

The First Amendment and Internet Filtering in Public Libraries

By Gretchen Kolderup

Since the Internet began to be available and be widely used in public libraries, people have been calling for online content to be monitored. Congress first passed the Communications Decency Act (CDA) in 1996 in an attempt to regulate indecency and obscenity on the Internet; the Supreme Court struck it down in 1997. In 1998 the Child Online Protection Act (COPA) was passed in an attempt to modify the CDA by focusing on “material harmful to minors.” In 2009 the Supreme Court refused to hear an appeal of a lower court ruling declaring it unconstitutional, effectively killing COPA eleven years after it was passed. In 2000 the Children’s Internet Protection Act (CIPA) was created to protect minors from explicit content online and to provide a method for the federal government to encourage libraries and schools to adopt filtering software by tying the use of such software to the availability of federal funding for Internet connectivity. The Supreme Court upheld CIPA in 2003 (Sobel, 2003). Additionally, over the last two and a half decades, countless individual conflicts have occurred between libraries, patrons, parents, school districts, and interest groups such as the American Library Association (ALA), the American Civil Liberties Union, and Family Friendly Libraries over the role of the library in protecting patrons from objectionable content and the rights of those patrons to access information.

Since CIPA requires libraries to install Internet filters if they are to receive federal e-Rate funding to support Internet connectivity and the purchase and maintenance of computers in the library, the use of filtering software in libraries has become more prevalent over time: in 2000 25% of public libraries used filters, by 2002 it was 43% (Oder, 2003), and in 2005, 65%. In Indiana in 2003, 66% of public libraries used filtering software and another 22% said they had plans to install filters in the future (Comer, 2005). Especially since 64% of libraries report being the only provider of free Internet access in their communities (Public, 2011), what parts of the Internet a library allows access to matters. But even though filters have improved since their initial creation, they still both underblock and overblock content, and practical matters of implementation further deteriorate their value. Moreover, the use of filters in a library setting continue to violate principles set out in the Constitution and various statements and resolutions of the ALA.

Family Friendly Libraries asserted that Internet filters would address the following problems: “child pornography trafficking on public library computers; public display of graphic sexual images exposing passers-by, including children, to harmful images; criminals being attracted to public libraries

by Internet sessions that are untraceable by law enforcement; the potential for harm to children who are exposed to child pornographers and those who choose to openly view pornography for pleasure in close proximity to children” (Family). The Supreme Court ruling supporting Internet filtering explained that the use of Internet filters in public libraries does not violate patrons’ First Amendment rights because of the “ease” with which these filters can be removed for “bona fide research or other lawful purposes” (United, 2003).

Filtering software usually uses a two-pronged approach: a pre-determined list of URLs for “inappropriate” websites, often sorted into various categories, is created by the company offering the software, and access to these URLs is blocked entirely. The software will also monitor the text of websites for forbidden words or phrases and block content to those websites as they are discovered. The composition of (and rationale behind) the lists of blocked URLs is maintained as a trade secret, and librarians must choose among categories to block without knowing exactly what they are blocking (Houghton-Jan, 2008).

The ability of filters to block content appropriately has been an issue since they were first introduced. In 1999 a study conducted by the Censorware Project found that the Declaration of Independence, the Bible, and the complete works of Shakespeare were all blocked by SmartFilter, which was being used in the Utah public school system (Heins, 2001). Lori Bowen Ayre wrote a thorough article in *Library Technology Reports* in 2004 that outlined the history and development of filters, how filters work and conflicts that arise in their use in the library, what filters were available and how they performed, how filters should be implemented in light of the then-recent decision upholding CIPA, and the future of filters in libraries. She concluded that “[n]o filter, however, actually limits its categories to obscene material and child pornography because the current definition of obscenity doesn’t work on the Internet” and pointed out that the companies who create Internet filtering software are not guided by information professionals but rather use automated methods to classify websites (Ayre). In 2005 *Consumer Reports* tested Internet filtering software and found that improvements had been made in blocking pornographic material but that many websites without objectionable content were still being blocked (Consumer, 2005). And in 2008, filters were still both underblocking and overblocking, as found in a study conducted by the San José Public Library. They tested four leading filtering software packages and found that clearly pornographic material—both text and images—

were not filtered out, and that academic information (about sexuality especially) was still being blocked. Most importantly, though, the librarians who conducted the study noted that they “were not able [...] to find any product on the market that successfully allows filtering only of images that are classified as obscene and harmful to minors” (Houghton-Jan, 2008). Since Internet filtering software still filters broadly by URL and narrowly by text, the only way to identify obscene images or video is by examining the text around them, which is less useful as the Internet becomes more visual.

Internet filters have improved since they were first introduced but are still extremely technologically limited in their ability to recognize pornographic images and universally underblock and overblock content, denying patrons access to material protected by the First Amendment while still allowing objectionable material to be accessed. While Family Friendly Libraries looks to Internet filtering software to protect adults and children alike from accidental exposure to pornographic material and to keep criminals out of the library, the software available even today is unreliable in its filtering (Consumer, 2005).

Supporters of filtering software and its defenders on the Supreme Court have pointed to the ability of librarians to disable the filters upon the request of an adult patron as evidence that First Amendment rights are not being suppressed. But numerous examples of barriers to the disabling of filters have appeared in the library press; clearly even if filtering software can be disabled, practical matters of implementation and staff knowledge prevent this disabling from being easy, as the Supreme Court has said it is. Furthermore, in a Washington State Supreme Court case that upheld CIPA, the court observed that of 92 requests to have content unblocked, only 8 were responded to within an hour. In total, 29% were responded to within the same day, 32% were responded to the next day, 22% took three days, and 5% took longer (with no record about whether or not the remaining requests were ever responded to) (Bradburn, 2009). These waiting periods for information create further unacceptable barriers to access.

Even if filters can be disabled upon request, that request must first be filed. While the right to privacy is not explicitly outlined in the Constitution, Supreme Court cases dealing with the Fourth Amendment have granted citizens some rights to privacy. Within a library setting, patrons have a right to privacy and confidentiality in their search for information. In a statement on privacy and confidentiality, the ALA notes that “[l]ack of privacy and confidentiality chills users' choices, thereby suppressing access to ideas” (Privacy). If a patron is using the Internet to seek out information about sensitive—but still legal and protected—subjects and he or she encounters a message from the filtering software indicating that the website he or she was trying to access has been blocked, the patron, who perhaps was using the Internet to avoid revealing personal details to another person, must ask a librarian to unblock the website. The Supreme Court’s specification that filters should

be lifted for those doing “bona fide research” opens patrons up to questioning about their intentions and how they will use the information they are seeking, which can be embarrassing, create barriers to access of information, and violate patrons’ privacy. Filters not only do an imperfect job of filtering and suffer further in their real-world implementation, but even attempting to disable them can create further barriers to a patron’s attempt to access Constitutionally protected information at the library.

The First Amendment states in part that “Congress shall make no law [...] abridging the freedom of speech.” From this Amendment courts have derived the notion of Constitutionally protected speech, which makes allowances for obscenity, material protected by copyright, and hate speech and slander. When the ALA successfully challenged CIPA in the Court of Appeals for the Eastern District of Pennsylvania, the judge wrote in his decision that “[...] the library plaintiffs must prevail in their contention that CIPA requires them to violate the First Amendment rights of their patrons [...]” because Internet filtering software overblocks content online and because no filtering software’s definition of inappropriate material was “identical to the legal definitions of obscenity, child pornography, or material harmful to minors” (ALA, 2002).

Although the Supreme Court overturned this District Court ruling in affirming that to receive federal e-Rate funding, libraries must block otherwise Constitutionally protected speech, there is no law that mandates filtering. Libraries are legally permitted to provide unfiltered Internet service to their patrons. In doing so, though, they do give up federal e-Rate funding, which some libraries are not financially able to do. In fact, 18% of public libraries in Indiana reported in 2003 that they had modified their computer usage policies because of CIPA, and “one librarian asserted, ‘The \$10,000 T-1 line is simply not something we can afford without e-Rate’” (Comer, 2005).

The ALA has also issued statements outlining professional principles for librarianship that conflict with the use of filtering software. One of the assertions in the Freedom to Read Statement is, “It is not in the public interest to force a reader to accept the prejudgment of a label characterizing any expression or its author as subversive or dangerous” (Comer, 2005). That filtering software companies create categories of objectionable material and populate those categories with URLs without transparency forces an Internet user in a library with filters to accept the prejudgment of these companies about what is or is not acceptable material. The Freedom to Read Statement also contains a clause explaining that “[t]here is no place in our society for efforts to coerce the taste of others, to confine adults to the reading matter deemed suitable for adolescents, or to inhibit the efforts of writers to achieve artistic expression” (ALA, 2006). CIPA does not just mandate the use of filtering software on computers in the children’s area of the library to receive federal funding, but that all computers, even staff terminals, have filtering software (Ayre, 2004). CIPA is

ostensibly about protecting children, but it also limits adults' access to material, treating them like children and attempting to protect them from themselves. And finally, the *Library Bill of Rights* states that "[a] person's right to use a library should not be denied or abridged because of origin, age, background, or views" (ALA, 2006). Even children deserve access to information; it should be parents' responsibility, not the library's or the government's, to monitor a child's Internet use. Furthermore, teaching children how to use the Internet safely equips them to successfully navigate the Internet as adults. The ALA mentions the benefits of educating rather than regulating in their Resolution on Opposition to Federally Mandated Internet Filtering (ALA, 2001). And the U.S. District Judge who struck down COPA in 2007 wrote, "perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection" (Urbina, 2007).

Arguments in favor of Internet filtering paint filtering software as an effective way to protect children from danger online, and that the use of such software does not violate First Amendment rights. However, even the best filters not only continue to block constitutionally protected speech and infringe on the ALA-supported rights of patrons—adults and children alike—they also underblock content that many would deem objectionable. Thus filters continue to simultaneously fail to effectively protect children and while at the same time limiting the access rights of adults. While still maintaining that no filters fully conform to the *Library Bill of Rights*, the ALA's Office for Intellectual Freedom and Intellectual Freedom Committee are well aware of the difficulties facing libraries who choose to filter or who are forced to do so. Consequently they are developing materials that will offer guidance to libraries on how to minimize the negative impact of whatever filtering product they choose to use.

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