



Memorandum

TO: Rules and Open Government
Committee

FROM: Rick Doyle
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SUBJECT: Preliminary Legal Issues –
Internet Filters at City Libraries

DATE: November 8, 2007

Background

At the Rules and Open Government Committee on October 24, 2007, this Office was directed to provide information pertaining to legal issue with the proposal to implement internet filters at the Library. The policy proposed by Councilmember Constant would place internet filters on library computers in order to limit or avoid the display of obscene or pornographic images on computer screens.

The purpose of this memorandum is to discuss some of the broad parameters of the legal issues involved in internet usage at public libraries, to facilitate the Council policy discussion. Depending on the policy direction of the Council, further legal analysis may be necessary.

Executive Summary

The U.S. Supreme Court has addressed the matter of use of internet filters in libraries and has held that as a general proposition, internet filters at libraries are not facially invalid. In a divided plurality opinion, the Court upheld the "Children's Internet Protection Act" or CIPA against a facial First Amendment challenge to the constitutional validity of the Act. The three Justices who participated in the plurality opinion, and the three Justices who issued separate concurring opinions, relied upon the availability and relative ease of unblocking or disabling the filters for adult users as a means of protecting constitutional speech and thus to justify the use of filters. The Court has not addressed the constitutionality of specific internet filter policies in an "as applied" challenge, so aspects of specific policies might be subject to further challenge.

The Joint Operating Agreement with San Jose State University contains provisions pertaining to Intellectual Freedom that would not allow the City to unilaterally implement internet filters that would affect University staff and students. Cooperation and consultation with San Jose State University is necessary to implement any internet filter policy at Martin Luther King Jr. Library.

The City has policies in effect that address allegations of hostile work environment or sexual harassment. In order to support a claim of sexual harassment based on a “hostile work environment,” the exposure of sexually explicit images in the workplace must be severe or pervasive. The totality of the circumstances must be evaluated on a case-by-case basis; typically, a few isolated instances of exposure to sexually explicit images would not create an illegal “hostile work environment.” Whether the “severe or pervasive” burden will be met will depend on the facts, but the duties of library staff in dealing with library customers, the extent of the City’s control over library customers and any First Amendment responsibilities will be also be matters to be considered.

Discussion

1. First Amendment Concerns

The subject of placing internet filters at libraries has undergone legal challenge on constitutional grounds. Most recently, the United States Supreme Court ruled on the facial validity under the U.S. Constitution of a federal law, the “Children’s Internet Protection Act” (CIPA). CIPA required public libraries to use internet filters as a condition for receipt of federal subsidies, and was challenged on First Amendment grounds in *U.S. v. American Library Association, Inc.*, (2003) 539 U.S. 194.

The use of internet filters in public libraries was upheld, but in the plurality opinion, the Justices that agreed in the result issued three different legal analyses in three separate opinions as to the basis for upholding the use of filters. The common thread in each of the three concurring opinions is that while use of Internet filters at libraries were constitutional, a critical part of the legal analysis was that the filters could be disabled in whole or in part for adult users.

a. The Children’s Internet Protection Act

The Children’s Internet Protection Act provides that a library may not receive two forms of federal assistance (discounted rates under the “E-rate program and grants under the Library Services and Technology Act (LSTA) unless it has “a policy of Internet Safety for minors that includes the operation of a technology protection measure ... that protects against access” by all persons to “visual depictions” that constitute “obscenity” or “child pornography,” and that protects against access by minors to “visual depictions” that are “harmful to minors.”¹ A technology protection measure means a specific technology that blocks or filters internet access to material covered by the Act.

CIPA permits a library to “disable” the filter “to enable access for bona fide research or other lawful purposes.”² Under the E-rate program, disabling is permitted “during use by an adult.”³ Under the LSTA program, disabling is permitted during use by any person.⁴

¹ 20 U.S.C. §§ 9134(f)(1)(A)(i) and (B)(i); 47 U.S.C. 254(h)(6)(B)(i) and (C)(i).

² 20 U.S.C. § 9134(f)(3); 47 U.S.C. § 254(h)(6)(D).

³ 47 U.S.C. § 254(h)(6)(D).

⁴ 20 U.S.C. § 9134(f)(3).

CIPA was challenged by the American Library Association and the Multnomah County Public Library of Portland, Oregon, as unconstitutional on its face, and these entities sought to enjoin the US and government agencies from withholding federal funds based upon CIPA.⁵

The basis of this challenge was fundamentally that filters are not technologically exact as they do not filter visual images, but function on the basis of words on the web pages, or by determinations made by the software provider as to what websites should be blocked, and thus exclude material that is not legally obscene nor child pornography.

The District Court below found that the Act violated the First Amendment, noting that by providing its patrons with internet access and the broad range of information on the Internet, essentially created a public forum, subject to strict scrutiny by the Courts, meaning that the government can only impose a content-based restriction if it shows a compelling government interest and that there are no less restrictive alternatives. The District Court, in a long opinion, determined that the U.S. failed to meet this legal test.

b. Analysis of the Supreme Court Decision.

In a plurality opinion, the Supreme Court reversed the District Court and allowed CIPA to stand.

Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas issued an opinion holding that libraries were not traditional public fora, and that in fact libraries had broad discretion to make decisions about what to make available in their collections and have traditionally excluded pornographic material.⁶ This opinion also concluded that Congress had authority to broadly define the conditions on which it would appropriate funds for a particular program.⁷

The plurality opinion also specifically noted that to the extent that erroneous "overblocking" occurred and thus denied access to constitutionally protected speech, constitutional difficulties were overcome by the ability of a patron to "only ask a librarian to unblock it or (at least in the case of adults) disable the filter."⁸ A library could also disable a filter altogether to enable bona fide research or other lawful purposes. This opinion further indicated that in the view of the plurality opinion, filters were less intrusive than close monitoring of computer users, which "would risk transforming the role of a librarian from a professional to whom patrons turn for assistance into a compliance officer whom many patrons might prefer to avoid."⁹

⁵ *American Library Association, Inc. v. United States*, 201 F. Supp. 2d 401 (E.D. Penn. 2002)

⁶ 539 U.S. 194 at p. 205.

⁷ 539 U.S. 194 at pp. 208 – 209.

⁸ 539 U.S. 194 at p. 209.

⁹ 539 U.S. 194 at p. 207 fn. 3.

Justice Kennedy, in a separate opinion, concurred in the result but on the basis that if “upon the request of an adult user,” filtered material would be unblocked without significant delay, CIPA on its face was not unconstitutional.¹⁰

Justice Breyer, in a separate opinion, also concurred in the result but on a different rationale that relied, as well, on the fact that the “Act allows libraries to permit any adult patron access to an “overblocked Web site” by simply asking for the site to be unblocked temporarily or to request that the filter be disabled.”¹¹

c. General Principles for Use of Filters

This decision upheld a First Amendment challenge to use of filters at libraries. The decision upheld the validity of CIPA against a challenge that on its face, the statute was unconstitutional, but this type of challenge does not involve how the statute is applied in particular situations. Thus, the Court left for future determinations whether particular methods of implementing filters may have constitutional defects, without providing much guidance as to such methods. At least six of the justices relied upon statements by the Solicitor General that the filters could be readily unblocked as to specific sites, or as to adults, totally disabled. However, the “how, what and when” of unblocking or disabling filters, and whether a particular policy for unblocking or disabling would meet constitutional or statutory requirements, has not been determined.

The plurality opinion does indicate, though, that the Court may well be concerned with placing librarians in the role of “compliance officers” as four of the Justices viewed the use of filtering software as a less intrusive alternative. For these reasons, a filtering policy which is relatively quick, and does not place librarians in the position of making determinations as to whether a particular site can be viewed, is likely to be deemed less intrusive of the individual’s rights and present fewer risks of challenge.

It should also be noted that, for purposes of determining what images are appropriately banned under CIPA, the statute relies upon definitions of “child pornography”, “obscenity” and “harmful to minors” that meet federal constitutional standards as to the type of speech that is not protected by the First Amendment. Both federal and California law have provisions banning child pornography with particular definitions of each.¹² Similarly, both federal and California statutes define what is deemed “harmful to minors; the federal law is CIPA and state law is a criminal statute.”¹³

Federal statutes prohibit the transmission of obscene matter as defined by state law but have no federal definition of obscenity, as the Supreme Court has set forth a legal test that relies on state law to specifically define what is deemed obscene. Thus each state’s law may vary to some extent.

¹⁰ 439 U.S. 194 at p. 214.

¹¹ 439 U.S. 194 at p. 219.

¹² Federal child pornography statute: 18 U.S.C. 2256; California child pornography statute: Penal Code §§ 311.2 – 311.11 and 311.11; definition in § 311.3(b).

¹³ 20 U.S.C. § 254(h)(5)(B) and § 9134(1)(A); California Penal Code § 313

Additionally, the US Supreme Courts has held that governmental entities may adopt more stringent controls on communicative materials available to youths than on those available to adults.¹⁴ One California Court of Appeals has held that “(d)issemination of sexually motivating matter which is not classifiable as obscene also may be regulated, provided that the regulation addresses only the time, place and manner of speech and is necessary to further a significant governmental interest.”¹⁵ This latter decision held that an ordinance that restricted access to adult magazines by requiring them to be sealed or removed from reach denied access to adults as well as children, was not constitutional. Thus, denying access to the internet for material that is not considered obscene for an adult under state law, but is considered harmful to minors, might present legal difficulties in terms of structuring an internet filter policy.

In establishing a policy pertaining to filters, in selecting any such filters, and in implementing a policy on a day-to-day basis, understanding these definitions is important in order to be able to distinguish between protected and non-protected expression. Additional legal research would be necessary in order to develop an access policy that addresses constitutional concerns.

2. Joint Operating Agreement – Martin Luther King Jr. Library

On December 12, 1998, the City and the Trustees of the California State University, on behalf of San Jose State University, entered into the “Agreement for Ownership and Operation of Joint Library Building” that resulted in the construction and joint operation of Martin Luther King Jr. Library.

The Operating Agreement with San José State University contains a section 5.4 entitled “Intellectual Freedom” which reads as follows:

5.4.1 **Policy.** It is the intent of the University and the City to continue to honor the current policy of both the University and City to provide for unrestricted access to all Library Material within the Library Collections and services within the Joint Library for all Members of the General Public and the University Users.

5.4.2 **Change in Policy.** In the event that City ordinances are passed or rules, policies or regulations are imposed by the City that restrict access for certain groups of users to Library Material within the City Library Collection or restrict use for certain groups of users of City sponsored services or programs, the City hereby agrees that it shall not restrict access to any Library Material within the University Library Collection or restrict use of any University services or programs. It is the intent of the City not to restrict University Users access to Library Collections. In addition, the University shall not be required to enforce,

¹⁴ *Erznoznik v. City of Jacksonville* (1975) 422 U.S. 205

¹⁵ *American Booksellers Association v. Superior Court of Los Angeles County and City of Paramount* (1982) 129 Ca. App. 3d 197

through its employees, any such ordinances, rules, regulations or policies imposed by the City. (Emphasis added.)

5.4.3 Federal or State Laws. In the event that federal and/or state laws are passed that restrict access for certain groups of users to Library Materials within the City Library Collection, but not Library Material within the University Library Collection, it is the intent of the Parties not to subject the University and the University Library Collection to such federal and/or state laws.

This provision in the Operating Agreement was not expressly mentioned in the staff memorandum that went to Council when the Agreement was approved. However, on September 18, 1997, the City Council had reaffirmed the 1971 policy of unrestricted access to all library materials and services. The express concern brought before the Council at the time was pornography on the internet. When the 1998 Agreement was presented to the Council for approval, City policy was well established.

Given this provision, a policy of internet filters at the joint library has inherent conflicts and practical complexities. Currently, the computers at the King Library are jointly owned and operated, and are equally available to SJSU Users and to the general public. In addition, the two staffs jointly serve SJSU Users and members of the general public.

Thus, it may well be that the University would not agree to filtered internet service for its Users. Given the provision above, it is not clear whether the City could block access to the "University collection" by any other parties, even if they were not University students or faculty.

We do not know whether software is available that would distinguish between University Users and general public users for purposes of internet access. As a legal matter, it is not clear whether such difference in access would present legal issues as to the use of Martin Luther King Jr. Library. It would not appear that the University is legally obligated to require its employees to participate in the implementation of an internet filter policy.

Given the provisions of this Agreement, minimally a change in City policy requires consultation with and cooperation with SJSU in the Joint Library.

3. "Hostile Work Environment" Issues

As provided below, the City's Discrimination and Harassment Policy and current law prohibit sexual harassment against City employees by third-parties. Sexual harassment cases based on a "hostile work environment" theory, however, are fact specific and, typically, a few isolated instances of exposure to sexually explicit images would not create an illegal "hostile work environment." We were unable to find any published case on point, it is at least theoretically possible that under certain specific facts, there may be liability for third-party sexual harassment if a library patron were to repeatedly display

obscene material or pornography over the internet to library staff,, the City is aware of should have been aware of the activity, and no remedial actions were taken.

This analysis is complicated by the fact that some sexually suggestive images may not necessarily be considered obscene or harmful to minors. There may be a right, even under the U.S. Supreme Court's holdings, for material which is offensive to some individuals but not illegal to be viewed over the internet. If a staff member objects to this material, the issue becomes whether that individual's work can be altered in a manner that removes or reduces exposure to the material.

A. The City's Discrimination and Harassment Policy

The City's Discrimination and Harassment Policy provides that it is the policy of the City to promote and maintain a work environment free of illegal harassment in employment. Under the Policy, "harassment" is defined by the existence of the following: (1) conduct that is based on a protected category/status¹⁶; (2) conduct that is unwelcome; and (3) workplace harm that creates a hostile work environment or results in a tangible employment action. Examples of actions that may lead to a "hostile work environment" claim and which are prohibited under the Policy include, but are not limited to, sexually suggestive pictures, cartoons, and videos on computer systems in the workplace.

The City's Policy also protects employees against sexual harassment by third-parties conducting business with the City. Employees are strongly encouraged to immediately report any and all complaints and concerns of harassment to a supervisor, Department Director, or the Office of Employee Relations. Allegations of harassment will be promptly and objectively investigated by the Office of Employee Relations. The investigation and findings will be based upon the totality of circumstances and each situation will be evaluated on a case-by-case basis. Upon a determination of a violation of the Policy, immediate corrective action is taken to resolve the situation.

B. "Hostile environment harassment" under California and federal laws

Title VII of the Civil Rights Act and California's Fair Employment and Housing Act ("FEHA") prohibit sexual harassment in the workplace. Indeed, FEHA requires that employers take all reasonable steps to prevent harassment from occurring. Cal. Govt. Code §12940(k). A "hostile work environment" sexual harassment claim under Title VII or FEHA must have the following elements: (1) the employee was subjected to unwelcome sexual advances, conduct or comments; (2) the harassment complained of was based on sex; and (3) the harassment was "so severe or pervasive" as to "alter the conditions of the victim's employment and create an abusive working environment."¹⁷

¹⁶ The following are identified as protected categories: race, color, religion, national origin, ancestry, age (40 and over), sex (gender, pregnancy, childbirth or related medical condition), sexual orientation, marital status, disability (physical and mental, including HIV and AIDS), medical condition (cancer/genetic characteristics), and actual or perceived gender identity).

¹⁷ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Fisher v. San Pedro Peninsula Hospital*, 214 Cal. App.3d. 590 (1989).

The level of severity or pervasiveness necessary to create a “hostile environment” is a question of fact that will be determined by looking at the “totality of circumstances,” including, frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or merely offensive, and whether it unreasonably interferes with the employee’s work performance. *Harris v. Forklift Systems*, 510 U.S. 17 (1993). Further, whether the conduct is actionable as “hostile environment” sexual harassment requires both an objectively hostile or abusive environment and the victim’s subjective perception¹⁸ that the environment is abusive. *Id.* Accordingly, it may be difficult to show that harassment based on exposure to sexually explicit images is sufficiently severe or pervasive to support a claim, or that the exposure to such images created an objectively hostile or abusive environment.

Additionally, an employer may be responsible for the acts of nonemployees with respect to sexual harassment of employees in the workplace, “where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.”¹⁹ The Government Code provides “In cases involving the acts of nonemployees, the extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees shall be considered.”²⁰ Thus, the issue of whether First Amendment responsibilities constrain the City’s ability to take certain remedial action will be considered by a court.

Conclusion

It is possible to have a constitutional policy pertaining to internet filters. How that policy is implemented is important, however, as the Supreme Court has not been presented with a challenge to a specific internet access policy at a library and it is possible for additional “as applied” legal challenges to be made.

The restrictions under the Martin Luther King Jr. Library Joint Operating Agreement pose legal and technical issues pertaining to implementing a City policy that would also affect University Users, absent SJSU express consent. A policy regarding internet filters at Branch libraries would not have the contractual issues that apply to the Martin Luther King Jr. Library.

In order to support a claim of sexual harassment based on a “hostile work environment,” the exposure of sexually explicit images in the workplace must be severe or pervasive.

¹⁸ The Ninth Circuit has adopted a “reasonable victim” standard that takes into account the victim’s gender, i.e., a hostile environment may exist where a woman plaintiff alleges conduct that a “reasonable woman” would consider sufficiently severe or pervasive to alter the conditions of employment. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). The “reasonable victim’s” standard is used in case brought under California’s Fair Employment and Housing Act. *Fisher v. San Pedro Peninsula Hospital*, 214 Cal.App.3d 590 (1989).

¹⁹ Cal. Govt. Code §12940(j); see also *Folkerson v. Circus Circus Enterprises, Inc.* 107 F.3d 754 (9th Cir. 1997).

²⁰ Cal. Govt. Code §12940(j).

Whether the “severe or pervasive” burden will be met will depend on the facts, but the duties of librarians in dealing with library customers, the extent of the City’s control over library customers and any First Amendment responsibilities will be also be matters to be considered.

If Council proceeds with developing a policy with regard to internet filters at libraries, additional legal research and analysis will need to be made with regard to the specifics of any particular proposed policy.

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