A FAQ on Library Filtering Policies in Washington State

December 2012

Background:

In April 2012 the U.S. District Court in Spokane, Washington ruled in ***Bradburn v. North Central Regional Library District*** *that a library's policy of selectively unblocking particular websites or web pages for adult patrons upon request was sufficient to satisfy the law. The ruling came in a case filed by the ACLU of Washington on behalf of four plaintiffs who were denied access to lawful materials on the Internet because of the North Central Regional Library District's overly broad filtering policy.*

The policy hampered adults in researching school assignments, locating businesses and organizations, and doing personal reading on general interest topics. The individual plaintiffs included a college student seeking to research an academic assignment on tobacco use, a professional photographer seeking information on art galleries and health issues, and an area resident seeking access to a blog he maintained on MySpace. The other plaintiff was the nonprofit Second Amendment Foundation, whose magazine Women and Guns was blocked by the library's filter.

The ACLU chose not to appeal the ruling in part because the case had been pending in the courts for over six years and the library had in the interim revised the filtering policies at issue in the case. Additionally, the decision was not published and had limited legal impact. However, at least one library in Washington has now chosen to implement similar policies, citing the Bradburn case as a precedent. The following FAQ explains why this is a bad idea.

Q: Can libraries rely on the *Bradburn* decision to install filters or require 72-hour waiting periods for filters to be unblocked?

A: Libraries that implement filtering policies similar to the one in North Central are restricting their patrons' First Amendment rights, and do so at their peril. The *Bradburn* decision was by *one* district judge reviewing *one* particular set of facts in *one* library system, and was not published by the court, which further reduces its impact. The filtering was upheld in part because most of the twenty-eight branch libraries that comprise the North Central Library District are relatively small in size and do not have partitions separating the children's portion of the library from the remainder of the library.

For more on this issue, libraries should consult a recent article by Theresa Chmara, an experienced First Amendment attorney who is general counsel for the Freedom to Read Foundation. In it, she carefully explains why libraries should obtain independent legal advice before implementing filtering policies, rather than relying solely on an unpublished court decision for guidance.[1]

Q: Does the ACLU's decision not to appeal the *Bradburn* ruling mean that libraries won't have to worry about being sued if they implement a policy similar to North Central's?

A: The ACLU stated clearly in its press release[2] about the decision that "Public libraries in Washington should not regard the Court's ruling as a license to filter with impunity. Should another district seek to deny library patrons access to broader categories of speech, the ACLU of Washington will take appropriate action to protect their constitutional rights."

Q. A group called "Stop Porn in Spokane Public Libraries" has posted a legal information sheet about filtering laws, citing several Supreme Court cases as precedents. Can I cite this information to defend my filtering policy?

A: The document you refer to was assembled by a non-lawyer, an anti-porn crusader named Dawn Hawkins. It should not be relied on for legal advice. It contains numerous misstatements of fact and law. For instance, the author repeatedly conflates pornography, which is legal, with obscenity, which is not. The author also states that the Supreme Court's 2003 ruling on the Children's Internet Protection Act (CIPA) mandates filtering of "offensive" content. To the contrary, CIPA specifically requires libraries to block only visual depictions of three kinds of content that fall outside the protection of the First Amendment: "obscenity," "child pornography," and for minors, content defined as "harmful to minors."

For information on CIPA and filtering that has been reviewed by attorneys involved in these cases, see the ALA's "Libraries and the Internet Toolkit," online at http://www.ala.org/advocacy/intfreedom/iftoolkits/litoolkit/librariesinternet

Q: Isn't it true that a library in Yakima, WA installed filters after a man was caught masturbating to porn on the library?

A: It is true that the Yakima library board recently voted to install filters, reportedly in response to such an incident. However, according to recent news reports, library officials have said that the man was not actually viewing porn at the time of the incident, so filters would not have prevented his actions.[3] Library director Kim Hixson acknowledged in an interview with the *Yakima Herald* that filters can be overbroad and block legally protected sites such as those with content about the sex trade and human trafficking.[4] The filters "will be reviewed for efficacy in coming months," according to Hixson, and in the meantime, patrons are encouraged to request unblocking of sites if the filter prevents access.

Q: What do I say in response to patrons who have heard from the Spokane anti-porn group and others that "countless children are getting their first experience of porn in the public library?" and that without filters, children will develop "porn addictions" and become victims of sexual assault?

A: Notably, the author of these statements, Dawn Hawkins, does not cite a single source for these assertions. Hawkins is Executive Director of Morality in Media and Porn Harms. The Porn Harms website's section citing "peer reviewed research" does not include a single study substantiating her claims. In contrast, Kaiser Family Foundation studies published in 2001 and 2002 found that only 9 percent of young people reported stumbling across pornography online "very often;" 14 percent reported "somewhat often;" 47 percent reported "not too often;" and 30 percent reported never having done so, while inadvertent exposure to pornography during Internet use occurred only 1% of the time.[5]

A reporter for Forbes Magazine, Seth Lubove, detailed his effort to verify the assertion that "most children now typically get their first exposure to porn at age 11." [6] He traced the statement to a self-published anti-porn advocate who could not remember his source but insisted that it was a common statistic. Researchers with the Crimes Against Children Research Center at the University of New Hampshire and California's Internet Solutions for Kids disputed his claim, citing current research demonstrating that 14 is the average age at which adolescents first seek out sexual materials on the Internet and that most young children who are exposed to porn see it in the home when they discover magazines kept by their parents.

According to a September 2012 news article, during the past two years Yakima library officials have recorded only six incidents of inappropriate behavior by people using public computers. During that same time, patrons have visited library branches 1,600,000 times and used its computers approximately 400,000 times, according to the library's director, Kim Hixson. "We'd like to say we've had zero" incidents, she told the *Yakima Herald*.

Q: How do I respond to the accusation that librarians are always defending porn in libraries?

A: The claim that ALA and its members defend or promote porn relies on anti-porn advocates' habit of falsely equating librarians' advocacy on behalf of children's and young adults' First Amendment rights with "promoting porn to kids." Nothing is further from the truth. ALA policies have always firmly defended a parent's right to guide their child's use of the Internet and other library resources, while asserting that those who object to particular library materials should not be given the power to restrict other library users' rights to access those materials.

We've found most parents agree that it is *their* role, not a librarian's, to determine what is appropriate for their children. Librarians have a special role in our democracy to safeguard *everyone's* access to information protected by the First Amendment.

In our experience, libraries have had great success with practical measures – such as special screens -- that protect the privacy of the viewer as well as of the adult or minor patron who may wish to avoid what is being viewed by others.

ALA stands by its longstanding mission of providing leadership for the development, promotion, and improvement of library and information services and the profession of librarianship in order to enhance learning and ensure access to information for all.

Sadly, the information about ALA provided by Dawn Hawkins via her Safe Schools, Safe Libraries handouts contains factual inaccuracies and misrepresentations. We strongly encourage anyone with questions about ALA's policies to consult ALA directly and to read those policies in full on the ALA website.

Endnotes

[1] Theresa Chmara, "Why Recent Court Decisions Don't Change the Rules on Filtering," *American Libraries,* July 24, 2012, online at http://americanlibrariesmagazine.org/news/07242012/why-recent-court-decisions-don-t-change-rules-filtering (last accessed on December 3, 2012.)

[2] "ACLU-WA Will Continue to Be Vigilant for Internet Censorship in Libraries," June 6, 2012, online at http://www.aclu-wa.org/news/aclu-wa-will-continue-be-vigilant-internet-censorship-libraries (last accessed on December 3, 2012.)

[3] Dan Catchpole, "Library to block porn websites," *Yakima Herald-Republic*, September 26, 2012; accessed online at http://www.yakima-herald.com/stories/2012/09/26/library-to-block-porn-websites (last accessed on October 30, 2012; paid archive)

[4] Dan Catchpole, "Library to block porn websites," *Yakima Herald-Republic*, September 26, 2012; accessed online at http://www.yakima-herald.com/stories/2012/09/26/library-to-block-porn-websites (last accessed on October 30, 2012; paid archive)

[5] "Generation Rx.com: How Young People Use the Internet for Health Information," accessed online at http://www.kff.org/entmedia/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13719; and "See No Evil: How Internet Filters Affect the Search for Online Health Information," online at http://www.kff.org/entmedia/3294-index.cfm

[6] Seth Lubove, "Sex, Lies and Statistics," *Forbes*, November 23, 2005. Online at http://www.forbes.com/2005/11/22/internet-pornography-children-cz_sl_1123internet_print.html (last accessed on December 3, 2012.)

Published on *American Libraries Magazine* (http://americanlibrariesmagazine.org)

Why Recent Court Decisions Don't Change the Rules on Filtering

By Theresa Chmara

July/August 2012 [6]

Blocking access to protected speech can lead to litigation and legal fees

Theresa Chmara

Several libraries have been sued recently on the grounds that their internet filtering programs are unconstitutional, raising questions in the library community about whether the rules have changed about blocking software.

The short answer is no.

These fact-specific cases arise from the ruling in the 2003 decision in *United States v. American Library Association,* in which the Supreme Court upheld the Children's Internet Protection Act. CIPA requires that public libraries receiving certain federal funds use internet filters on public computers to block materials deemed to be visually obscene, child pornography, or harmful to minors; the high court upheld the statute with the caveat that adults would still be able to access constitutionally protected material.

In writing for the majority, Chief Justice Rehnquist explained:

> 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 Solicitor General confirmed that a "librarian can, in response to a request from a patron, unblock the filtering mechanism altogether," and further explained that a patron would not "have to explain … why he was asking a site to be unblocked or the filtering to be disabled."

Since then, federal court cases have addressed a narrower issue: whether the implementation of a particular library's filtering policy is constitutional. In November 2006 the ACLU of Washington filed suit against the North Central Regional Library District (NCRL), alleging that the library violated the First Amendment by refusing to disable blocking software at the request of adult patrons (as stipulated in the CIPA decision).

After six years of litigation, the federal district court held on April 10 that NCRL's filtering policy does not violate the US Constitution, partly because the branch libraries are "relatively small in size and only one has a partition separating the children's portion of the library from the remainder of the library."

This court decision, however, has little impact beyond that particular library. The decision was by one district judge reviewing one particular set of facts in one library system, and was not published by the court, which further reduces the weight of the ruling.

What does this mean for other libraries that are considering filtering? The fact that the district court in one case upheld an internet filtering system does not mean that other libraries can be assured of a similar result.

In another recent case involving a school library, the US District Court for the Eastern District of Missouri reached a different conclusion. The court held on February 15 that the school district in Camdenton, Missouri, had unconstitutionally blocked websites that support or advocate on behalf of lesbian, gay, bisexual, and transgender (LGBT) people while permitting students access to websites that condemn homosexuality or oppose legal protections for LGBT people.

The district court held that the library's use of an "anonymous" system for requesting that sites be unblocked was stigmatizing and ineffective if students did not know what had been blocked. After the court's finding of unconstitutionality, the school district agreed to stop blocking LGBT websites, submit to monitoring for 18 months, and pay $125,000 in attorneys' fees.

Libraries should continue to be wary of using internet filtering systems that block constitutionally protected material for adults or minors. CIPA only requires filters that block access to visual images of obscenity, child pornography, and, for minors, material deemed harmful to minors. If libraries use filters that block constitutionally protected material deemed harmful to minors and do not allow adults to disable filters, or fail to provide an effective unblocking system, those libraries may open the door to years of litigation and significant legal expenses.

THERESA CHMARA *is an attorney in Washington, D.C., who is general counsel of the Freedom to Read Foundation and a board member of the American Booksellers Foundation for Free Expression. She is author of Privacy and Confidentiality Issues: A Guide for Libraries and their Lawyers [7] published by ALA Editions. She emphasizes that this article does not constitute a legal opinion and advises readers to consult their own legal counsel for legal advice regarding their particular situation.*

American Libraries, Tue, 07/24/2012 - 07:33

Intellectual Freedom

Links:
[1] http://www.ala.org/ala/conferencesevents/upcoming/annual/index.cfm
[2] http://atyourlibrary.org
[3] http://ilovelibraries.org/
[4] http://www.americanlibrariesmagazine.org/content/advertising-information/advertising-information
[5] http://americanlibrariesmagazine.org/print/10963
[6] http://americanlibrariesmagazine.org/archives/issue/julyaugust-2012
[7] http://www.alastore.ala.org/detail.aspx?ID=2410

MEMORANDUM

TO: Barbara Jones
Deborah Caldwell-Stone
Freedom to Read Foundation

FROM: Theresa Chmara
General Counsel

DATE: July, 2012

SUBJECT: Library Internet Filtering Update

The Freedom to Read Foundation has asked me to provide an update on the legal issues surrounding Internet filtering by libraries. Several libraries have been sued recently on the ground that their internet filtering policies are unconstitutional.

Before I begin that analysis, I must caution that this memorandum is merely a general discussion of these issues, and is not an opinion letter. Because laws differ from state to state, this memorandum necessarily cannot serve as the basis for legal judgments for any library. Additionally, the law related to Internet use and filtering is changing rapidly as new legislation is adopted and new court challenges are filed. A library that offers Internet access should seek legal advice for an analysis of its own particular situation, Internet filtering policies and practices, and an evaluation of the current laws of its own state and jurisdiction.

The recent cases challenging Internet filtering policies at libraries are very fact specific and stem from the ruling in *United States v. American Library Association,* 539 U.S. 194 (2003), where the Supreme Court upheld the Children's Internet Protection Act. In the ALA

case, the Supreme Court upheld CIPA's requirement that public libraries receiving certain federal funds use filtering systems on Internet terminals.

CIPA provides that CIPA provides that schools and libraries applying for certain funds for Internet access (e-rate discounts or LSTA grants) may not receive such funds unless they certify that they have in place a policy of Internet safety that includes the use of technology protection measures, *i.e.*, filtering or blocking software, that protects against access to certain visual depictions. Specifically, the school or library seeking funds must certify that it has filtering software in place that will block access for minors to visual depictions that are obscene, child pornography or harmful to minors and for adults to visual depictions that are obscene or child pornography.

The CIPA statute was upheld because the justices concluded – based on the statements of the Solicitor General at oral argument – that filtering for adults would be disabled by request and without the need for adults to justify their request for access to particular sites. For example, in writing for the majority, Chief Justice Rehnquist explained:

> 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. As the District Court found, libraries have the capacity to permanently unblock any erroneously blocked site, *id.*, at 429, and the Solicitor General stated at oral argument that a "library may ... eliminate the filtering with respect to specific sites ... at the request of a patron." Tr. of Oral Arg. 4. With respect to adults, CIPA also expressly authorizes library officials to "disable" a filter altogether "to enable access for bona fide research or other lawful purposes." 20 U. S. C. §9134(f)(3) (disabling permitted for both adults and minors); 47 U. S. C. §254(h)(6)(D) (disabling permitted for adults). The Solicitor General confirmed that a "librarian can, in response to a request from a patron, unblock the filtering mechanism altogether," Tr. of Oral Arg. 11, and further explained that a patron would not "have to explain ... why he was asking a site to be unblocked or the filtering to be disabled," *id.*, at 4.

United States v. American Library Association, 539 U.S. at 209. Justice Kennedy agreed, stating in his concurrence that

> If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case. . . . 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, not the facial challenge made in this case.

Id. at 214. Justice Breyer concurred in upholding CIPA on the same basis:

> the Act allows libraries to permit any adult patron access to an "overblocked" Web site; the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, "Please disable the entire filter."

Id. at 219. Justices Stevens, Souter and Ginsburg dissented on the ground that any filtering requirement in the public library context is unconstitutional. In sum, the United States Supreme Court's decision upholding CIPA relied plainly on the assurance of the Solicitor General that adults' use of the Internet in the library would be unfettered by any need to justify their requests.

Subsequently, several cases have challenged the application of particular Internet filtering schemes in particular libraries. Recent federal court cases have addressed the issue of whether a particular library filtering system is constitutional. For example, in November, 2006 the ACLU of Washington filed suit against the North Central Regional Library District (NCRL). The suit alleged that the library violated the First Amendment by refusing to disable Internet filters at the request of adult patrons. After six years of litigation, the federal district court held on April 10, 2012 that the library filtering policy does not violate the federal constitution, based at least in part on the fact that the branch libraries are "relatively small in size and only one has a partition separating the children's portion of the library from the remainder of the library." This court decision, however, has little impact beyond that particular library. The decision was

by one district judge reviewing one particular set of facts in one library system. The decision is unpublished and thus has limited, if any, precedential value. Moreover, the decision was based specifically on the fact that the library was "relatively small in size." What does this mean for other libraries that are considering filtering? The fact that the district court in one case upheld an internet filtering system does not mean that other libraries can be assured of a similar result.

In a recent case involving a school library, the district court reached a different conclusion, holding that the school district in Camdenton, Missouri was acting in an unconstitutional manner when it used a filtering system that blocked websites supporting or advocating on behalf of lesbian, gay, bisexual, and transgender ("LGBT") people but permitted access to websites that condemn homosexuality or oppose legal protections for LGBT people. The district court held that the library's use of an "anonymous" system for requesting that sites be unblocked was stigmatizing and ineffective if students did not know what had been blocked. After the court's finding of unconstitutionality, the library district agreed to stop blocking LGBT websites, submit to monitoring for 18 months and pay $125,000 in attorneys' fees.

Another challenge to Internet filtering policies is pending in Salem, Missouri. On January 3, 2012, the ACLU filed suit on behalf of an individual against the Salem Public Library and its director alleging the public library filtering system unconstitutionally blocks access to websites that discuss minority religions by classifying those sites as "occult" or "criminal." The complaint alleges that the library's Netsweeper filter blocks access to sites such as the official home page of the Wiccan church, astrology sites and sites that discuss the practice of Wicca. The complaint also alleges that the library does allow access to sites that discuss Wicca and other pagan beliefs from a Christian viewpoint. The complaint

alleges that the library director refused specific requests to unblock specific sites. In April 2012, the district court dismissed the lawsuit against the city of Salem on the ground that the city has no control over the policies and practices of the library. The lawsuit against the library board and director is pending. The parties have started the discovery process. Trial is set to begin in June 2013.

Libraries should consult legal counsel if they are considering the use of internet filters and exercise caution in implementing a filtering policy. CIPA only requires filters that block access to visual images of obscenity, child pornography and, for minors, material deemed harmful to minors. If libraries use filters that block constitutionally protected material and do not allow adults to disable filters or block constitutionally protected material for minors without an effective unblocking system, they may open the door to years of litigation and significant expenditures of legal fees.

ALA American Library Association

Legal issues: CIPA & Filtering

(An excerpt from ALA's Libraries and Internet Toolkit 2012; available online at http://www.ala.org/advocacy/intfreedom/iftoolkits/litoolkit/legalissues_CIPA_filtering)

CHILDREN'S INTERNET PROTECTION ACT

Congress added the Children's Internet Protection Act (CIPA) and the Neighborhood Children's Internet Protection Act (NCIPA) to a major spending bill (H.R. 4577) on December 15, 2000. President Clinton signed the bill into law on December 21, 2000 (Public Law 106-554). The acts place restrictions on the use of funding for Internet access that is available through the Library Services and Technology Act, Title III of the Elementary and Secondary Education Act, and on the Universal Service discount program known as the E-rate. These restrictions take the form of requirements for Internet safety policies and technology that blocks or filters certain content from being accessed through the Internet (Jaeger et al. 2005, 105-6).

The requirements of the Children's Internet Protection Act do not apply to libraries that do not receive funding for Internet access through LSTA, ESEA, or the E-rate discount program. No library is required to seek or accept such funding.

COMPLIANCE

To comply with CIPA to receive designated federal funding or E-rate discounts for Internet access, a library or school must institute three measures:

1. Install a technology protection measure
2. Adopt an Internet safety policy
3. Provide public notice and hold a public hearing

More specifically, CIPA requires schools and libraries applying for certain funds for Internet access (e-rate discounts or LSTA grants) to certify that the library has adopted an Internet safety policy that includes use of a "technology protection measure," i.e., filtering or blocking software, that prevents access to visual images that are obscene or child pornography. The filtering software must block minors' access to visual images that are obscene, child pornography or harmful to minors, as defined by law; and block adults' access to visual images that are obscene or child pornography. Before adopting the Internet safety policy, schools and libraries must provide reasonable notice and hold at least one public hearing or meeting to address the proposed policy.

The law requires that the filtering software must be placed on all computers, including those computers used by staff and any Internet-capable devices owned by the school or library. An administrator, supervisor, or other person authorized by the school or library may disable the filtering software during use by an adult, to enable access for bona fide research or for another lawful purpose. A school or library may unblock appropriate sites that are wrongfully blocked by the filtering software for users of all ages.

Beginning in July 2012, schools subject to CIPA's requirements must certify that their Internet safety policy provides for the education of minors about appropriate online behavior; such programs should include cyberbullying awareness and response, and interacting with other individuals on social networking websites and in chat rooms.

LEGAL CHALLENGE

In 2001, the American Library Association and other groups joined with library users to file a lawsuit challenging the constitutionality of the Children's Internet Protection Act. The lawsuit asserted that the law's filtering requirements violated the First Amendment rights of public librarians and public library users (the suit did not address schools, as none of the plaintiffs had standing to challenge CIPA on behalf of local school boards.) Initially, a three-judge panel of the Eastern District of Pennsylvania unanimously held that CIPA required librarians to violate library users' First Amendment rights. The government appealed that decision, and on June 23, 2003, a sharply divided Supreme Court issued a plurality decision upholding the law. (A plurality decision is issued when no majority of justices back a particular legal opinion but when a majority of justices do agree on the ultimate outcome of the case.)

The Supreme Court ruled that the First Amendment does not prohibit Congress from forcing public libraries—as a condition of receiving federal funding—to use software filters to control what patrons and staff access online via library computers, as long as adults could request that the filters be disabled without needing to explain their request.

Only four justices signed onto Chief Justice Rehnquist's opinion that public libraries have broad discretion to choose what they bring into their libraries, and that any First Amendment issues with overblocking were cured by CIPA's disabling provisions. The justices' reliance on the disabling provisions as a cure for any violation of the First Amendment was based on the U.S. Solicitor General's position that librarians could unblock filters for adults without any explanation or need to ascertain that the request was bona fide.

Justice Kennedy concurred with the finding that the law was not facially invalid, specifically basing his vote for reversal on the U.S. Solicitor General's position that libraries would disable filters for adults seeking Internet access. Justice Kennedy noted, however, if the rights of adults to view material on the Internet was unduly burdened by CIPA's filtering requirements, it could give rise to a claim in the future that CIPA was unconstitutional as applied to those users. Justice Breyer also concurred, noting that his vote to uphold the law rested on the ease of disabling/unblocking filters for adults.

LIABILITY AND FILTERING

Library users are suing both public and school libraries for failing to disable filters or for improperly blocking Constitutionally-protected speech. The plaintiff in *Hunter v. City of Salem*, a lawsuit currently scheduled for trial in June, 2013, alleges that the local public library and its board of trustees have unconstitutionally blocked access to websites discussing minority religions by using filtering software that improperly classifies the sites as "occult" or "criminal."

A school board was sued by a student and a number of organizations for improperly blocking students' access to protected speech addressing gay and lesbian issues. The plaintiffs in

PFLAG, Inc. v. Camdenton R-III School District argued that the filtering software used by the school district unconstitutionally blocked access to web content that was geared toward the lesbian, gay, bisexual and transgender (LGBT) communities that promoted gay rights and affirmed gay identity that was not sexually explicit in any way, while allowing access to anti-LGBT sites that advocated against gay rights and promoted "ex-gay" ministries. The school district argued that it had an obligation to protect students from inappropriate material and had broad discretion to choose which materials students may access in the school library.

The court ordered the school district to cease using the filtering software, ruling that the school district's use of the discriminatory "sexuality" filter resulted in unconstitutional viewpoint discrimination that violated the students' First Amendment rights. The school district agreed to a consent decree that required it to stop blocking LGBT websites, submit to monitoring for 18 months and pay $125,000 in attorneys' fees.

In Bradburn, et al. v. North Central Regional Library District, several library users sued their local library district for failing to disable filters at their request. Among the sites the users were prevented from using were sites about youth tobacco usage; art galleries and health issues; a MySpace blog; information on firearms use by hunters, and The Second Amendment Foundation's magazine, "Women & Guns."

While the lawsuit was pending, the library changed its filtering software and amended its filtering policy. Six years after the initial filing of the lawsuit, the federal district court ruled in an unpublished decision that the library's filtering policy did not violate the constitution, in part because the branch libraries are "relatively small in size and only one has a partition separating the children's portion of the library from the remainder of the library." As an unpublished decision reviewing one particular set of facts in one library system, the decision has limited precedential value.

In summation, libraries considering the use of filtering software should consult their legal counsel prior to any such deployment. Libraries that employ filters that block constitutionally protected material deemed harmful to minors and do not allow adults to disable filters, or fail to provide an effective unblocking system, may open the door to years of litigation and significant legal expenses.

LIABILITY AND YOUNG PEOPLES' ACCESS TO THE INTERNET

The sole court decision to address this issue has ruled that libraries are not responsible for the content that users access through the library's computers connected to the Internet.

In *Kathleen R. v. City of Livermore*, the plaintiff sued the City of Livermore for failing to block Internet content after her son downloaded images at a Livermore Public Library that she found inappropriate. The California Court of Appeals held that the library was not legally liable for the actions of patrons using computers they provided, based in part on a provision in the federal Communications Decency Act, 47 U.S.C. § 230, that immunizes Internet service providers against state law liability for third parties' postings. The Court also rejected the plaintiff's allegation that the library exhibited obscene and materials harmful to minors by allowing computer use, based on the library's written Internet Use Policy that prohibited the use of computer resources for illegal purposes.

DEFINING OBSCENITY, CHILD PORNOGRAPHY, AND "HARMFUL TO MINORS"

The Supreme Court's decision in *Miller v. California* defines obscenity as materials that "depict or describe patently offensive hardcore sexual conduct," which "lacks serious literary, artistic, political, or scientific value." To determine if a particular work is obscene, a judge or jury must apply a three-part test, popularly called the *Miller* test, to the work in question. The questions the judge or jury must ask include:

- Whether the average person, applying "contemporary community standards," would find the work, as a whole, appeals to the prurient interest;
- Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and
- Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The stringent standard established by the *Miller* test extends First Amendment protection to most sexually explicit expression. Materials many consider "pornographic" or "indecent" do not meet the standard for obscene material and are thus fully protected by the First Amendment. For example, in *Jenkins v. Georgia*, the Supreme Court emphasized that "nudity alone is not enough to make material legally obscene under the *Miller* standards."

Child pornography is the second category of sexually explicit material that may be banned or regulated by the state. In *New York v. Ferber*, the Supreme Court held that "works that visually depict sexual conduct by children below a specified age" are not protected by the First Amendment and need not meet the *Miller* test for obscenity in order to be banned, as the harm targeted by child pornography is the sexual abuse of the children used to create the images.

In contrast to obscenity and child pornography, so-called "indecent speech" or "pornography" is fully protected by the First Amendment. In *Sable Communications of California, Inc. v. FCC*, the Supreme Court stated that "sexual expression which is indecent but not obscene is protected by the First Amendment." Over the years the Supreme Court has struck down laws barring or regulating indecent speech made available through cable television, "dial-a-porn" phone services, and the Internet.

In *Ginsberg v. New York*, the Supreme Court ruled that federal and state legislators may regulate or restrict minors' access to Constitutionally-protected sexually explicit speech. As a result, Congress and state legislatures have passed laws restricting or regulating the dissemination of sexually explicit materials to minors (those under the age of 17.) Under the standards set by *Ginsberg*, such laws, called "harmful to minors" or "obscene-as-to-minors," must include the same safeguards for protected speech provided by the *Miller* test, only tailored to minors. Thus, such laws must protect minors' access to sexually themed speech that has serious literary, artistic, scientific, or political value for minors and may not restrict adults' rights to access non-obscene speech.

Sexually explicit speech is often colloquially called "pornography." The word "pornography" has no meaning in the law, and there is no agreed-upon definition for the term. When library policies and procedures address illegal speech or sexually explicit content, they should employ the more precise terminology established by the Supreme Court , such as

"obscenity," or "child pornography," to describe and discuss the categories of content that may be restricted by the library.

CIPA: MYTHS AND FACTS

"Ensuring student safety on the Internet is a critical concern, but many filters designed to protect students also block access to legitimate learning content and such tools as blogs, wikis, and social networks that have the potential to support student learning and engagement. More flexible, intelligent filtering systems can give teachers (to whom CIPA restrictions do not apply) access to educationally valuable content."

-- "Balancing Connectivity and Student Safety on the Internet,"
The National Education Technology Plan 2010
Department of Education

There is much confusion over CIPA's requirements in schools and libraries alike. A number of myths have arisen over the years about web filtering and what CIPA requires of schools and libraries. Both the Federal Communications Commission (FCC) and the Department of Education have issued guidance to address this confusion. Some points to remember:

- CIPA's filtering requirements do not apply to schools and libraries that do not accept federal funds or E-rate discounts for Internet access.
- Schools and libraries do not risk their funding by unblocking content that has been inappropriately blocked by the filtering software or by disabling the filter for adults in accordance with the law.
- CIPA does not require schools or libraries to block access to YouTube, Facebook, or other online social media.
- The Supreme Court's decision upholding CIPA does not state that mandatory filtering for all users is consistent with the First Amendment.
- CIPA does not require schools or libraries to track their users' web-surfing habits; in schools, "monitoring" only requires supervision, not the use of software or other technological measures to record students' Internet use.
- While filtering software must be installed on staff and teacher computers, it is not a violation of CIPA to give staff, teachers, and other adults the ability to override the filter for research and other legitimate uses.

STATE LAWS

Many states have also enacted laws that address issues of Internet access, filtering and intellectual freedom in libraries. Please consult your state's legal code for any relevant laws pertaining to library Internet access and policies, including those mandating use of Internet filters. Many of these laws apply differently to public libraries than to school libraries.

The National Council of State Legislatures' Web site (http://www.ncsl.org) will help you check on your state laws.

RESOURCES

Bargesian, Tina. "Straight from the DOE: Dispelling Myths about Blocked Sites," *Mind/Shift,* posted April 26, 2011.
http://mindshift.kqed.org/2011/04/straight-from-the-doe-facts-about-blocking-sites-in-schools/

Chmara, Theresa. "Library Internet Filtering Update," Freedom to Read Foundation, posted July, 2012.
http://www.ftrf.org/resource/resmgr/docs/libraryfilteringupdate_july_.pdf

Chmara, Theresa. "Why Recent Court Decisions Don't Change the Rules on Filtering," *American Libraries* (July/August 2012), 17.

Heins, Marjorie, Christina Cho, and Ariel Feldman. *Internet Filters: A Public Policy Report.* 2nd Ed. New York: Brennan Center for Justice at New York University School of Law, 2006.

Jaeger, Paul T., Charles R. McClure, and John Carlo Bertot. "CIPA: Decisions, Implementation, and Impacts." *Public Libraries* 44, no. 2 (March/April 2005): 105-9.

Jaeger, Paul T., and Yan Zheng. "One Law with Two Outcomes: Comparing the Implementation of CIPA in Public Libraries and Schools." *Information Technology and Libraries* 28, no. 1 (March 2009): 6-14.

Pinnell-Stevens, June. "Defining Obscenity, Child Pornography, and 'Indecent' Speech" and "Liability for Minors' Internet Use" in *Protecting Intellectual Freedom in Your Public Library (*Chicago, ALA Editions, 2012): 46-48.

National Council of State Legislatures
http://www.ncsl.org

FCC Report and Order 11-125, August 21, 2011
(Report and Regulations Implementing CIPA)
http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0819/FCC-11-125A1.pdf

Office of Educational Technology, Department of Education. "Balancing Connectivity and Student Safety on the Internet," The National Education Technology Plan 2010 (November 2010):56.
http://www.ed.gov/sites/default/files/netp2010.pdf

E-rate Central
http://www.e-ratecentral.com/default.asp

Universal Service Administrative Company CIPA Compliance
http://www.universalservice.org/sl/applicants/step10/cipa.aspx

Children's Internet Protection Act (CIPA) Legal FAQ
http://www.ala.org/advocacy/advleg/federallegislation/cipa/cipalegalfaq