6864 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

April 25, 2000

The Honorable Michael L. Fair
Senator, District No. 6
501 Gressette Building
Columbia, South Carolina 29202

Dear Senator Fair:

You have asked for an opinion concerning the constitutionality of Internet filters. You state the following:

> [t]he Greenville County Library has been trying to develop a policy that would protect children from exposure to pornography while not violating anyone's First Amendment rights.
>
> I have suggested that the library put filters on their computers that screen pornography. These filters can be purchased and have been proven to be effective in screening pornography. Those who oppose filters use the First Amendment as leverage for their positions that libraries should not place filters on their computers.
>
> The questions are: 1. Do public libraries have an obligation to provide computers? 2. Do public libraries have an obligation to provide Internet service? 3. Do public libraries have the right to use filters for any purpose including but not limited to filters to remove pornography?

Request

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Law / Analysis

To our knowledge, only one case to date has addressed the constitutionality under the First Amendment of Internet filters. In Mainstream Loudoun v. Board of Trustees, 2 F.Supp.2d 783 (E.D. Va. 1998), an association of adult patrons sued the Board of Directors of the Loudoun County Public Library following the Library's installation of site-blocking software on all its computers, pursuant to its newly adopted "Policy on Internet Sexual Harassment." The policy required the filtering of all "child pornography and obscene material (hard core pornography)" and "material deemed Harmful to Juveniles under applicable Virginia statutes and legal precedents (soft core pornography)." Id. at 787. The Library Board purchased a software program known as "X-Stop," which used predetermined criteria for choosing which sites were blocked. The Library also implemented an unblocking policy in which patrons, after denied access to a site, would submit written requests which included their name, telephone number, and a detailed explanation of why they wanted access to the site. Id. at 797.

The plaintiffs alleged that this policy blocked "access to protected speech, such as the Quaker Home Page, the Zero Population Growth website, and the site for the American Association of University Women-Maryland." Id. at 787. Plaintiffs also claimed that the blocking decisions were based upon no clear criteria and that the unblocking procedure "chills plaintiffs' receipt of constitutionally protected materials." Id.

The Court rejected the Library's argument that restricting access to selected materials is merely a decision not to acquire materials rather than one to remove materials. The Court stated as follows:

> [b]y purchasing Internet access, each Loudoun library has made all Internet publications instantly accessible to its patrons. Unlike an interlibrary loan or outright book purchase, no appreciable expenditure of time or resources is required to make a particular Internet publication available to a library patron. In contrast, a library must actually expend resources to restrict Internet access to a publication that is otherwise immediately available. In effect, by purchasing one such publication, the library has purchased them all. The Internet therefore more closely resembles plaintiffs' analogy of a collection of encyclopedias from which defendants have laboriously redacted portions deemed unfit for library patrons.

Id. at 793-94. The Court further distinguished the public library from a high school library motivated by curricular justifications to restrict access to certain information. In the view of the Court, the First Amendment applies to and limits the discretion of the Library to "place content based restrictions upon access to constitutionally protected materials within its collection." Id. at 794. The Court concluded that the Library could not place content-based restrictions on Internet speech (through the use of filtering software) "absent a compelling state interest and means narrowly drawn to achieve that end." Id. at 795.

The State possessed a compelling interest, it was argued, in prohibiting the transmission of obscenity, child pornography, and material harmful to juveniles under applicable Virginia statutes. The Court noted that obscenity and child pornography find no protection in the First Amendment. However, the software restricted access to information that was neither obscene nor pornographic such as the Quaker's website. Furthermore, in the facts before the Court, the software manufacturer used its own unknown criteria for determining obscenity and pornography, criteria which did not follow any legal definition of obscenity.

While the Court found that the State possessed a compelling interest in the prevention of harmful materials being distributed to minors, it found that this interest did not "justify an unnecessarily broad suppression of speech addressed to adults." Id. at 796. In addition, the Court viewed the Library's unblocking policy as not preventing a First Amendment challenge. Librarians were given standardless discretion to allow access to restricted sites. Thus, the Court viewed the policy as having a "chilling" effect upon the adult patrons' First Amendment rights because these adults were required to petition the government to receive constitutionally protected speech - material which was harmful to minors but not legally obscene or constituting child pornography. Id. at 797.

The Court conceded that its holding did not "obligate the [library] to act as unwilling conduits of information because the Library Board need not provide access to the Internet at all." Id. at 795. Having chosen to provide the Internet, however, the Court concluded that the Library "must operate the service within the confines of the First Amendment." Id. at 796.

In a closely related case, Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library, 24 F.Supp.2d 552 (E.D. Va. 1998), the Court noted that the Library's policy "is not narrowly tailored because less restrictive means are available to further defendant's interests and ... there is no evidence that defendant has tested any of these means over time." Id. at 566 (citing Sable Communications of Calif., Inc. v. FCC, 492 U.S. 115, 109 S.Ct. 2829,

106 L.Ed.2d 93 (1989). The Court suggested, among other alternatives, that "filtering software could be installed on only some Internet terminals and minors could be limited to using those terminals. Alternately, the library could install filtering software that could be turned off when an adult is using the terminal." Id. at 567. While the Court refused to express an opinion as to whether these alternatives could pass muster under the First Amendment, because the issue was not before the Court, certainly, one could reasonably infer that the Court would have viewed those alternatives in a favorable constitutional light.

The question here is whether the two Mainstream Loudoun cases are controlling in this instance. The second Mainstream Loudoun decision (Mainstream Loudoun II) rejected defendant's argument that a public library is a non-public forum, and, thus, so long as the State's interest in Internet blocking is "reasonable and viewpoint neutral" it should be upheld as constitutionally valid. In terms of forum analysis, the Court referenced Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45-46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). In its discussion of Perry, the Mainstream Loudoun II Court said the following:

> [i]n Perry ..., the Supreme Court identified three categories of fora for the purpose of analyzing the degree of protection afforded to speech. The first category is the traditional forum, such as a sidewalk or public park. These are "places which by long tradition or by government fiat have been devoted to assembly and debate". Id. at 45, 103 S.Ct. 948. Second is the limited or designated forum, such as a school board meeting or municipal theater. This category consists of "public property which the State has opened for use by the public as a place for expressive activity". Id. The last category is the non-public forum, such as a government office building or a teacher's mailbox, which is not "by tradition or designation a forum for public communication." Id. at 46, 103 S.Ct. 948. It is undisputed that the Loudoun County libraries have not traditionally been open to the public for all forms of expressive activity and, therefore, are not traditional public fora.

24 F. Supp.2d at 561. Mainstream Loudoun II, relying upon Kreimer v. Bureau of Police, 958 F.2d 1242 (3rd Cir. 1992), found that three factors go into determining that a particular place such as a public library constitutes a limited public forum: government intent, extent of use and nature of the forum. The Court concluded that "defendant intended to designate the Loudoun County libraries as public fora for the limited purposes of the expressive

activities they provide, including the receipt and communication of information through the Internet." Id. at 563. With respect to the extent of use criterion, the Court found that "[d]efendant has opened the library to the use of the Loudoun County public at large and has significantly limited its own discretion to restrict access, thus indicating that it has created a limited public forum." Id. As to the final consideration – "whether the nature of the forum is compatible with the expressive activity at issue – "the Mainstream Loudoun Court found that "it is compatible with the expressive activity at issue here, the receipt and communication of information through the Internet." Id. Thus, the Court concluded that the Library constituted a limited public forum, that the policy discriminated against speech based upon content and thus that a compelling Internet was required to be shown by the State in order to uphold the policy. While the Court determined that "minimizing access to illegal pornography ... and avoidance of creation of a sexually hostile environment are compelling governmental interests," the Courts nevertheless, held that the Policy as written was not narrowly tailored in the least restrictive way possible.

The Mainstream Loudoun decisions are, of course, only the rulings of a District Court. The Fourth Circuit Court of Appeals has, as yet, not decided the issue of the constitutionality of Internet filters in a public library. It is, therefore, at least arguable, perhaps even likely, that the Mainstream Loudoun cases incorrectly analyzed the issue of whether a public library is a limited public forum. Legal commentators have presented an alternative view to Mainstream Loudoun in this regard.

One commentator has argued that not only is a public library a nonpublic forum, but that forum analysis is altogether inappropriate with respect to a public library. In an article, entitled "The Library Internet Filter: On The Computer Or In the Child," 11 Regent U. L. Rev. 425 (1999), Brent L. Van Norman relied upon a Second Circuit case, General Media Communications, Inc. v. Cohen, 131 F.3d 273 (2d Circuit. 1997), cert. den., 118 S.Ct. 2637 (1998), a case which classified military bookstores as nonpublic forums. Cohen concluded that "when the state reserves property for its 'specific official uses,' it remains nonpublic in character." Moreover, Cohen, found that "it is ... well established that the presence of some expressive activity in a forum does not, without more, render it a public forum." Id. at 279. Thus, it could be argued, based upon Cohen, that "the library may enforce restrictions against both communicative and non-communicative behavior providing the restrictions are reasonable and viewpoint neutral. 11 Reg. U. L. Rev. at 429.

Van Norman also argues, based upon the recent U. S. Supreme Court case, Arkansas Educational Televison Commission v. Forbes, 118 S.Ct. 1633 (1998) that forum analysis is altogether inappropriate. In Forbes, the Court refused to apply forum analysis to public

broadcasting generally. The Court reasoned that editorial discretion was critical to the operation of public broadcasting generally. The Court reasoned that editorial discretion was critical to the operation of public broadcasting. Thus, argues Van Norman

> [s]imilarly librarians must constantly use editorial discretion I selecting material for library acquisition .... In other words, if a librarian is faced with constant complaints about Internet pornography, the librarian may prefer to eliminate access to the Internet altogether.
>
> If forum analysis is inapplicable to the library setting, library restrictions need only be reasonable and viewpoint neutral, resembling a nonpublic forum.

11 Regent U. L. Rev. at 432.

In addition, Van Norman argues that government has a compelling interest to protect the safety of children and that Internet filters are the least restrictive means available that still accomplish the protective purpose. Citing Reno v. ACLU, 117 S.Ct. 2329 (1997), Van Norman urges that "it is currently impractical if not infeasible to identify the age of an Internet user and prohibit access to inappropriate material .... Therefore, if placement of a pornography on the Internet cannot be prevented, the only alternative is to block the images from receipt." Id. at 434.

Van Norman additionally argues that the removal of Internet pornography and lewd and lascivious material via an Internet filter does not violate the First Amendment because, citing Cohen and Bethel Sch. Dist. No. 403 v. Fraser, 478 U. S. 675, 685 (1986), a distinction based upon lasciviousness is viewpoint neutral. Id.

Finally, Van Norman relies upon Bd. of Ed. Island Trees Union Free School Dist. No. 26 v. Pico, 457 U. S. 853 (1982). In Pico, the U. S. Supreme Court held that schools may not remove books from a school library if the motivation is to suppress ideas, but may do so if the intent was to remove persuasive vulgarity. Pico also made it clear that its holding only related to book removal, not book acquisition. Says Van Norman, even "[a]ssuming arguendo that installing an Internet filtering system is equivalent to removing a book from the library's shelf, the removal is allowable because the motivation is based on removing material that is pervasively vulgar." Id.

Another commentator has also outlined a criticism of the Mainstream Loudoun case and articulated a number of arguments as to why Internet filters do not violate the First Amendment. In an incisive article, entitled, "Burning Cyberbooks In Public Libraries: Internet Filtering Software and the First Amendment," 52 Stan. L. Rev. 509 (2000), Commentator Jumichi P. Semitsu sets forth persuasive counter arguments to the Mainstream Loudoun analysis.

First, Semitsu points out that public libraries may be subject to liability for violating state statutes which prohibit the displaying, selling, or offering of "harmful matter" to minors. While such statutes generally exempt libraries from liability, Semitsu points out that their applicability to the Internet is not clear.

Next, Semitsu notes that one "could counter, however, that in choosing a filtering criterion, a library is choosing which types of 'books' to make publicly available." 52 Stan. L. Rev. at 526. In other words, the argument could easily be made, according to Semitsu, that Mainstream Loudoun is incorrect in analyzing Internet filters to book removal as opposed to book acquisition. If that is the case Pico concludes that the First Amendment would not apply.

In addition, Semitsu argues that "[t]he Mainstream Loudoun courts analysis can also be challenged on the basis it erred as to what constitutes the relevant forum. The forum analysis obviously changes if the forum is the library computers, the library's catalogues, or the library's power to make acquisition decisions – as opposed to the library building where the publican assemble to read materials or meet in private meeting facilities." Id. at 534.

In Semitsu's view, Mainstream Loudoun's analysis "may be used to justify some level of filtering." The author went on to say that

> [w]hile a library may have intended to create a forum for the purposes of receiving information, it probably did not intend to create a forum for people to "speak," send information, play online games, make financial transactions or receive video feeds. Thus, even if a court were to declare the library or the computer terminal to be a limited public forum, a library could still argue that e-mail, chat rooms, news groups, gaming rooms and commercial sites do not fit the purposes of the forum. This is siginificant to pro-filtering groups since the blocking of all commercial sites would eliminate nearly all pornography: very

> few sites provide users the change to view sexual graphics without payment, advertisements or invitations or subscribe or pay for additional viewings.

Id.

Further, Semitsu referenced Reno v. ACLU, supra where the U. S. Supreme Court reiterated that the protection of children's physical and psychological well-being is a compelling state interest. As to whether the Internet filter policy is sufficiently narrowly tailored to achieve this compelling interest, Semitsu noted that such depends upon several factors. Semitsu argued that an important factor in this determination would be

> ... does the filtering policy apply to all patrons, or to children only? The Mainstream Loudoun court found that less restrictive means were available since the filtering software could have been installed on only some Internet terminals and minors could have been limited to using those terminals.

Id. at 538.

Finally, Semitsu argues that an Internet filter policy is probably not constitutionally overbroad. He notes that "... if a library Internet policy forbids the viewing or downloading of child pornography (which may constitutionally be forbidden), but also forbids the viewing or downloading of hateful speech (which the Supreme Court considered protected speech in R. A. v. City of St. Paul, 505 U.S. 377 (1992) ...., the policy is overbroad and may be struck down entirely." Id. at 539-540. However, in Semitsu's view, "[b]ecause a library filtering policy may not necessarily be 'substantially' overbroad and because most filtering software allows librarians to reduce the different types of sites blocking criteria, the over breadth docterine, by itself, may not provide patrons any relief." Id. at 540.

Therefore, based upon the foregoing analysis, it is our opinion that an Internet filter policy does not violate the First Amendment. As you suggest, public libraries have no obligation to provide computers or Internet service. Notwithstanding this fact, however, public libraries have the constitutional right to use filters to remove pornography.

Pending legislation, H. 4426 as amended, provides that "An adult patron may request unfiltered access to the Internet for serious literary, artistic, political, or scientific purpose, and the institution may temporarily disable the blocking software for such purposes." In

other words, proposed legislation provides adults with unfiltered Internet access which is not illegal.

While we do not conclude that such provision is constitutionally required in order to pass muster pursuant to the First Amendment, insertion of this requirement certainly renders proposed legislation constitutional. Notwithstanding this provision, however, in our judgment, there are numerous other reasons that an Internet filter policy for a public library is constitutional; among these are that the Internet in a public library is a nonpublic forum, thus requiring that the Internet filter policy merely be reasonable and view point neutral; that an Internet filter policy is more analogous to the acquisition of books rather than removal of books and thus is not confined by the First Amendment; that even if the Internet filter policy constitutes book removal, such removal is constitutionally valid under Pico because its goal is to remove persuasively vulgar material from the view of minors; and finally, that an Internet filter policy serves a compelling interest – the removal of harmful material from access to minors and is narrowly tailored to the accomplishment of that interest. These reasons, when coupled with the requirement that adults would have access to an unfiltered Internet, renders the proposed policy constitutional under the First Amendment.

Conclusion

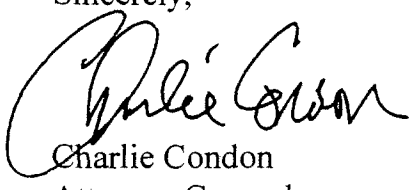
A public library is not an adult bookstore or pornographic peep show. The First Amendment does not prohibit public libraries from using Internet filters to protect minors from harmful, vulgar material. While the Internet is a powerful learning tool for children, it also poses substantial dangers to young people. Public libraries must therefore take steps to shield children from the salacious side of the Internet. Otherwise, they will be subject to potential liability for exposing minors to harm.

In other words, taxpayers do not have to stand idly by while their public library tax dollars are used to expose children to smut or indecent material. A parent would not expect his or her child to go to the public library and find "Hustler" next to Hemingway, or pornography along side Pride and Prejudice. Neither should it be any different because the Internet is now a mainstay of the public library.

The Internet filter provides a constitutional means to make sure children continue going to the public library in a safe, healthy environment. The purpose of the filter, as its name indicates, is to block out harmful, vulgar material from the reach of minors. A public library can constitutionally filter filth from the eyes of children. State and local governments possess a compelling interest in protecting minors from harmful material, from vulgar

material and from offensive material. The Internet filter is the least restrictive means to carry out the duty to protect minors. It is thus our opinion that the Internet filter used by public libraries is constitutional under the First Amendment.

Sincerely,



Charlie Condon
Attorney General