



February 25, 2008

Via Email and Facsimile

Sacramento Public Library Authority Board
828 I Street
Sacramento, California 95814

Re: Internet Use and Access Policy

Dear Members of the Sacramento Public Library Authority Board:

We are writing on behalf of the ACLU of Northern California and its Sacramento County Chapter to urge the Library Authority Board to revise the Internet Use and Access Policy adopted in March 2007 (hereafter Current Policy) and remove provisions that infringe on access to constitutionally protected material. As we understand it, the Current Policy requires blocking software on all Sacramento library computers. Adults must request unfiltered access on a per session basis and young people must have parental consent on a per session basis to obtain unfiltered access. Regardless of whether adults or young people are using filtered or unfiltered access, library staff will ask them to stop viewing constitutionally protected material if the subject matter “would interfere with the maintenance of a safe, welcoming, and comfortable environment.” If an adult or young person refuses to stop viewing constitutionally protected material, they may be barred from using the computer for a period of time.¹

Since 2004, internet use at the Sacramento libraries has been very high and complaints about internet content have remained extremely low. An October 2007 review of library records by the Sacramento Library Director and Deputy Director of Public Services, and documents obtained through our recent public records request, reveal that there have been more than three-million (3,000,000) internet sessions logged at the Sacramento public libraries since 2004 and only twenty-four (24) complaints from all of the Sacramento libraries combined that relate in any way to internet content.² From January through September 2007, of the 543 incident reports

¹ Internet Use & Access Policy as adopted March 2007. Available at http://www.saclibrary.org/about_lib/internet_use.html, (last visited Feb. 24, 2008).

² Extrapolation from data of more than 605,000 internet sessions in a 6-month period. “Internet Use Policy Update (Oct. 25, 2007 Board Meeting),” submitted by Anne Marie Gold, Library Director, and Alison B. Landers, Deputy Director for Public Services, at Attachment A0116 available at http://www.saclibrary.org/about_lib/auth_board/071025/6_2.pdf (last visited Feb. 5, 2008).

The ACLU of Northern California Sacramento County Chapter filed a public records request on November 27, 2007, requesting all incident reports relating to internet content from January 1, 2004 to November 27, 2007. Several

filed at all the Sacramento libraries, only 6 (1%), were internet content related and none were reported from the Central Library.³ In fact, the Sacramento Library Director told the board that the “vast majority of computer related incidents are customer behavior problems, not related to the content of what is being viewed.”⁴

While there have been few problems in the Sacramento libraries with internet content, the board has amended the Policy several times since 2004. These changes have done little to reduce the already few reported incidents, but have inevitably blocked adult and youth access to important, and constitutionally protected, information in the libraries. A policy that denies adults unfiltered access to the internet violates that adult’s First Amendment rights and is subject to legal challenge. Similar concerns are raised if minors are denied access to protected material.

1) The Policy Improperly Interferes With the Ability of Library Users to View Constitutionally Protected Material

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). For example, unlike the narrow legal categories of obscenity or child pornography, sexually explicit speech is entitled to full constitutional protection as to adults. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 811 (2000); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997); *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989). In *United States v. American Library Association*, 539 U.S. 194, the Supreme Court upheld the constitutionality of the CIPA statute *only* because it read the statute as requiring libraries to honor requests from adults for unfiltered access to the internet. Justice Kennedy and Justice Breyer, whose votes were necessary to obtaining a majority upholding the statute, made this clear. *See id.* at 214-15 (Kennedy, J., concurring in the judgment); *id.* at 219-220 (Breyer, J. concurring in the judgment). Significantly, neither Justice Kennedy nor Justice Breyer limited his view on the matter to providing only a qualified ability to obtain unfiltered access. *See also id.* at 209 (plurality opinion interpreting statute as not requiring adult patrons to provide a reason for asking to have filtering software turned off). A library policy that gives the discretion to library staff to require that patrons stop viewing constitutionally protected material suffers the same constitutional defect as a policy that denies users an unqualified right to unfiltered access to the internet. Such a policy violates the First Amendment and cannot stand.

The Current Policy was precisely “recommended to ensure that staff take a more proactive stance” in improperly preventing users from viewing constitutionally protected information.⁵ It directs library staff to order an internet user to “end a search or change a screen,” even if content is constitutionally protected, if that content is deemed to be “subject matter that would interfere with the maintenance of a safe, welcoming and comfortable

of the twenty-four (24) total internet-content complaints were unrelated to sexually explicit content. Rather, they involved alleged criminal behavior that is addressed by other library rules or were complaints about youth patrons using social networking sites, watching music videos, being noisy, or using the computers beyond the acceptable time-limit.

³ “Internet Use Policy Update (Oct. 25, 2007 Board Meeting),” available at http://www.saclibrary.org/about_lib/auth_board/071025/6_2.pdf at page 109 (last visited Feb. 25, 2008).

⁴ *Id.* at 108.

⁵ *Id.* at Attachment A0119.

environment.” It further threatens a library user with possible loss of computer privileges if she resists library staff demands and refuses to “appropriately consider the rights of others” when using internet and computer resources—an unconstitutionally vague standard when applied to content rather than behavior. The First Amendment requires that courts “look through forms to the substance” of government conduct; informal means of coercion, persuasion, and intimidation can give rise to constitutional violations. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67, 631 (1963) (constitutional violation where Rhode Island commission’s conduct amounted to “thinly veiled threats to institute criminal proceedings” against publishers who did not stop circulating publications on commission’s list); *see also Laird v. Tatum*, 408 U.S. 1, 12-13, 33 L. Ed. 2d 154, 92 S. Ct. 2318 (1972) (“Governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights”); *American Communications Ass’n, C.I.O. v. Douds*, 339 U.S. 382, 402, 94 L. Ed. 925, 70 S. Ct. 674 (1950) (“Under some circumstances, indirect ‘discouragements’ undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions, or taxes”). The “ask” by library staff to stop viewing information, even if it is constitutionally protected, and the threatened loss of computer privileges for refusal, are exactly the type of government intimidation that is prohibited by the First Amendment.

The Current Policy not only infringes on the rights of those internet users approached by library staff, but also has a chilling effect on the use of the internet by all library patrons. All must worry whether they can use the internet as a trusted resource to search for sensitive information or whether they will face the embarrassment of a “tap on the shoulder” by library staff. Government activities that “would chill or silence a person of ordinary firmness from future First Amendment Activities” cannot pass constitutional muster. *White v. Lee*, 227 F. 3d 1214, 1228 (9th Cir. 2000) citing *Mendocino Environmental Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999). Further, the Current Policy infringes on the right of adults to view constitutionally protected material without even attempting the less restrictive alternative of offering privacy screens or recessed monitor table stations, even though both are supposed to be available in every branch.⁶ *See Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 665 (2004) (“A statute that ‘effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve’”) (quoting *Reno v. ACLU*, 521 U.S. 844, 874 (1997)). In short, the Current Policy violates the First Amendment rights of library patrons.

2) The Current Policy Is Unconstitutionally Vague and Overbroad

The Current Policy is both unconstitutionally vague and overbroad. It fails to limit its reach to the narrow categories of unprotected obscenity or child pornography as to adults, and material that is “harmful to minors” as to youth, but rather extends the restriction to “subject matter that would interfere with the maintenance of a safe, welcoming and comfortable environment.” This overbroad and indefinable standard covers a great deal of constitutionally protected material, both for adults and young people. Moreover, as used in the policy, it is more

⁶ Privacy screens are available and at least one recessed table was installed at all library locations by July 24, 2007. *Id.* at 108 and Attachment A at 0115.

than simply subjective; it gives every library staff member and patron a potential veto over the material available to others, based on subjective sensibilities and prejudices.

Efforts to ban access to information in libraries are not new. To Kill a Mockingbird, The Color Purple, and Heather Has Two Mommies are just a small selection of materials that some have tried to keep off library shelves because the content made them “uncomfortable.” Under the Current Policy, other patrons may complain and library staff can force users to stop viewing internet material because of its political or artistic content, not to mention the wide array of controversial topics ranging from abortion and gay rights to gun control that may be objectionable to one or more members of the library community. However, the rights of all to constitutionally protected information may not be curtailed on the basis that someone may not feel “safe, welcom[e] and comfortable.” Such an amorphous standard cannot be applied in the First Amendment context.

3) Internet Blocking Software Inevitably Blocks Constitutionally Protected Material

The mandatory filtering imposed by the Current Policy also inevitably blocks materials that adults and young people have a First Amendment right to access through the internet. Blocking software, even when intended to block access only to material that is obscene, “harmful to minors,” or that constitutes child pornography, nevertheless blocks vast amounts of protected speech. A software program is simply incapable of making the fine legal distinctions made in the courtroom as to whether material falls into one of these categories. Over-blocking also results from more systemic flaws in the way either machines or humans make decisions as to whether material should be blocked. Even with advances in software technology, this problem has not gone away over the years.

In 2002, the Kaiser Family Foundation found that “on average, filters incorrectly blocked about one in ten sites on safe sex, condoms, or health issues pertaining to gays.”⁷ In 2005, Consumer Reports found that blockers tended to stop many sites that they should not, including sites about “health issues, sex education, civil rights, and politics,” including KeepAndBearArms.com, a site advocating gun owners’ rights, and the National Institute on Drug Abuse.⁸ In 2006, the Free Expression Policy Project at NYU School of Law found that filtering software overblocked sites as diverse as the U.S. State Department’s Embassy website and whitehouse.org, a political satire site with no adult content.⁹

⁷“See No Evil: How Internet Filters Affect the Search for Online Health Information – Executive Summary,” Kaiser Family Foundation, Dec. 12, 2002. Available at <http://www.kff.org/entmedia/upload/See-No-Evil-How-Internet-Filters-Affect-the-Search-for-Online-Health-Information-Executive-Summary.pdf> (last visited Feb. 13, 2008).

⁸“Filtering Software: Better But Still Fallible,” *Consumer Reports*, June 2005, available at <http://www.consumerreports.org/cro/electronics-computers/resource-center/internet-filtering-software-605/overview/index.htm> (last visited Feb. 13, 2008).

⁹Marjorie Heins, Christina Cho and Ariel Feldman, “Internet Filters: A Public Policy Report,” 2d Ed., Free Expression Policy Project, 2006, available at <http://www.fepproject.org/policyreports/filters2.pdf> (last visited Feb. 5, 2008).

This month, the San Jose Public Library completed testing of three internet filtering programs. It found extensive overblocking.¹⁰ Specific sites that were inaccurately blocked included WebMD and the American Urological Association; a World War II history site; Univision.com (one of the largest Spanish-language broadcasters); Victims of Pornography (an anti-pornography support group); and PFLAG (Parents and Friends of Lesbian Gays - a LGBT support and advocacy group). The filters also blocked access to information in the library's Health and Wellness Resource Center database and the World Book Encyclopedia online. It even blocked entries in the library's own online catalog of available books.¹¹

4) The Current Policy Interferes with Youth, Low-Income, and Minority Communities' Access to Essential Information

The restrictions in the Current Policy also have an extremely detrimental effect on the ability of young people, particularly low-income and minority youth, to access essential information. Public libraries are often the only source of internet access to complete schoolwork, find important information for their families, and to learn about personal issues such as health, sexual or physical abuse, and LGBT issues.¹²

According to Consumer Reports, filters often block more sites than they should, including sites necessary for older students to complete research assignments.¹³ In many families, parents also need the help of their teenage children in accessing information on the internet, for a variety of reasons. As more and more information about issues such as healthcare and public benefits moves online, blocking software and other restrictive policies make it more difficult for young people to help. The Current Policy adopted by the board simply exacerbates the problems of the Digital Divide.

The Current Policy also means that young people searching for information on a range of sensitive issues are not able to turn to the library as a safe place. LGBT teenagers whose sexual orientation is not known to their parents or other young people trying to access life-saving information on a range of important issues from sexual abuse, to contraception, to substance abuse problems, may not be able to use the library internet to access a full range of important information because of the mandatory filtering. They are also likely deterred from accessing

¹⁰ 38% overblocking when individuals used keywords to search for information and 12% overblocking when an individual typed in an actual website address. Sarah Houghton-Jan, "Internet Filtering Software Tests: CyberPatrol, FilterGate, & WebSense," Feb. 4, 2008, http://www.sjlibrary.org/about/sjpl/commission/agen0208_report.pdf (last visited Feb. 13, 2008).

¹¹ *Id.*

¹² 73% of public libraries are the only source of free public access to computers and the internet in the community. American Library Association, "Libraries Connecting Communities: Public Library Funding & Technology Access Study 2006-2007 Report," Sept. 12, 2007, available at <http://www.ala.org/ala/ors/plftas/finalreport.pdf> (last visited Feb. 5, 2008).

29% of African American youth, 20% of Latino youth, and 27% of youth from families with annual incomes of less than \$20,000, depend on library computers to access information for schoolwork and for their families. The Bill and Melinda Gates Foundation, "Towards Equality of Access: The Role of Public Libraries in Addressing the Digital Divide," Feb. 25, 2004, available at <http://www.gatesfoundation.org/nr/Downloads/libraries/uslibraries/reports/TowardEqualityofAccess.pdf> (last visited Feb. 5, 2008).

¹³ *Consumer Reports*, supra note 8.

otherwise available information for fear that library staff and other patrons may be closely monitoring the information that they are accessing on the internet. The library has traditionally been a place where young and old alike can seek information, knowing that they can do so privately and anonymously. The Current Policy works a fundamental and unjustified change in the role of the library as a safe haven for those in need of information.

5) The Current Policy Has No Place in the Sacramento Public Libraries

Board Member Robert Fong, at the October 25, 2007 meeting of the Sacramento Public Library Authority Board, stated it well:

It's one thing to talk about appropriate behaviors absolutely in a library and that's where we used to focus our attention, [but] it's such a dangerous slippery slope to start to say what you can read and what you can look at . . . when you talk about policing content in a public library, we're going backwards fast.

By revisiting the Current Policy, board members have the opportunity to safeguard the fundamental role of Sacramento libraries. The board should repeal the restrictive language in the March 2007 amendment, remove mandatory filtering, and appropriately address any limited internet-content problems with existing privacy screens and recessed seating.¹⁴

If you have any questions or would like to discuss this issue further, please contact us. We will also be attending the February 28, 2008 Library Authority Board meeting.

Sincerely,

Nicole A. Ozer, Esq.
Technology and Civil Liberties Policy Director
ACLU of Northern California
(415) 621-2493 x306
nozer@aclunc.org

Jim Updegraff
Chair, Sacramento County Chapter Board
ACLU of Northern California

¹⁴ American Library Association, "12 Ways Libraries Are Good for the Country," available at <http://www.ala.org/ala/online/resources/selectedarticles/12wayslibraries.cfm> (last visited Feb. 22, 2008).