendly Internet,” <<http://clinton2.nara.gov/WH/New/Ratings/>>.
- ⁷ “Faulty Filters: How Content Filters Block Access to Kid-Friendly Information on the Internet,” December 1997, <<http://www2.epic.org/reports/filter-report.html>>.
- ⁸ “Censored Internet Access in Utah Public Schools and Libraries,” November 1999, <http://censorware.net/reports/utah/>.
- ⁹ “Internet Filters: A Public Policy Report,” Fall 2001, <<http://www.ncac.org/issues/internetfilters.html>>.
- ¹⁰ *ACLU v. Reno*, 31 F. Supp.2d 473, 479-80 (E.D.Pa. 1999), *aff’d*, 217 F.3d 162, 171 (3rd Cir. 2000), *cert. granted sub nom. Ashcroft v. ACLU*, 121 S. Ct. 1997 (2001).
- ¹¹ *Ashcroft v. ACLU*, 122 S. Ct. 1700 (2002)
- ¹² Memorandum in support of Loudoun County Library System, Feb. 12, 1998, <http://www.fflibraries.org/Internet_Docs/FFLLoudounSupport.htm>.
- ¹³ *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998).
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ *Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772 (Cal. Ct. App. 2001).

F I R S T R E P O R T S

¹⁷ “Filters Rejected; Proposal to Screen Library Terminals Fails 55% to 45%,” *The Holland Sentinel*, Feb. 23, 2000, <http://www.thehollandsentinel.net/stories/022300/new_filters.html>.

¹⁸ According to the American Library Association, some 5,000 public libraries have received approximately \$200 million in E-Rate subsidies.

¹⁹ “Congress Passes Internet Filtering For Schools, Libraries,” Dec. 15, 2000 <<http://www.senate.gov/~mccain/intfinal.htm>>.

²⁰ Pub. L. No. 106-554.

²¹ *American Library Ass’n v. United States*, 201 F. Supp. 2d 401 (E.D. Penn. 2002).

²² *Id.* at 409.

²³ *U.S. v. American Library Association*, *supra* note 1.

²⁴ *Id.*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

—FIRST AMENDMENT TO THE U.S. CONSTITUTION

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