

April 17, 2009

Members of the San José City Council
200 East Santa Clara Street
San José, California 95113

Re: Library Internet Access and Computer Use Policy

Dear San José City Councilmember:

We write to express the concern of the ACLU of Northern California regarding Internet blocking software and to urge you to support access to essential information and oppose any plans to impose content filtering in the San José Public Libraries. Internet use in the San José libraries is very high and problems are extremely rare. Precious taxpayer money should be spent on providing the library with greater resources and funding programs that actually improve child safety, not on software that limits access to important information on health care, sex education, civil rights, and politics.

Outside very narrowly defined categories, “the First Amendment bars the government from dictating what we see or read or speak or hear.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002). It is well-acknowledged that, notwithstanding advances in software technology, filtering improperly blocks vast amounts of information that adults and young people have a First Amendment right to access.¹ A recent test by the San José Public Library of three software filtering programs found substantial overblocking not only of Web sites but also of information in its Health and Wellness Resource Center database and even its online catalog of available books.² A subsequent “demonstration” of filtering software by Councilmember Constant, which was observed but not participated in by ACLU of Northern California staff due to its non-scientific format (for example: there was only one computer, which Councilmember

¹ Victoria Rideout et al, *See No Evil: How Internet Filters Affect the Search for Online Health Information – Executive Summary*, KAISER FAMILY FOUNDATION, Dec. 12, 2002, <http://www.kff.org/entmedia/upload/See-No-Evil-How-Internet-Filters-Affect-the-Search-for-Online-Health-Information-Executive-Summary.pdf>; Consumer Reports *Finds Filtering Softwares Improve Blocks on Pornography But Restrict Acceptable Web Sites, Better But Still Fallible*, CONSUMER REPORTS, June 2005, <http://www.consumerreports.org/cro/cu-press-room/pressroom/archive/2005/06/eng0506sof.htm>; Marjorie Heins et al., *Internet Filters: A Public Policy Report (Second Edition)*, BRENNAN CENTER FOR JUSTICE, 2006, <http://www.fepproject.org/policyreports/filters2.pdf>.

² Blocked sites included: WebMD and the American Urological Association (online health sites); a World War II history site; Univision.com (a Spanish language Web hub); Victims of Pornography (an anti-pornography support group); and PFLAG (Parents and Friends of Lesbian Gays - a LGBT support and advocacy group). Sarah Houghton-Jan, *Internet Filtering Software Tests: CyberPatrol, FilterGate, & WebSense*, SAN JOSÉ PUBLIC LIBRARY, Feb. 4, 2008, http://www.sjlibrary.org/about/sjpl/commission/agen0208_report.pdf.

Constant controlled, so there was no way for the participating public to verify if the blocking screen was appropriate during individual “test searches”), also provided instances of both overblocking and underblocking which were noted in contemporaneous media reporting. A vote by the City Council to institute any content blocking software in the libraries would severely threaten access to essential information.

We additionally caution that any revision to the current Internet Use Policy or text for a login screen must be consistent with both constitutional and statutory law to avoid chilling protected speech. Portions of the new Internet Use Policy included in Councilmember Constant and Mayor Reed’s recommendation would mislead users about the consequences of viewing certain materials. An individual would have to “knowingly” access material that depicts sexual conduct of minors under the age of 18 to violate Penal Code 311.11 or “knowingly” display material harmful to minors to violate Penal Code 313.1. Unlike the policy language proposed in the Constant/Reed memo, the Santa Clara Library System policy tracks this “knowingly” requirement by prohibiting “attempts to show material” rather than targeting passive display or exposure of harmful material to minors.³ The inclusion of “knowingly” language is an important legal distinction because it is unconstitutional for adult access to Internet content to be limited to materials that are only fit for children. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 665 (2004); *see also Sable Communications v. FCC*, 492 U.S. 115, 128 (1989). An Internet use policy that makes adults afraid to view protected content by improperly suggesting that they may be subject to criminal prosecution if a child inadvertently sees such content is constitutionally impermissible. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-67, 68-69 (1963).

The existing library Internet procedures appear to be working quite well. Last year, over seven million people visited the San José Public Libraries, but there were only four content-related complaints. Any limited problems can, and should, be properly dealt with by the use of privacy screens, recessed seating, and the continued work of staff to address any illegal behavior, not by the installation of blocking software that significantly reduces access to important information.

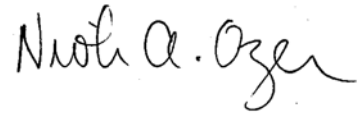
The *San José Mercury News* Editorial of October 24, 2007, stated it well:

A decade ago, the San José City Council wisely rejected a proposal to install filters on computers at city libraries to prevent viewing pornography over the Internet. Filtering was a bad idea then, and still is. Responding to a minor nuisance at the downtown library by dampening the rights of inquiry and speech of all patrons at every city library is an unacceptable trade-off.

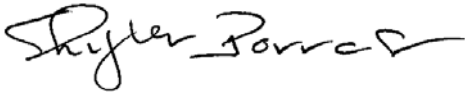
³ *Internet Policy*, SANTA CLARA COUNTY LIBRARY,
<http://www.santaclaracountylib.org/findit/internetpolicy.html>

The City Council should support access to essential information, reject any installation of blocking software, and ensure that San José Public Libraries continue to be safe environments that nurture the ability of all community members to learn and grow.

Sincerely,

Handwritten signature of Nicole A. Ozer in black ink.

Nicole A. Ozer, Esq.
Technology and Civil Liberties Policy Director
ACLU of Northern California

Handwritten signature of Skyler Porras in black ink.

Skyler Porras
San José Director
ACLU of Northern California