

# MEMORANDUM

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Freedom to Read Foundation

**FROM:** Theresa Chmara  
General Counsel

**DATE:** July, 2012

**SUBJECT:** **Library Internet Filtering Update**

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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 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.