

MEMORANDUM

TO: Honorable Chuck Reed and Members of the San José City Council

FROM: Timothy D. Chandler, Esq.
Alliance Defense Fund

DATE: August 23, 2007

RE: Constitutionality of Proposed Internet Filtering Policy

I. INTRODUCTION

The Alliance Defense Fund (“ADF”) has teamed with the Values Advocacy Council to prepare a model policy for Internet filtering in public libraries that accomplishes two primary objectives: to maximize the protection for children using libraries while fully respecting patrons’ First Amendment freedoms. This memorandum explains why filtering software is so important and provides the basic legal framework for ADF’s model policy.

By way of introduction, ADF is a non-profit legal organization dedicated to aggressively defend religious liberties, protect the sanctity of life, and promote traditional family values. Our organization exists to educate the public and the government about important constitutional rights. ADF has been called upon to assist and successfully defend many public officials nationwide.

II. REASONS THAT INTERNET FILTERING IS IMPORTANT

Currently, the San José Public Library system’s policies do not require filtering software on its publicly available computers with access to the Internet. There are a multitude of reasons why it has become crucial to install filtering software:

- Sex-related crimes are prevalent in San José libraries. A November 2006 investigative report by a local ABC reporter found that “San José’s police blotter over the past year lists several arrests for child porn at the library, at least ten cases of child molestation or other sex crimes involving kids, and several cases of men viewing porn and performing a lewd act, right at the terminal.”¹ The report also revealed that the privacy screens used by

¹ The video and transcript of the report are available at http://abclocal.go.com/kgo/story?section=i_team&id=4808374 and a transcript is included at Tab XX.

the San Jose Library system are completely ineffective. Investigative reports in other cities have made similar findings.²

- There is a strong link between viewing explicit sexual images of children on the Internet and child molestation. A recent study by the Federal Bureau of Prisons found that more than 85 percent of convicted Internet offenders admit to committing acts of sexual abuse against minors, and each offender had an average of more than 13 victims.³
- Filters are required by federal law. The Children’s Internet Protection Act (“CIPA”) requires public libraries that receive certain federal funding to use a technology protection measure (e.g. filtering software).⁴ Under the Library Services and Technology Act (LSTA) the Institute of Museum and Library Services makes grants to state library administrative agencies to “electronically link libraries with educational, social, or information services,” “assist libraries in accessing information through electronic networks,” and “pay costs for libraries to acquire or share computer systems and telecommunications technologies.”⁵ Additionally, the E-rate program established by the Telecommunications Act of 1996 entitles qualifying libraries to buy Internet access at a discount.⁶ Without filtering software, the Library is not eligible for federal funding.
- State law also requires libraries that receive state funding to have a policy regarding Internet access by minors.⁷ Without such a policy, the Library is not eligible for state funding.

Despite these compelling reasons, public libraries are often reluctant to install filtering software because they are concerned about violating adult patrons’ First Amendment rights. However, as discussed below, the U.S. Supreme Court has upheld the constitutionality of Internet filters in public libraries, providing specific guidance to ensure that filter policies comply with the First Amendment. The model policy proposed by ADF and the Values

² For example, a 2006 report by the CBS affiliate in Los Angeles described libraries as “havens for sex,” noting consensual sex in the bathrooms, groping between the book aisles, and lone sex at the computers. A 2006 report by the CBS affiliate in Chicago discovered that 33 sex crimes had occurred at a single library over a three year period. The video and transcript of these reports are available at http://cbs2.com/goldstein/local_story_321000136.html and http://cbs2chicago.com/investigations/local_story_355221218.html, respectively. Both transcripts are included at Tab XX.

³ See <http://www.nytimes.com/2007/07/19/us/19sex.html?ex=1186113600&en=09c47207f399ff98&ei=5070>. A copy of the July 19, 2007 New York Times article is included at Tab XX. The 85% rate is particularly significant because only 26% of those surveyed were known to have committed acts of sexual abuse against minors at the time that they were convicted. And authorities were only aware of 4% of the victims when the men were sentenced.

⁴ 20 U.S.C. § 9134. A copy of this federal statute is included at Tab XX.

⁵ 20 U.S.C. § 9141(a)(1)(B), (C), (E); *United States v. American Library Association*, 529 U.S. 194, 199 (2003).

⁶ 47 U.S.C. § 254(h)(1)(B).

⁷ California Education Code § 18030.5. A copy of this state statute is included at Tab XX.

Advocacy Council is fully consistent with the Court’s guidance and does not run afoul of the First Amendment.

III. LEGAL ANALYSIS

As mentioned above, the Children’s Internet Protection Act, or CIPA, requires public libraries that receive certain federal funds to install filtering software on each of its computers that prevents users from accessing visual depictions that are obscene or are child pornography. Additionally, the software must prevent minors under the age of 17 from accessing visual depictions that are deemed “harmful to minors.”⁸ CIPA gives libraries the discretion to disable the filtering software to enable access to otherwise blocked material “for bona fide research or other lawful purposes.”⁹

In a 6-3 vote, the U.S. Supreme Court upheld the constitutionality of CIPA in *United States v. American Library Association, Inc.*¹⁰ In doing so, the Court concluded that libraries may use filtering software—with certain limitations—without violating patrons’ First Amendment rights. There was no majority opinion in the case. Four Justices joined together in a plurality opinion and two other wrote separate opinions concurring in the judgment.

The plurality opinion concluded that libraries may choose for themselves what Internet materials to offer. It emphasized that libraries have never been intended to be a universal source of information, but instead “enjoy broad discretion” in making their own decisions about what materials would most benefit the community.¹¹ The Internet—as “a technological extension of the book stack”—falls within the scope of this discretion.¹² If, for example, librarians can choose not to offer pornographic magazines (which they undoubtedly can), then they can also choose not to offer pornographic websites.

The three dissenting Justices were concerned about “overblocking”—that is, the filtering software erroneously blocking access to constitutionally protected material. Without conceding that overblocking raised a constitutional concern, the plurality opinion explained that this concern was dispelled by the fact that patrons who encounter an erroneously blocked site “need only ask a librarian to unblock it.”¹³

By contrast, the two concurrences—from Justices Breyer and Kennedy—were not willing to give libraries as much discretion as the plurality. They placed particular weight on the ability

⁸ 20 U.S.C. § 9134(f)(1)(A)(i).

⁹ 20 U.S.C. § 9134(f)(3).

¹⁰ 539 U.S. 194 (2003).

¹¹ *Id.* at 204-05.

¹² *Id.* at 207.

¹³ *Id.* at 209.

of adult patrons to request filtered sites to be unblocked if they needed to access the site for “bona fide research or other lawful purpose.”¹⁴ Without such a policy, libraries would violate adult patrons’ First Amendment rights. But by allowing sites to be unblocked, Internet filtering software may be allowed some “overblocking” of constitutionally protected expression without running afoul of the law.¹⁵

Indeed, Justice Breyer described the process of requesting a site be unblocked as a “comparatively small burden” in light of the government’s compelling interest in shielding minors from harmful materials.¹⁶ Similarly, Justice Kennedy noted that the government’s compelling interest in “protecting young library users from material inappropriate for minors” justified the slight burden on adult users resulting from the filtering software, and the requirement that they request particular sites to be unblocked.¹⁷ Thus, a library may use filtering software as long as it provides a way for adult patrons to have particular sites unblocked for bona fide research or other lawful purposes.

Minors do not enjoy the same freedom to have sites unblocked. Justice Kennedy specifically noted that it was only adult patrons who he was concerned about.¹⁸ Even the dissent agreed that “it is neither inappropriate nor unconstitutional for a local library to experiment with filtering software as a means of curtailing children’s access to Internet Web sites displaying sexually explicit images.”¹⁹

Although it was not directly addressed by the Supreme Court in the CIPA case, previous cases suggest that the Supreme Court would nonetheless require libraries to unblock a filtered website if the minor obtained parental permission. In *Ginsberg v. New York*, the Court upheld a statute prohibiting selling material to minors that could be considered obscene as to them, even if it was not obscene as to adults.²⁰ But in *Reno v. American Civil Liberties Union*, the Court struck down a statute that prohibited transmission of indecent communications to minors.²¹ One of the key differences between the two cases was that the statute in *Reno* did not provide an exception for parental consent to the child receiving the communication, while the *Ginsberg* statute did.²²

¹⁴ See *id.* at 214 (Kennedy, J., concurring); *id.* at 219 (Breyer, J., concurring).

¹⁵ The ACLU recently filed a lawsuit against a library district in Washington because the library’s Internet policy allegedly did not allow librarians to unblock erroneously filtered sites for adult patrons. See *Bradburn v. North Central Regional Library District*, CV-06-327 (E.D.Wash. 2006).

¹⁶ *Id.* at 219-20 (Breyer, J., concurring).

¹⁷ *Id.* at 214-15 (Kennedy, J., concurring).

¹⁸ *Id.* at 214 (Kennedy, J., concurring) (explaining that “if, on the request of an adult user, a librarian will unblock filtered material” then “there is little to this case”) (emphasis added).

¹⁹ *Id.* at 220 (Stevens, J., dissenting).

²⁰ 390 U.S. 629, 636 (1968).

²¹ 521 U.S. 844, 882 (1997).

²² *Id.* at 865.

Therefore, libraries should allow minors to have sites unblocked, but only if they first obtain parental permission and, of course, the site does not contain illegal material such as child pornography.

IV. CONCLUSION AND OFFER OF *PRO BONO* DEFENSE

Included with this memorandum is a model policy that ADF has prepared in accordance with these legal principles. *The policy was drafted to provide a constitutional mechanism for providing as much protection for our children as possible.* A large and growing number of cities and library systems are adopting similar policies.²³ ADF strongly believes that this policy will pass constitutional muster. For that reason, ADF will defend the City of San José at no cost should it adopt this policy and have it challenged in court.

²³ A sampling of some such policies, from cities around California and from around the rest of the country, are available at Tab XX.